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A Guide to Same Sex Couple Adoptions

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Amircani, Maha, "A Guide to Same Sex Couple Adoptions" (2010). *College of Law Library Student-Authored Works.* Paper 20.
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Research Guides

A Guide to Same Sex Couple Adoptions

Guide Information

Last Updated:	Aug 16, 2011
Guide URL:	http://libguides.law.gsu.edu/content.php?pid=165087
Description:	A bibliography created for Nancy Johnson's Advanced Legal Research class.
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Overview

An issue that has recently moved its way to the forefront of Family Law is the adoption of children by homosexuals. The decision to adopt a child is probably one of the biggest decisions a person can make. The process can be very daunting and may have numerous legal implicaitons. These legal implications are drastically multiplied when the adoption involves a same sex couple. In the U.S., states may restrict adoption by sexual orientation and marital status. In the U.S., there are 270,000 children living with same-sex couples. Of these, one-quarter, or 65,000, have been adopted. This area of the law is still developing and constantly changing. In many states, the legallity of gay adoption is still ambiguous. Numerous issues arise in the context of homosexual adoptions, such as whether the biological parents' rights must be terminated upon adoption, whether such homosexual adoptions are in the best interest of the child, and whether resticting the rights of homosexuals to adopt is a consitutional violation.

The purpose of this research guide is to inform same sex couples and other members of the LGBT community, as well as anyone else who may be interested in the subject, on the status of the law in the area, the legal issues that may arise, and the remedies available in these situations. This guide also provides links to other helpful resources on the topic.

Scope

This research guide provides information on same sex couple adoptions. Included within the scope of this guide is joint adoption by a biological parent and their same sex partner, joint adoption by same sex couples, the affect of gay marriage on adoption, and constitutional challanges to bans on gay adoptions. The guide provides the user with both primary and secondary resources as well as other usefull links and information on the subject.

About the Author

Maha Amircani is a third year law student at Georgia State University College of Law. She received her Bachelors Degree in International Affairs from the University of Georgia with a concentration in comparative politics and human rights. During her time at GSU, Maha has worked with public interest organizations such as the ACLU of Georgia, the Atlanta Volunteer Lawyers Foundation, and Law Students for Reproductive Justice. After graduating from law school in 2011, she hopes to pursue a career in the public interest. For more information about this resource guide, please contact Professor Nancy Johnson via e-mail at njohnson@gsu.edu.

Key Terms

- LGBT - Lesbian, gay, bisexual, transgendered
- Single (Individual) Parent Adoption - Individual adoption is the traditional type of adoption where an unmarried person seeks to adopt a child that has been put for adoption by the birth parent(s) or by the State.
- Joint Adoption - In a joint adoption an unmarried couple petitions the court to adopt a child that has been placed for adoption by the birth parent(s) or by the State.
- Second-parent Adoption - This type of adoption involves one parent who already has legal rights of the child and a second parent that is petitioning for joint rights. The initial parent does not give up parental rights. Second-parent adoption is a viable option for gay and lesbian couples that reside in states that do not allow joint same-sex adoption.
- Step-parent (Domestic Partner) Adoption - When a child is already living with both same-sex parents, step-parent, or domestic partner, step parent or domestic partner adoption can be filed.

- Guardianship - When same-sex or gay parent adoption isn't an option, parents can protect their families by applying for guardianship. Guardianship, however, does not provide the same legal rights as adoption.
- Foster Care vs. Adoption - Foster care differs from adoption in a few ways. A foster parent assumes responsibility for the foster child's care while the State maintains all legal guardianship of the child. Adoption transfers legal responsibility and care over to the adoptive parents.

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Primary Sources

Case Law

SUPREME COURT DECISIONS

Sharon S. v. Superior Court of California, San Diego County, 540 U.S. 1220 (2004)

Denying certiorari, the Court let the decision of the California Supreme Court stand, holding that a former domestic partner could complete an independent second-parent adoption of a biological child conceived by artificial insemination of the other partner during the partnership, even though the other partner did not relinquish all of her parental rights.

Troxel v. Granville, 530 U.S. 57 (2000)

In this plurality decision, The Supreme Court held that a Washington State statute providing that any person may at any time petition for visitation of an unrelated child, and that the court may order such visitation when it is in the child's best interest, violated the birth mother's substantive due process rights.

