

THIS COULD TOTALLY TRANSFORM TRADITIONAL MARRIAGE AS WE KNOW IT!

if only...

Same-Sex Marriage and IV-D

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Same-Sex Marriage Legal in Minnesota

- * MN legalized same-sex marriage in 2013
- * Significant change in rules of construction
 - * Gender-specific terminology in current statutes must be construed to refer to a person of either gender
- * Full impact unknown
 - * Will affect determination of parentage
 - * Will affect establishment of child support

Evolution of Marriage Definition

“Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. . . .”

Minn. Stat. 517.01 (1941)



Landmark Challenge

- * Minnesota Supreme Court one of first to rule on validity of marriage between same-sex couples
- * 5/18/1970 Jack Baker's application for a marriage license in Hennepin County to marry his male partner was denied
- * Minnesota Supreme Court – Minnesota law does not authorize marriage between same-sex partners.
 - * *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971)
- * The U.S. Supreme Court denied review in 1972

Statutory Clarification

“Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential”


Minn. Stat. 517.01 (1977)

DOMA

- * Federal Defense of Marriage Act (DOMA) enacted in 1996
- * Defines marriage as ‘a legal union between one man and one woman as husband and wife’
- * Defines a spouse as ‘a person of the opposite sex who is a husband or a wife’
- * Effectively denying federal benefits to same-sex spouses
 - * Including social security survivor benefits, family leave and immigration rights


Uneven Evolution

- * 1980s and 1990s activity re gay and lesbian partnership issues was rocky road
- * Domestic partner laws enacted
- * Mixed court rulings and legislative efforts
- * Massachusetts first state to legalize same-sex marriage in 2003. *Goodridge v. Alverson*
- * Between 2005 – 2011 some states legalized same-sex marriage while other states banned it



Constitutional Amendment

- * 2011 Minnesota Legislature proposed a constitutional amendment stating that marriage is the union of one man and one woman
- * The amendment was put on the 2012 ballot for vote by the electorate
- * Minnesota voters rejected amendment 52/48



Same-Sex Marriage Enacted in Minnesota

“Marriage, so far as its validity in law is concerned, is a civil contract between a ~~man and a woman~~, two persons to which the consent of the parties, capable in law of contracting, is essential”

Minn. Stat. 517.01 (August 1, 2013)

Gender-Neutral Rule

- * Rules of construction: When necessary to implement rights and responsibilities of spouses or parents in a same sex marriage, “including those laws that establish parentage presumptions,” gender-specific terminology “must be construed in a neutral manner to refer to a person of either gender.” Minn. Stat. 517.201, subd. 2
- * Religious exemption allows organizations to refuse to perform civil marriages in violation of their beliefs. Minn. Stat. 517.201, subd. 1



Since Enactment

- * Thousands of same-sex couples have married
- * Same-sex marriages in other states now recognized here
- * Judges dealing with myriad of new legal issues
 - * ERISA, estate planning, health care, Social Security, real estate
- * Note - June 2013 U.S. Supreme Court struck down part of DOMA. U.S. v Windsor

Impact of Same-Sex Marriage on Child Support

- * Where there is marriage there will be children
- * Where there is marriage there will be separation and divorce
- * Counties will establish child support for same-sex ex-spouses
- * What issues will they encounter?

Defining the Parent-Child Relationship

- * Definition of parent/child relationship in Parentage Act has not been changed:
- * The "parent and child relationship" means the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship. Minn. Stat. 257.52

Establishing the Parent-Child Relationship

- * Bio mother is established by proof of having given birth to the child
- * Bio father established under Parentage Act
 - * Presumptions
 - * Artificial insemination
 - * Paternity actions
 - * GT
 - * Recognition of Parentage (ROP)

Exceptions to Biology

- * Default rule for establishing parentage is a biological relationship between the parent and a child
- * Notable exceptions to this rule:
 - * Presumptions
 - * Physician-assisted artificial insemination
- * Did legislature intend that same-sex marriage would be another exception?



The Marital Presumption

- * A man is presumed to be the biological father of a child born during or shortly after his marriage to the biological mother. Minn. Stat. 256.55, subd. 1(a)(2012)
- * Purpose of the “marital presumption” is to look past the biology of parenthood to protect marriage, family and child

The Gender-Neutral Presumption

- * Minn. Stat. 256.55 stated in gender neutral terms:
A person is presumed to be the biological parent of a child if:
the person and the child's biological parent are or have been married to each other and the child is born during the marriage, or within 280 days after the marriage is terminated . . .
- * The marital relationship affords same-sex spouses the right to this presumption



Applied to Female Spouses

- * Child was born to a married female couple after same-sex marriage law was effective
- * Birth mother told hospital staff she was married, same-sex spouse was presumed the second parent of the child
- * Both spouses listed on the child's birth certificate as parent
 - * DHS CSED Help Desk Opinion



Applied to Male Spouses

- * Less clear because neither male spouse gives birth
- * Proposition: If one male spouse produces evidence that he is the bio parent his male spouse should be afforded the marital presumption of parenthood

