

Same-Sex Couples as Parents

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I. Introduction

Due to the growing social acceptance of homosexual relationships in many countries, an increasing number of children are being raised by same-sex partners. Many of these children come from previous heterosexual partnerships of the biological parent. Moreover, lesbian and gay couples often wish to raise children and therefore seek to fulfill this wish either by means of assisted reproductive technology or by taking a child into foster care or adopting. This development poses new problems for the law. In many countries, the discussion focuses on the question as to whether same-sex partners should be allowed to adopt a child. Although the positions are highly controversial, a growing number of countries are now allowing adoption by same-sex partners. I would like to start by giving an overview of this international legal development (II.). I will then go on to show that, since homosexual families live in vastly different circumstances, they require legal provisions that are not limited to adoption law but include rules on parentage as well as custody (III.).

II. Adoptions by Same-sex Couples

More and more legal systems allow adoptions either by one or both of the partners living in a same-sex relationship. In most cases, adoptions of stepchildren are permitted. Such adoptions may be limited to the biological child of one partner or may include a partner's previously adopted legal child. Increasingly, a growing number of countries also provide for joint adoption of a child not previously connected with either partner.

Two divergent developments can be discerned: On the one hand, there are countries where for quite some time already adoptions by same-sex partners have been permitted even though the relationship has no formal status. This is the prevailing position in some Common Law countries. On the other hand, there are those countries where the relationship of same-sex couples has been given official status, as in the institution of registered partnerships or even that of marriage. Although many of these systems have conferred almost equal rights on registered partners, adoptions were not permitted until later.

In the United States, it seems that adoption by a same-sex partner was first granted in 1985.¹ Nowadays, co-parent or second-parent adoptions are allowed in a number of States. However, there are significant differences throughout the country. Even within some federal states there is diverging case law. At least in six states, decisions at the appellate court level have held adoptions by a same-sex partner to be permissible. Thus adoptions by a homosexual partner are possible in New York, New Jersey, Massachusetts, Illinois, Vermont, Pennsylvania and in the District of Columbia.² In other States, such as Oregon or Washington, lower courts at least

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¹ In re A.O.L. No. 1-JU-85-25-P/A (Alaska 1st Jud. Dist. July 23, 1985).

² In the Matter of Jacob, 660 N.E.2d 397 (New York 1995); In re Adoption of Two Children by H.N.R., 666 A.2d 535 (New Jersey Super. 1995); Adoption of Galen, 680 N.E.2d 70 (Massachusetts 1997); In re Petition of K.M. and D.M., 653 N.E.2d 888 (Illinois App. 1995); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vermont 1993); In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pennsylvania 2002); In re M.M.D., 662 A.2d 837 (District of Columbia 1995).

have granted adoptions by a homosexual partner.³ Some states, like Vermont⁴ or California⁵, now have statutory provisions that permit the adoption of a stepchild by a same-sex partner. The adoption of a child that is not the biological, but the previously adopted, child of the other partner is the exception.⁶

She or he can adopt both a biological child and a previously adopted child of her or his partner. Only a few states expressly prohibited⁷ or still prohibit – as is the case in Florida⁸ or Mississippi⁹ – adoptions by homosexuals. In some Canadian provinces, same-sex partners are allowed to adopt their partners' child as well.¹⁰ This is likewise possible in several Australian territories, such as Western Australia¹¹ and Tasmania.¹² In 2002, the South African Constitutional Court held in a remarkable decision that the provisions of the Child Care Act and of the Guardianship Act, which reserve adoptions to married couples or single persons, violate the Constitution and has thus made possible co-parent adoptions by a same-sex partner.¹³ Following a fundamental reform of the Children and Adoption Act of 2002 in England, unmarried couples may also jointly adopt a child, regardless of their sex.¹⁴ In April 2004, a bill was introduced in the Spanish Congress to reform the Código Civil in order to allow unmarried partners to adopt, without regard to their sexual orientation.¹⁵ In these countries the parent-child-relationship has been legally protected before the partnership was legally recognized through the institution of registered partnerships or the opening up of marriage to same-sex partners.

In those states which have created a new status of registered partnership or allowed same-sex couples to marry, adoption was initially almost everywhere ruled out. In subsequent reforms, however, registered or married partners of the same sex were allowed to adopt. Thus in Denmark,¹⁶ Iceland,¹⁷ and since 2005 also in Germany,¹⁸ the adoption of stepchildren, at least, is possible. After initially prohibiting such adoptions, Swedish law made it possible for registered partners to adopt both stepchildren and children who are not the child of one of the partners.¹⁹ Also, in the Spanish autonomous region of Navarra²⁰ as well as the Basque Region²¹ and in Aragón,²² Catalonia²³ and Cantabria,²⁴ same-sex partners who have registered

³ In re Adoption of M.M.S.A., No. D8503-61930 (Oregon Cir. Ct. Multnomah Sept. 4, 1985); Interest of E.B.G. No. 87-5-00137-5 (Washington Super. Ct. Thurston Mar. 29, 1989).