Bowers v. Hardwick, 478 U.S. 186 (1986)

This case dealt with a Georgia sodomy statute. This issue in the case was wheather the statute violated the fundemental rights of homosexuals. In this 1986 decision, the Supreme Court stated that substantive due process did not confer a fundamental right to engage in consensual homosexual sodomy. This case has been cited in homosexual adoption decisions where fundemental rights of homosexuals were at issue.

COURT OF APPEALS DECISIONS

Florida Dep't of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G. (a.k.a. In re: Gill)

This case began when an openly gay man petitioned to adopt 2 boys that heand his partner had been raising as foster children. However, a 1977 law banning gay adoption prohibited him from doing so. Gill challenged the law as violating the equal protection rights of the children and their prospective parents. The case went all the way to the Federal Cour of Appeals. On September 22, 2010, the Third District Court of Appeal issued a unanimous decision declaring that Florida's law prohibiting gay men and lesbians from adopting children is nconstitutional. The State of Florida announced that it will not appeal that decision to the Florida Supreme Court.

Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007)

In this case, same-sex couples and their adopted children challenged an amendment to Oklahoma statute preventing recognition of adoptions by same-sex couples. The statute was declared unconstitutional because the Full Faith and Credit Clause required Oklahoma to recognize adoptions, including same-sex couples' adoptions, that were validly decreed in other states.

Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004)

This case found that a Florida statute prohibiting adoptions by homosexuals was rationally related to legitimate state interest in furthering best interests of adopted children by placing them in families with married mothers and fathers, and so did not violate equal protection rights of consequently excluded foster parents and legal guardians.

Catholic League for Religious and Civil Rights v. City and County of San Francisco, 2010 WL 4138432 (9th Cir. 2010)

In this case, a Catholic advocacy organization brought § 1983 action against city/county and individual members of its board of supervisors, alleging that Establishment Clause was infringed by San Francisco's non-binding resolution opposing Vatican directive that Catholic archdiocese stop placing children in need of adoption with homosexual households.The court dismissed the claim on the merits, finding that the resolution did not violate Establishment Clause.

Adar v. Smith, 597 F.3d 697 (5th Cir. 2010)

This case was brought by an unmarried same sex adoptive parents of a child born in Louisiana but adopted in New York, pursuant to New York state law that authorizes joint adoptions by unmarried, same-sex couples. The couple brough suit against the State Registrar of Louisiana's Office of Vital Records and Statistics when they refused to issue a certificate reflecting the child's new name and his relationship to the Adoptive Parents. They sought injunctive relief and declaratory judgment that Registrar's refusal to enforce New York adoption decree and to issue amended birth certificate violated Full Faith and Credit Clause. A district court judge granted the motion and the Court of Appeals affirmed, holding that Louisiana owed full faith and credit to the New York adoption decree.

STATE COURT DECISIONS - Homosexual adoptions upheld

Adoption of Tammy (1993) 416 Mass 205, 619 NE2d 315

In this case, two unmarried cohabitating women, one of whom was biological mother of child, jointly petitioned to adopt the child. The Supreme Judicial Court of Massachusetts held that the adoption statute did not preclude same-sex cohabitants from jointly adopting a child, so long as it was in the best interest of the child to allow such adoption.

Matter of Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995)

The New York Court of Appeals held that the homosexual partner of one child's biological mother and the unmarried heterosexual partner of another child's biological mother were "adult unmarried persons" with standing to adopt under New York's Domestic Relations Law § 110. This case also held that the portion of the statute terminating biological parent's rights toward adoptive child does not apply in situations when biological parent consents to adoption, agrees to retain parental rights, and agrees to raise child together with adopting parent and, thus, did not require termination of parental rights of biological mothers who consented to adoption of their respective children by an unmarried man and lesbian partner with whom the mothers shared long- term emotional and financial commitments.

In re Evan (1992, Sur) 153 Misc 2d 844, 583 NYS2d 997

The Surrogate's Court of New York granted an adoption petition to a lesbian woman wishing to adopt her partern's biological son, holding that it was in the best interest of the child.

Adoptions of B.L.V.B. (1993, Vt) 628 A2d 1271, 27 ALR5th 819

In this case, the biological mother and her partner filed uncontested petitions to allow the partner to legally adopt the mother's children, while leaving mother's parental rights intact.The court granted the petition, noting that the two women had lived together in a committed, monogamous relationship for 7 years and made the decision together to have and raise children. The biological mother gave birth to two children after being artificially inseminated by an anonymous donor. The mother's partner assisted at both births, and that the partners had been equally responsible for raising and parenting the children.