Rebuttable Presumption

- * Presumptions can be rebutted in a legal action by certain individuals including bio mother or bio father
- * Requires “clear and convincing evidence.”
- * Two conflicting presumptions -
- * “the presumption which on the facts is founded on the weightier considerations of policy and logic” Minn. Stat. 257.55, subd. 2



Legal Uncertainties

- * Legal consultation is advised:
 - * Hospital will not place the names of male spouses on the child’s birth certificate without a court order.
 - * Parentage arrangements are often made by:
 - * Adoption agreements
 - * Artificial insemination agreements
 - * Surrogacy agreements (with uncertain legality)

Assisted Reproduction Artificial Insemination

- * Artificial insemination – recognized in law
- * Gender neutral artificial insemination law:
 - * Non-bio spouse of inseminated female is “treated in law” as the biological parent and the donor is not, if:
 - * Insemination is under supervision of a licensed physician
 - * Woman’s spouse consents to donation of semen from another man. Minn. Stat. 257.56
- * Can only apply to females



Surrogacy

- * Same-sex male spouses must use surrogacy
- * No Minnesota statute or case recognizes right to have a child through surrogacy
- * Therefore, Parentage Act definition of mother/father rules
- * Surrogacy contracts often rely on “choice of law” provisions if there is a dispute

Choice of Law

- * One case has addressed use of surrogacy in Minnesota; unpublished decision. *In re Baby Boy. A.*, No. A07-452, 2007 WL 4304448, at *3-8 (Minn. App. Dec. 11, 2007),
- * Court upheld parental rights of bio father and denied parental rights to the surrogate mother
- * Court honored the terms of the surrogacy contract
- * But applied Illinois law which was stated as controlling law in the contract
- * Under Illinois law, a surrogacy contract is valid



Custody not Parentage

- * Gay couple entered into an agreement whereby one of the men’s sperm was used to impregnate the woman
- * After child’s birth, a ROP was signed by the surrogate and the sperm donor
- * Agreement - Surrogate would terminate her parental rights and consent to an adoption.
- * She changed her mind, revoked the ROP and sued the sperm donor for parentage




Parentage Act applies

- * Trial court established both men as legal fathers and the surrogate was declared not a parent
- * BUT appellate court reversed the trial court based on the Parentage Act
- * Both the biological mother and the biological father were the parents of the child. However, the court did not reverse the award of custody to both men

A.L.S. by guardian ad litem J.P. v E.A.G. v R.W.S, No. A-10-443-2010 WL 4181449 (Minn Ct. App. Oct 26, 2010)

New Issues for Child Support

As a result of the same-sex marriage law child support workers and their attorneys will be confronted with challenging new issues when attempting to establish child support and/or parentage



What Will You Do?

- * Dissolution order obtained by same-sex spouses
- * Court orders both spouses are parents based on marriage presumption
- * Child support ordered
- * CP requests IV-D services

But What If . . .

- * Same-sex spouses separate
- * Bio-parent/spouse receives PA w/child
- * No dissolution filed

- * Should you file pleadings to establish child support from other spouse or determine parentage?
- * What evidence do you need?

What if . . .

- * Female spouses separate
- * Bio-parent/spouse receives PA with child
- * No dissolution filed

- * What documentation do you need to establish child support from other spouse?
- * What if only one spouse is on the BC and no father?

What If . . .

- * One female spouse is on the BC
- * A man is on the BC and he signed a ROP
- * And there is a marriage certificate showing the child was born during the same-sex spouse's marriage?

What If . . .

- * In the parentage action, both non-bio spouse and bio-father want to be declared parent
 - * Assume no prior written agreements and no physician involved
- * Does it matter if a written agreement signed by all 3 actors exists, stating bio-father would not assert any parental rights
 - * No physician involved

What if . . .

- * In the parentage action, neither the bio-father nor the non-bio spouse want to be declared parent and pay child support
- * And non-bio spouse rebuts the marriage presumption with biology

What If . . .

- * Two male spouses separate
- * One spouse receives PA w/child
- * No dissolution filed

* Can you establish child support from other spouse without a parentage action?

What If . . .

- * The bio mother's name is on the child's BC and neither of the male spouses signed a ROP and neither name is on the BC?

or

- * The bio mother's name is on the child's BC along with the male bio spouse and the child was born during the male spouses' marriage

What If . . .

- * Bio mother and both male spouses signed a surrogacy contract saying she would not assert any parental rights to the child and she does not come forward to assert any rights?

* But what if she decides she wants to parent the child arguing the surrogacy agreement is void?

What If . . .

- * Bio spouse (either gender) wants non-bio spouse recognized as legal parent to support child and
- * Non-bio spouse does not want to be named as legal parent, have custody/PT or pay child support
- * Saying bio parent got pregnant (or arranged surrogate) without spouse's agreement.
- * Non-bio spouse challenges the marriage presumption

What If . . .

