

## Update on LGBT Family Law in the Washington Metropolitan Area

The last several years have seen an incredible change in laws affecting LGBT families in the Washington metropolitan area, and we may see more changes on the federal level in the next several months. Here is a whirlwind synopsis of laws affecting same-sex headed families in the D.C. area.

### Federal Level

The Supreme Court will hear arguments on two marriage equality cases, *Hollingsworth v. Perry* and *Windsor v. United States* on March 26<sup>th</sup> and 27<sup>th</sup>, and we expect decisions from the Court by June 30<sup>th</sup> of this year. Those decisions could be anything from the Court saying that it won't make substantive decisions in either of these cases, to establishing marriage equality as a constitutional right in the entire United States. Most court observers expect that the Court will invalidate Section 3 of the Defense of Marriage Act (DOMA), which would mean that marriage equality for federal purposes would be determined on a state by state (or jurisdiction) basis. Section 3 defines "marriage" for all federal purposes as between one man and one woman. So, for us in the D.C. metro area, if Section 3 is invalidated, residents of Maryland and the District of Columbia would be considered married for federal purposes, but residents of Virginia would not. Of course, there will be many open questions as to how any Supreme Court decision in these cases would be implemented. There are over 1000 rights and responsibilities associated with marriage on the federal level, so federal recognition of our marriages will be huge. Stay tuned!

### District of Columbia

The District has had marriage equality since March 9, 2010. There are over 400 rights and responsibilities associated with marriage for District residents. D.C. residents can still register as Domestic Partners instead of getting married, but the domestic partnership has little, if any, effect outside the District. There is no residency requirement to marry in the District or register as Domestic Partners.

D.C. recently enacted a new law that allows couples who married in D.C. and live in a jurisdiction where neither can divorce, to come back to D.C. to get divorced. Of course, the couple should attempt to resolve all issues pertaining to their marriage so they can go forward with an uncontested divorce in the Superior Court of the District of Columbia. This law is meant to help with the new meaning of "wedlock."

The District enacted the Domestic Partnership Judicial Determination of Parentage Amendment Act on July 1, 2009. It provides that if a couple is married, registered as Domestic Partners in D.C., or sign a Consent to Parent, both members of the couple will be presumed to be legal parents of their child under D.C. law **if the child is born in D.C.** Both parents will be on the birth certificate at birth. Unfortunately, the law may not apply to gay male couples as surrogacy is illegal in the District. The Parentage Act has been amended to allow adoptions in the District

**based on the birth of the child in D.C.**, and the amendments are retroactive to July 1, 2009. The law means that a lesbian couple does not have to live in the District in order to obtain a second-parent adoption of their child that will be recognized outside the District of Columbia and on the federal level. This is a big step forward, especially for residents of Virginia who can give birth in D.C. Even with marriage equality, it is essential for couples to obtain second-parent adoptions as birth certificates alone do not confer parental rights, and legal rights to children flowing from marriage may not be recognized in many states, and currently, not by the federal government.

## **Maryland**

Beginning January 1, 2013, same-sex couples have been able to marry in Maryland. Marriages between same-sex couples from outside Maryland have been recognized in Maryland since May 18, 2012, after the decision in *Port v. Cowan*. *Port* required Maryland to allow a same-sex couple to divorce in Maryland. Married couples have over 400 state-based rights and responsibilities. However, there are some issues relating to marriage equality in Maryland that still must be addressed. For example, the Maryland Comptroller takes the position that Maryland imports the federal definition of marriage for income and estate tax purposes.

For families in Maryland headed by same-sex couples, a child born into the marriage will be considered the legal child of both parents. For married lesbian couples, both parents will be on the child's birth certificate **at birth**. However, we are still working through issues for gay male couples who have children through gestational surrogacy. Traditional surrogacy appears to be illegal in Maryland. In any case, all couples with children should obtain a second-parent adoption, or joint adoption, of their children whenever possible, as court orders almost certainly will be upheld, whereas legal rights to children obtained solely through marriage may not.

## **Virginia**

There has not been much change in Virginia in laws impacting our families, except to go backward! Virginia now allows adoption agencies to explicitly discriminate against LGBT families in placements for children to be adopted.

Second-parent adoptions are not available in Virginia, not because they are specifically outlawed, but because of concerns that the Virginia legislature may forbid these adoptions if they are attempted. However, in some Virginia counties same-sex couples may obtain a joint custody order of their children. Joint custody orders have been upheld by the Virginia courts. These orders can be problematic though as they allow both parents to have custody, but only one parent to have responsibility for child support if the couple separates. In addition, the Commonwealth of Virginia may have a say in whether the couple is fit and proper to have their child. That happened to a couple in the Charlottesville area. Fortunately, the couple was able to dismiss their request for a joint custody order before the Court ordered that their child be removed from their care.

## General

Before or after getting married, couples should seriously consider executing pre or postnuptial agreements which specify their rights and responsibilities during their marriage and if they divorce. These are particularly important for our families because of the many and varied laws governing marriage for same-sex couples. And, as always, couples and individuals should complete estate planning documents. These are vital in order to make our own decisions about who should inherit our property, make our health care decisions, manage our finances, and, if we have children, who should take care of them if we can't.

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