In re M.M.D. (1995, Dist Col App) 662 A2d 837

In this case, an unmarried same sex couple living together petitioned to adopt a child that had already been adopted by one of them. The D.C. court of Appeals granted the petition finding that the fact that one member of the couple had adopted the child created no impediment on the other member of the couple joining in petition. The court also held that the stepparent exception which states that rights of the natural parent married to the stepparent are not cut off by stepparent's adoption of child applied to prevent the adoptive parent's rights from being terminated by the partner's adoption of the child.

In re K.M. (1995, 1st Dist) 274 Ill App 3d 189, 210 Ill Dec 693, 653 NE2d 888

This case held that unmarried same-sex cohabitants have standing to jointly petition for adoption.

STATE COURT DECISIONS - Homosexual adoptions denied

Matter of Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996)

In this case, lesbian domestic partners petitioned to adopt each other's natural child. The court denied their petitions, holding that such an adoption was prohibited by state statute. The court based this decision on the fact that the relevant statute required the biological parent to terminate their rights before the child was eligible for adoption.

In Interest of Angel Lace M., 184 Wis.2d 492, (Wis. 1994)

T he Wisconson Supreme Court denied a lesbian's petition to adopt the biological child of her cohabitating partner, holding that although adoption would have been in child's best interest, child was not eligible for adoption under the state statute since her mother's parental rights remained intact.

Legislation

As this is a somewhat new and developing issue, this area of the law has been shaped mostly by precidential court decision rather than legislation. However, there are certain U.S. laws that play an important role in these decisions:

FEDERAL LAWS

42 U.S.C.A. § 1996b

Prohibits the denial of adoption or foster parenting on the basis of the race, color, or national origin of the individual, or of the child, involved. The law does not directly prohibit such denaial on the basis of sexual orientation.

Defense of Marriage Act (DOMA)

In two related cases this year, a federal district court in Massachusetts ruled that critical portions of the Defense of Marriage Act (DOMA) violate the federal Constitution. In striking down the section of the statute that bars federal legal protections to legally married same-sex couples, Judge Joseph Tauro found that the law violates states' rights to define marriage and violates the Constitution's equal protection clause by treating married same-sex couples differently from married different-sex couples. Prior to the passage of DOMA, the federal government always recognized the states' right to define marriage. The cases were brought by the Massachusetts attorney general and Gay & Lesbian Advocates & Defenders (GLAD).

U.S.C.A.Const. Art. III § 2, cl. 1

Full Faith and Credit Clause of the Constitution was relied on by a 10th Circuit Court of Appeals in holding that an Oklahoma statute preventing recognition of adoptions by same-sex couples was unconstitutional because the Full Faith and Credit Clause required Oklahoma to recognize adoptions, including same-sex couples' adoptions, that were validly decreed in other states.

U.S. Const. Amend. XIV

The 14th Amendment's due process and equal protections clauses are often heavily relied upon for constitutional decisions regarding homosexual couples, including the area of

adoption.

STATE LAWS

Arkansas Proposed Initiative Act No. 1

In November of 2008, Arkansas voters approved this measure to ban anyone "co-habitating outside of a valid marriage" from being foster parents or adopting children. Although the law could apply to heterosexual couples, it was believed to have been written to target gay couples due to the fact that same-sex marriage is prohibited in that state, thereby making an adoption impossible.- Single gay men and lesbians were still allowed to adopt in Arkansas. The law was ***overturned*** on April 16, 2010 by state judge Chris Piazza.

New York Domestic Relations Law § 110 - Who may adopt

This law provides that an adult unmarried person or an adult husband and wife together may adopt another person. New York courts have interpreted this law to allow homosexual adoptions.

Uniform Parentage Act

The Uniform Parentage Act (UPA) is a set of uniform rules for establishing parentage, which may be adopted by state legislatures on a state by state basis. It is used is used to officially establish a parent-child relationship between a child (or children) and unmarried parents. Once parentage is established, the court may make orders for child support, health insurance, child custody, visitation, name change, reimbursement of pregnancy and birth expenses, and restraining orders. Establishing parentage is also important in order to secure for the child certain benefits, such as social security, veteran's benefits, and inheritance rights.

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Seconday Sources

American Law Reports

American Law Reports (A.L.R.) are an excellent secondary source and are often a good place to begin when researching a certian topic. American Law Reports provide an overview of legal principles and controlling doctrines. Below are selected A.L.R that analyze the same sex couple adoptions and provide annotations to additional primary and secondary sources on the topic.