- * Two female spouses; one was artificially inseminated by a physician
- * Non-bio spouse signed consent under current artificial insemination statute
- * Spouses separate; PA open with child

- * Non-bio spouse does not want to be the legal parent, have custody/PT or pay child support – not bio parent?
- * What if the sperm donor moves to intervene asking to be declared the parent?

**Recognition of Parentage
Minn. Stat. 257.75 – Part 1**


- * Allows for unmarried parents of a child to sign a document at or near the birth of the child voluntarily acknowledging parentage of the child.
- * Does not apply to same-sex married couple
- * Federal law requiring genetic consanguinity in state laws governing voluntary acknowledgement of parentage
 - * Can't avoid adoption laws

ROP Part 2

- * Minn. Stat. 275.75, subd. 1a – Joinder
- * Sex neutral language:
A person who is a presumed parent under [the marriage presumption] may join in a recognition of parentage that recognizes that another person is the child’s biological parent
- * Non-bio same-sex spouse must renounce marriage presumption if bio-same sex spouse and bio parent wish to execute a ROP

Potential Clarifying Legislation

- * Clarifying legislation to avoid litigation and inconsistent court decisions
- * Change definition of parent-child relationship (Minn. Stat. 257.52)
- * Marriage presumption (Minn. Stat. 257.55) –
 - * Change word “biological” to “legal”
 - * Specific language that the marriage presumption applies to same-sex couples and males and females and specifying satisfactory evidence



**Bills Attempted in 2014 -
Senate**

- * SF 2627, Sen. Pappas and Latz
- * Proposed amendments to section 257.56
- * Providing protection to “intended parents” in both artificial insemination, assisted reproduction, and gestational surrogacy arrangements
- * Includes duty to support provisions



Bills Attempted in 2014 House

- * H.F. 291, Rep. Simon and Holberg
- * Would apply the Parentage Act provisions relating to paternity to determinations of maternity
- * Re mother’s right to custody – changes “biological” mother to “birth” mother
- * Adds a presumption to 257.55 for “intended parents” when pregnancy initiated by means other than sexual intercourse and all presumptive parents entered into written agreement



What are Other States Doing?

- * 19 states + District of Columbia recognize same-sex marriage
- * 31 states prohibit it
- * States surrounding Minnesota-
 - * Iowa, Illinois – s-s marriage allowed
 - * Wisconsin – s-s marriage ban – 7th Cir. Ruled unconstitutional 9/14; will be appealed
 - * N.D. + S.D. – s-s marriage ban - being challenged

What are Other States Doing?

California

- * Non-bio partner who has received child into home and held self out as parent has same parental rights as the bio parent. *Elisa B. v. Superior Court*, 117 P.3d 660 (2005)
- * Child can have more than two legal parents.
 - * West’s Ann. Cal. Fam.Code sec. 7612(b)(2013)
- * Child w/more than two legal parents entitled to same guideline dollar amount w/support from each legal parent. West’s Ann.Cal.Fam.Code sec 3040(d)(2013)

What are Other States Doing?

New York

- * Female spouse of bio mother was presumed parent of child conceived from artificial insemination and born during marriage.
 - * *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845 (Sup. Ct. 2014)
- * Same-sex partners who consciously choose to bring child into world through artificial insemination, in reliance on partner's implied promise to support the child, non-bio partner is equitably estopped from denying responsibility to support the child.
 - * *Matter of H.M. v. E.T.*, 2010 NY Slip Op 03756 (14 NY3d 521)



What About Interstate Enforcement?

- * Same-sex couple married in MN
- * Child born during the marriage
- * Parties separate
- * One parent receives PA with child

- * NCP moves to state that does not recognize same-sex marriage
- * Does the marital presumption exist?
- * Can child support be established or enforced?

DOMA Problem

- * In *U.S. v. Windsor*, U.S. S. Ct. recognized same-sex marriage for purpose of receiving federal benefits previously limited to opposite-sex married couples under section 3 of DOMA.
- * But section 2 of DOMA is still in effect:
 - * No state is required to give effect to a same-sex marriage under the laws of another state "or a right or claim arising from such relationship."

Federal Law Helps

- * Full Faith and Credit for Child Support Orders requires states to recognize child support orders in other states. 28 USC, Part V, Ch. 115, sec. 1738B
- * UIFSA says that a party whose parentage of a child has been previously determined may not plead nonparentage as a defense to a proceeding under UIFSA. Sec. 315

Establishment/Enforcement

- * If a child support order is established in Minnesota, all states would give full, faith and credit to the order
- * If parentage has been established by a court order in Minnesota, states may be willing to establish child support - unclear

Establishment of Parentage

- * If parentage has not been established in Minnesota and we are relying on the marital presumption -
 - * UIFSA requires state to apply its own law when responding to a request
 - * A birth certificate with the names of both parents is not entitled to Full Faith and Credit in other states
 - * Watch for case law



What do we know for certain?

- * Private bar actively involved in litigating same sex issues.
- * If arrangements are not properly done, there will be litigation.
- * For parties who don't consult attorneys and instead make informal arrangements, we will have litigation with mostly pro se parties.
- * The law (and public opinion) continues to evolve
