



## Parenting Issues for Same-Sex Couples

This memo is about the legal status of same-sex couples with respect to the children they are raising. New developments in Washington law have created several ways that same-sex couples with children can legally establish the parental rights of both partners. However, because these new developments in the law are not recognized in every state, we still recommend that same-sex couples use a procedure called a second-parent adoption to establish equal legal status for both parents, whenever possible.

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The law on these issues has changed significantly over the last decade and will probably continue to change. As a result, while

this memo will provide you with basic information, we recommend that you consult with a qualified family law attorney before you make any significant changes in your relationships with your partner or children and before you petition a court regarding your parental rights.

### **Who is a “legal” parent?**

In general, biological and/or adoptive parents are the legal parents of a child.

Washington law also now provides a legal “presumption of parentage” if you and your partner have a child while you are state-registered domestic partners. That means you will legally be presumed to be a child’s parent if a child is born to your partner while you are registered domestic partners, even if you are not biologically related to the child. In addition, Washington law now provides that you are legally presumed to be a child’s parent if, during the first two years of the child’s life, you lived in the same household as the child and openly held the child out as your own. However, those legal presumptions can be challenged in court.

Being a legal parent means that you have legally recognized rights and responsibilities toward that child. A person remains a legal parent until he or she voluntarily gives up these rights or a court of law terminates a person’s parental rights.

There may be another adult in a child’s life that the child sees as his/her “mama” or “papa.” This person may live with the child, care for the child, and act like a parent in every way. Even so, if s/he isn’t a biological or adoptive parent, a judge may have to determine that person’s legal rights with respect to that child if there is ever a dispute with the child’s biological or adoptive parent(s).

### **What does it mean to be a “legal” parent?**

Legal parents are usually entitled to residential time (custody or visitation) with their children. Legal parents are also responsible for their children’s care and support, including financial support. In general, they also have the right to make decisions regarding their children’s education, medical care, and general well-being, especially in an emergency.

## **What rights and obligations do I have if I’m not a “legal” parent to the child I am parenting?**

In general, if you’re parenting a child but you don’t have a legally recognized relationship, the legal system will consider you to be a stranger to the child. This means that legally you have none of the responsibilities or obligations of a parent. In other words, you do not have any legal right to custody or visitation with the child. You also do not have the right to make major decisions regarding the child, including major medical decisions, even in an emergency. In addition, you do not have any obligation to support and care for the child.

## **How does it affect the child I’m parenting if I’m not a “legal” parent?**

If you are not a legal parent, the child will not have any right to inherit from you if you die without a will, and he or she will not be able to receive any Social Security benefits from your account if you are disabled or die. Also, your non-legal child most likely will not be able to receive health insurance or other insurance benefits that are available to your legal child, as through your employer.

In addition, if you and the child’s legal parent end your relationship, the legal parent can deny you the right to see the child, because he or she, and not you, has the right to make decisions regarding the child.

## **What can we do to make my partner, who is a non-legal parent now, a “legal” parent of my biological child?**

To make sure that your legal status will not be challenged in court and is recognized nationwide, the best thing to do is to petition for a second-parent adoption. This is a legal procedure that allows a same-sex parent to adopt his or her partner's biological or adoptive child without the partner losing any parental rights. Second-parent adoptions protect children in same-sex parent families by giving the child two legal parents. It grants adoptive parents the same rights as the biological parent in custody and visitation matters. This procedure ensures that both parents will continue to have a legally recognized parental relationship with the child if the two of you separate or if the biological parent dies or becomes incapacitated.

If the other biological parent still has rights regarding the child, you will need to obtain consent to the adoption from that other parent. As part of this process, the other biological parent will need to agree to terminate his or her parental rights.

If the biological parent will not agree, the adoption is “contested”. In contested proceedings, you will only be able to proceed with the adoption if:

- 1) You can show that the refusal to consent is against the best interests of the child and
- 2) That parent has substantially disregarded their parenting responsibilities.

Under Washington law, a person who donates sperm or eggs to be used in assisted reproduction (a method of causing pregnancy without sexual intercourse) does not have legal rights with respect to the child, unless there is a signed, written agreement that provides otherwise.

Proceeding with a second-parent adoption is complicated, and we strongly suggest that you contact a qualified family law attorney to help you with this process. You can contact the Legal Voice Information and Referral line for referrals to attorneys who practice adoption law or lesbian/gay family law.