Adoption of child by same-sex partners, 27 A.L.R.5th 54
This annotation collects and discusses those reported cases where the petitioners for adoption are same-sex partners. Included in the scope of the annotation are cases where one petitioner is a biological parent to the child, as well as cases where neither petitioner is. The scope extends to male petitioners as well as female ones.

Marital or sexual relationship between parties as affecting right to adopt, 42 A.L.R.4th 776
This annotation collects and discusses the reported cases in which the courts have determined or discussed the question of what effect, if any, a pre-existing marital or sexual relationship between the parties to an adoption will have on the right of those parties to enter into that adoption.

Marital status of prospective adopting parents as factor in adoption proceedings, 2 A.L.R.4th 555.
This annotation collects and discusses the state and federal cases in which the courts, in evaluating the merits of a petition for the adoption of a child, have determined the effect of the circumstance that at the time the petition was filed, or at some subsequent time during the pendency of the adoption proceedings, the petitioner was single, widowed, divorced, or separated.

Legal Encyclopedias

1. American Jurisprudence

2 Am. Jur. 2d Adoption § 19

Discusses the effect of a petitioner's sexual orientation in making a decision regarding the adoption petition.

2 Am. Jur. 2d Adoption § 163

Discusses the stepparent exception, which states that the rights of a natural parent married to a stepparent are not cut off by the stepparent's adoption of the child, applying to prevent an adoptive parent's rights from being terminated by his homosexual partner's adoption of the child.

2. Corpus Juris Secundum

14 C.J.S. §34 - Children Out-of-Wedlock, Custody and Protection, Parent and Nonparent

2 C.J.S. §100 - Adoption of Persons, Hearing and Determination, Factors for Consideration, Generally

Treatises and Forms

Treatises

Courtney Joslin and Shannon Minter, ***Lesbian, Gay, Bisexual and Transgender Family Law.***

This is an amazing resource for researching all aspects of family law within the LGBT community. Numerous chapters address the topic of adoption and the various legal issues involved. While other treatises may discuss the subject of same-sex adoptions, this is by far the most comprehensive treatise on the subject and should provide an excellent resource to anyone interested in the suject.

Ann M. Haralambie, ***Handling Child Custody, Abuse and Adoption Cases***

Chapter 8 of this treatise, special issues, begins with a section entitiled "The The Lesbian, Gay, Bisexual or Transgendered Parent." § 8:2 discusses how sexual orientation my preclude custody. § 8:3 is about the effect of sexual orientation on the child. § 8:5 specifically address adpotion in the context of sexual orientation. § 14:4, "Who May Adopt," also addresses the topic of homosexuals adopting.

In addition to these treatises, there are numerous state specific family law treatises that discuss same-sex couple adoptions. Because this issue is often a decision made on the state rather than federal level, and each state's laws and policies differ, these treaties can be an invaluable resources.

Forms

1 Am. Jur. Legal Forms 2d, Adoption §§ 9:1- 9:45
1A Am. Jur. Pleading and Practice Forms, Adoption, Forms 1-10

Law Reviews and Periodicals

Debra Carrasquillo Hedges, ***The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment***, 41 B.C. L. Rev. 883 (2000)

This note addresses state courts and legislatures refusal to legally recognize, through second-parent adoptions, the relationship of children born to a homosexual couple with their non-biological second parent.The author argues that such refusal to permit second-parent adoptions denies the children of homosexual couples, as a class, many of the legal benefits and protections afforded to children of heterosexual couples and therefore amounts to a violation of the Equal Protections Clause.

Joel Stashenko, ***Ruling Affirms Narrow Reading of 'Parent' in Same-Sex Case,*** 28 No. 6 MATRIMST 7 (2010).

Declining to overrule a 19-year-old precedent, the New York Court of Appeals narrowly held that a samesex partner who has not adopted her partners biological child cannot assert visitation rights under New York law. The case also cleared the way for a lesbian to seek visitation with a nonadoptive child born to her former partner in a Vermont civil union, but only because the doctrine of comity requires New York to defer to the law of Vermont, which recognizes her as a parent. This note analysis this holding and its implications.

Michael England, ***In Whose Best Interest? Florida's Statutory Ban on Homosexual Adoption and the Arguments Set Forth in Support of an Absolute Ban, Represent the Perceived Best Interest of a Conservative Morality and Not Those fo the Children,*** 9 WTJCFA 279 (2010).

This article discusses Florida's statutory ban on gay adoption. The ban has since been overturned, but this article offers a perspective on the arguments that were offered in support of the ban and how these arguments conflict with the "best interest of the child" standard.

Lauren Schwartzreich, ***Restructuring the Framework of Legal Analyses of Gay Parenting***, 21 Harv. BlackLetter L.J. 109 (2005).

This article presents an argument against creating a hierarchy where couples of the opposite sex are ranked higher than those of the same sex. It discusses the inadequate protections in place in the legal system to protect children of same sex couples. This article goes beyond the narrow scope of same sex adoption and addresses the relationship between the legal system and gay patents generally, wheather adoptive or biological.

Maxwell S. Peltz, ***Second Parent Adoptions: Overcoming Barriers to Lesbian Family Rights***, 3 Mich. J. Gender & L. 175 (1995).

In this article, the author narrows the scope to Lesbian Families and the barriers they encounter when attempting a second parent adoption. It discusses statutory barriers to second parent adoptions for lesbians, how to overcome those barriers, and the implications of second parent adoptions on the family.

William B. Rubenstein, ***Divided We Propogate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships***, 10 UCLA Women's L.J. 143 (1999).

This article discusses rules and laws that govern familial disputes, specifically in same-sex families. The author analyzes how child custody decisions are made in same-sex families, who makes these decisions, and the affects these decisions have on the families.

Elanor Michael, ***Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the "Best Interests of the Same-Sex Family"***, 36 Conn. L. Rev. 1439 (2004)

This article discusses the use of the second parent adoption cases to provide non-biological parents in same sex relationships parental rights.

Books

The following books provide another important resource on the subject of same sex couple adoptions. Many provide personal narratives of those who have gone through same sex adoption themselves while others discuss the topic from a more subjective perspetive.

1. The Kid: (What Happened After My Boyfriend and I Decided to Go Get Pregnant)an Adoption Story - By Dan Savage

2. Gay and Lesbian Parenting Choices: From Adoption or Using a Surrogate to Choosing the Perfect Father - By Brette Sember McWhorter

3. Fatherhood for Gay Men: An Emotional and Practical Guide - By Kevin McGarry

4. Gay Men Choosing Parenthood - By Gerald Mallon

5. Lesbian and Gay Foster and Adoptive Parents: Recruiting, Assessing, and Supporting an Untapped Resource for Children and Youth - By Stephen Hicks

6. Same Sex Intimacies: Families of Choice and Other Life Experiments - By Catherine Donovan

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Other Resources

Helpful Organizations and Websites

Family Equality Council

Family Equality Council works to ensure equality for LGBT families by building community, changing hearts and minds, and advancing social justice for all families.

Families Like Ours

The mission of Families Like Ours, Inc. is to make change by reducing barriers within the adoption and foster care communities. Therefore, reducing the amount of time children are waiting for a stable and safe forever family. Families Like Ours is the premier national independent, nonprofit 501(c)3 Adoption Exchange. They welcome the diversity of all pre and post adoptive-foster families so they can be permanent families for children in the US foster care system.

National Center For Lesbian Rights

While this organization specifically caters to the needs of lesbians as opposed to all LGBT persons, it provides numerous valuable resources on adoption.

Rockaway Institute

The Rockway Institute advances the use of scientific and professional expertise to counter antigay prejudice and inform public policies affecting lesbian, gay, bisexual, and transgender (LGBT) people. The Institute's view is that public opinion, policies, and programs should be shaped by the facts about LGBT lives, not by political ideology. A primary goal is to organize the most knowledgeable scientists, mental health professionals, and physicians in the United States to provide accurate information about LGBT issues to the media, legislatures, and courts. In addition, the Institute conducts research to answer the nation's most pressing LGBT policy questions in the areas of couple/family relations, mental health, education, and health care.

COLAGE

COLAGE is a national movement of children, youth, and adults with one or more lesbian, gay, bisexual, transgender and/or queer (LGBTQ) parent/s.The organization builds community and works toward social justice through youth empowerment, leadership development, education, and advocacy.

Greenwood and Fink, Attorneys at Law

This Rhode Island law firm specializes in providing legal and other services to same sex adopting couples.

Families Like Mine

This is a website created by Abigail Garner, author of the Lambda Literary finalist, *Families Like Mine: Children of Gay Parents Tell It Like It Is.* The site launched in 1999 with the mission to decrease isolation for people who have parents who are lesbian, gay, bisexual or transgender (LGBT), and bring voice to their experiences.

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