In addition to the legal paperwork, there are a number of other steps that you must take to complete any type of adoption. In general, the court will require only a “post-placement report” for a second parent adoption. This report evaluates the home environment, family life, health, facilities, and resources of the prospective adoptive parent, as well as the physical and mental condition of the child, and any other factors relating to whether the proposed adoption is advisable. The report will also review the criminal record of the prospective adoptive parent. Overall, this report is designed to evaluate whether the proposed adoption is in the best interest of the child as determined by the court. Again, a family law attorney and/or an adoption agency can assist you in this process.

Finally, a judge needs to approve the adoption. While there is nothing in our state law that prohibits second-parent adoptions, unfortunately some judges in this state may continue to discriminate against gay and lesbian couples by refusing to grant them.

An experienced family law attorney in your area can help you consider the potential biases of the judge assigned to hear your adoption petition before proceeding. If you feel strongly that a particular judge will not give you a fair shake, you can petition the court to assign a different judge to your case. Legal Voice may be able to refer you to an attorney who will consider providing limited services, for a fee, to help with this part of the process.

### **What is the best time to do a second-parent adoption?**

It’s important to put these legal protections in place as soon as possible so as to protect your parent-child relationship in the event that you and your partner break up or your partner (the legal parent) suddenly dies.

### **Should we do a second-parent adoption if our child was born while we were registered as domestic partners in Washington?**

Yes, in order to have the fullest protection under the law. As discussed earlier, it is true that Washington law now creates a legal presumption that both you and your partner are the parents of a child born to either of you while you are registered as domestic partners. This means that you are considered the parent in Washington as a matter of law. You are legally the parent unless someone proves in court that you are not. This law also allows for both partners’ names to appear on the birth certificate of those children.

However, we still advise couples who have registered as domestic partners to complete second-parent adoptions to make sure that both parents have a legal relationship with their child. This is because Washington domestic partnership law is not recognized in most other states, but an adoption approved by a court in Washington must be recognized everywhere. When traveling in other states or moving to another state, parents should not rely only on the presumption afforded by Washington domestic partnership law for their legal parental status, because other states may not recognize it.

### **If we got married in another state or country that recognizes marriages of same-sex couples, do we still need to do a second-parent adoption?**

In theory, both of you should be considered legal parents to any children who were born during the course of your marriage. Washington will now recognize your marriage from another state as a Washington domestic partnership, including the presumption of parentage. Other states may not; the laws are different in every state. Because of this and because of recent case law developments and the federal and state Defense of Marriage Act (DOMA) laws, you should not assume that you will be legally recognized as the parent of any non-biological children. We therefore strongly recommend that you complete a second-parent adoption even if you were married in another jurisdiction.

### **If we entered into a civil union or domestic partnership in another state do we still need to do a second-parent adoption?**

Yes. Different states have different laws regarding the parental rights of non-biological parents in same-sex relationships. Also, the law in many states is changing and it is impossible to predict what actions state legislatures or courts will take on these issues. Due to these uncertainties, we strongly recommend that you complete a second-parent adoption.

### **Other than adoption, is there any other way for a non-legal parent to become a “legal” parent?**

Yes, there are several ways this could happen. But none of them will necessarily assure recognition by another state or create permanency for your family as well as a second-parent adoption will.

#### **Presumption of Parentage**

Recent changes to Washington’s Uniform Parentage statute create two presumptions that can help same-sex couples establish the legal status of both parents:

- 1) People in a state-registered domestic partnership are both presumed to be the parents of a child born to one of them while the couple is registered as domestic partners. This presumption also applies if a child is born to one partner within 300 days after a domestic partnership is legally dissolved.

- 2) Whether or not the parties are in a domestic partnership, “a person is presumed to be the parent of a child if, for the first two years of the child’s life, the person resided in the same household with the child and openly held the child as his or her own.”

A “presumed parent” is legally a parent unless someone proves in court that they are not.

When a child has a presumed parent, a court action to decide parentage must be brought within four years of a child's birth – **unless:**

- 1) the presumed parent did not live with (or have sexual intercourse with) the other parent during the probable time of conception **and**
- 2) the presumed parent never held the child out as his/her own.

In either one of these situations, the parentage action can be brought at any time.

### **De Facto Parentage**

Additionally, in Washington State, a person who is not a biological or adoptive parent of a child can petition the court for legal parental rights if s/he can prove that s/he is a *de facto* parent (a person who has acted as a parent). If the petition is successful, a *de facto* parent is entitled to equal parental rights.

Before the court will recognize you as a *de facto* parent, however, you must file a court action and show all of the following:

- that you (as the non-legal parent) have an actual parent-like relationship with the child;
- that the biological or adoptive parent agreed to and encouraged your parent-like relationship with the child;
- that you (as the non-legal parent) and the child have lived together in the same household;
- that you have assumed obligations of parenthood without expecting payment;
- that you have been in a parental role for a long enough period of time that you have established with the child a bonded, dependent relationship, parental in nature;
- that you have undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life.

*In the Matter of the Parentage of L.B.*, 155 Wn.2d 679, 708 (2005).

If you are able to show to a court that you meet these criteria, the court will consider you in an equal position to the existing legal parent in the court’s decision-making process. In other words, you will not automatically receive custody and visitation, but you will be considered equal to the other legal parent as the court decides what parental rights would be in the best interests of the child.

Keep in mind, however, filing a *de facto* parentage action with the court will be time-consuming and costly. Also, you must be able to prove all of the above criteria before the court will even consider what role you should play in the child’s life. New cases also indicate that this remedy is becoming more fact-specific and more limited as to what family situations it applies to.

Of course, the issue of whether or not you qualify as a *de facto* parent or whether parentage is challenged is likely to come up only if you and your partner break up, and your ex-partner refuses to allow you to continue to see the child and to act like a parent. Thus, if your partner agrees to your equal parental status, second-parent adoption is the best option for preserving your parenting rights because it does not rely on the unpredictable litigation that establishing parentage in other ways requires.

### **Are there any other things we can do to protect my partner’s rights to function as a parent?**

There are several different things that you can do to attempt to ensure that your partner, as a non-legal parent to your children, is able to care for your children as an equal parent. Some of these include:

#### Designate your partner as your choice to be your children’s legal guardian.

You can name your partner as the person you would like to be your child’s guardian if you die or are incapacitated. You can do this in several ways. You can identify your partner as your choice to be the child’s guardian in your will. You can also identify your partner as your choice to be the child’s guardian in a separate “Nomination of Guardian” document. This is a good idea because, unlike your will, the “Nomination of Guardian” document will be valid any time you are incapacitated, while your will is only valid after your death. You may need an attorney to draft this document for you. In either case, you should make sure that your partner has a copy of each document in which you have named him or her to be your child’s guardian.

Fill out paperwork stating that you want your partner treated like a legal parent. Provide a letter or fill out a form provided by your child’s school stating that your partner is authorized to make emergency and non-emergency medical decisions for your child, to come to school to visit your child (for assemblies, recitals, etc.) and to pick up your child from school.

You should also provide your child’s doctor and other health care professionals with a letter or form stating that your partner is authorized to make emergency and non-emergency medical decisions for your child. You can use the one-page form in the publication “A Kinship Caregiver’s Guide to Consenting to Health Care” as a guide, but your letter or form should also state that your partner is permitted to visit your child at the hospital and should be treated as an equal family member for hospital visitation purposes and need not be limited to 6 months.

Draft a shared parenting agreement. You can and should work with your partner to develop a written shared parenting agreement between you. Once you have signed the agreement, honor it.

### **What should we include in a shared parenting agreement?**

The two of you should write up a parenting agreement that is agreeable to both of you. The time to do this is while your relationship is solid and intact. Although these agreements are not generally enforceable by a court, they can serve as strong evidence of you and your partner’s

intentions with regard to parenting your child. There is no particular form for such an agreement, but a useful agreement should address several topics:

- Define the intended parenting relationship. Your parenting agreement should spell out the nature of your relationship. For example, you should say that even though only one of you is the legal parent, you both consider yourselves to be equal parents to the child.
- Name the non-legal parent as the person who will become the child’s legal guardian if the legal parent is incapacitated or dies. The legal parent should also prepare a will that names the non-legal parent as the appointed legal guardian. While this designation will not be binding on a court, courts usually follow these designations unless there is a compelling reason not to. See the Legal Voice memo “Placement of Minor Children in Case of Death.”
- Address what happens if you and your partner (the legal parent) separate or break up. You should state that you both agree that both parents will remain involved in the care and upbringing of the child and that both of you will have continuing access to the child. In particular, you should clearly state your agreement regarding custody and visitation following a break up. State in the agreement who will have primary custody of the child, when and for how long will the non-custodial parent be able to have visitation with the child, etc. For example, you may decide to share custody equally, with the child moving back and forth between your homes every week or month, or you may decide that the child will live with one of you during the week but stay with the other parent a few weekends a month. The publication “**Parenting Plans, Residential Schedules and Child Support for Parentage Cases**” has a parenting plan form and explanations that may help you talk through what you want to put in your agreement.
- Define each partner’s financial obligations. Also, your shared parenting agreement should spell out the basic ground rules for financial support, including who will be responsible and in what amount for child support, tuition assistance, medical care and insurance. It should also state how the two of you will pay the child’s expenses. You may decide to share all the child’s expenses jointly or divide them in some way other than 50/50; for example, you may agree that one parent is solely responsible for certain defined expenses. The publication “**Parenting Plans, Residential Schedules and Child Support for Parentage Cases**” has a child support order form and worksheets that may help you talk through what you want to put in your agreement.
- Provide a mechanism for resolving disputes. You may also want to include a provision in your agreement stating that you agree to attempt to resolve any dispute or disagreement about the shared parenting arrangement through mediation. A mediator is an unrelated third person who can work with you and your former partner to help you reach an amicable and mutually acceptable resolution to any disputes regarding the children and their care. See the Legal Voice memo “Mediation: Should I Use It?”

## **If my partner and I break up and I am not a “legal parent” to our child, how can I get custody and/or visitation of our child?**

There are several options for you to consider:

Enter into an agreement with your partner. If your partner agrees to your continuing custody and/or visitation, it may be fairly easy for you to continue your parental relationship with the child. As explained above, if you and your partner drafted a shared parenting plan spelling out the custodial and visitation schedule for your child, financial support arrangements, and any other important parenting issues, you can follow the terms of the plan that you both agreed to. You may also want to establish an agreed parentage order and parenting plan and enter it with the Court. If you were married or in a registered domestic partnership, you will be required to enter a parenting plan with the court when you get your dissolution (divorce).

File a court action and attempt to establish yourself as a *de facto* parent or parent under the new parentage statute. If your partner, the legal parent, refuses to allow you to continue your relationship with the child, it can be difficult for you to gain custody or visitation rights. There is, however, a two-step process that may be successful. Your first step will be to petition the court for status as a *parent*. Because this may be a complicated process, we recommend that you consult with a qualified family law attorney to assist you in preparing the pleadings and other legal paperwork.

If your petition requesting *de facto parent* or *parentage* status is granted, you can petition the court for a “parenting plan.” Permanent parenting plans usually specify all of the following:

- What the parents will do to attempt to resolve future disputes (before seeking additional court intervention);
- Who will be making decisions regarding the children's education, health care, and religious upbringing (known as “legal custody”); and
- What the residential schedule for the child will be (known as “physical custody”).

The parenting plan will include a schedule designating which days of the year the child will reside with you, and which days of the year the child will reside with your ex-partner, including provisions for holidays, birthdays of family members, vacations, and other special occasions.

At the same time that the court issues a parenting plan, the court will also usually establish child support, ordering you or your partner to provide money to the other to pay for the costs of raising the child. There are several factors that the court will consider when ordering child support, including where the child is living and the relative financial means of the parents.

See the publication "**Parenting Plans, Residential Schedules and Child Support for Parentage Cases ...**" for more information about parenting plans and child support orders.

File a non-parental custody petition. Another option which may be available is filing for nonparental custody. You may also want to consider including this claim in any court action you file seeking to establish yourself as a de facto parent. However, you should know that it is not easy to succeed with such a claim. The law presumes that children belong with their parents and that generally, parents act in the best interests of their children. Therefore, the law will give custody to a non-parent only if the child isn't living with the legal parent, the legal parent is unfit (unable to care for the child because of drug or alcohol problems, for example), or the non-parent can prove to the court that the child's growth and development would be seriously harmed by living with an otherwise capable parent.

**RESOURCES**

- Related Legal Voice memos, available at **www.LegalVoice.org** or call our Legal Information and Referral Line at (206) 621-7691

Options for Unmarried Parents

Placement of Minor Children in case of Death

Mediation: Should I Use It?

How to Find a Lawyer

Working with a Lawyer

Dissolution When the Wife is Pregnant

- Related Northwest Justice Project publications, available at **www.washingtonlawhelp.org**:

“A Kinship Caregiver’s Guide to Consenting to Health Care”, Go to Family Law, Non-parents caring for children.

"Parenting Plans, Residential Schedules and Child Support for Parentage Cases ...", Go to Family Law, Parenting Plans, Parenting Plans in Parentage

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