⁴ 15A Vermont Statutes Annotated § 1-102.; cf. *Baker v. State*, 744 A.2d 864, 884-885 (Vermont 1999).

⁵ §§ 9000 (b) California Family Code.

⁶ Cf. In the matter of Carolyn B. 2004 NY SlipOp 01860 (New York 2004).

⁷ See e.g. New Hampshire Revised Statutes Annotated 170-B:4 (revised 1999).

⁸ Florida Statutes Annotated § 63.042(3).

⁹ § 93-17-3 Mississippi Code.

¹⁰ Cf. British Columbia, Sec. 5 Adoption Act, R.S.B.C. 1996, c. 5; and the Northwest Territories, North West Territories Adoption Act, S.N.W.T. 1998, c. 9.

¹¹ The Amendment (Gay and Lesbian Law Reform) Bill 2001 (Western Australia) inasmuch amends the Adoption Act 1994 (Western Australia).

¹² Relationships (Consequential Amendments) Act 2003 (Tasmania).

¹³ *Du Toit and Another v. Minister for Welfare and Population Development and Others*, 2002 (10) BCLR 1006 (CC), 2002 SACLX LEXIS 23.

¹⁴ Art. 50 Adoption and Children Act 2002 (last amended by the Civil Partnership Act in 2004).

¹⁵ Proposición de Ley sobre igualdad jurídica para las parejas de hecho, Boletín Oficial de las Cortes Generales Nr. B-45-1 of April 23, 2004, p. 1 et seq.

¹⁶ § 4 (1) Lov om registreret partnerskab no. 372, inserted by law of June 2, 1999.

¹⁷ § 6 (1) 1 Lov om registreret partnerskab no. 87.

¹⁸ § 9 (7) Lebenspartnerschaftsgesetz.

¹⁹ Chapter 3 § 2 of the Lag om homosexuella sambor (1994:1117), as amended on June 5, 2002.

²⁰ Art. 8 Ley 6/2000 of July 3, 2000 para la igualdad des parejas estables, Boletín Oficial de Navarra no. 82 of July 7, 2000.

²¹ Art. 8 Ley 2/2003 of May 7, 2003, reguladora de las parejas de hecho, Boletín Oficial del País de Vasco no. 2003100 of May 23, 2003.

their long-term partnership may now adopt not only stepchildren but also other children. In 2004 in Navarra, for the first time the mother's same-sex partner was granted the right to adopt her child.²⁵ In the Netherlands, both registered and married same-sex partners have the right to adopt.²⁶ It is important to note that in general, adoptions are limited to partners who have formalized their partnership.

This brief outline shows that although the starting point was completely different, the lines of development have begun to converge: gradually, same-sex partners are granted the right both to adopt and to formalize their relationship - although this development is by no means complete. With respect to the parent-child relationship, in all legal systems the focus is now almost exclusively on the right to adopt.

III. A broader approach to same-sex parentage

Why is this focus too narrow? Above all, legal rules concerning the parent-child relationship must safeguard the best interests of the child. Where the partner of a parent has taken on parental responsibility and there exists a factual relationship between him or her and the child, this relationship needs to be protected. It serves the welfare of the child to legally recognize and protect this factual relationship, regardless of the sex of the partner. However, adoption is not the only, and not always the best, way to achieve an adequate protection. Same-sex parentage covers highly diverse factual situations. On the one hand, there are children who have lived a significant period of their life with both biological parents before their separation and are only later on cared for by the new same-sex partner of their biological parent. On the other hand, there may be two lesbians, for example, who decide that one of them with the consent of the other is to receive a child by artificial insemination so that they can together raise this child as their own child. These situations require different legal rules. Whether a factual parent-child relationship exists depends on the child's age at the time when the partner took on parental responsibility as well as on the duration of the common living arrangement. The appropriate form of protection is contingent on the nature and intensity of the relationship as well as on the existence of other parent-child relationships the child may have. It is in the case of multiple parentage, in particular, that special rules are necessary. Consequently, the legal provisions concerning parentage (1.) and adoption (2.) as well as custody (3.) must be reconsidered.

1. Parentage

If the child was conceived as a result of artificial insemination with donor sperm that was performed with the consent of the woman's partner, she should be considered the legal mother of the child. A growing number of legal systems, such as the French,²⁷ English²⁸ and Swiss²⁹

²² Art. 10 Ley 2/2004 of 3 May, in modification of Ley 6/1999 of March 26, relativa a parejas estables no casadas, Boletín Oficial de Aragón no. 54 of May 12, 2004.

²³ Art. 1 Ley 3/2005 of April 8, de modificación de la Ley 9/1998, del Código de Familia, de la Ley 10/1998, de uniones estables de pareja, y de la Ley 40/1991, del Código de Sucesiones por causa de muerte en el Derecho Civil de Cataluña, en materia de Adopción y Tutela, Diario Oficial de la Generalidad de Cataluña no. 4366 of April 19, 2005.

²⁴ Art. 11 Ley de Cantabria 1/2005 of May 16, de parejas de Hecho de la Comunidad Autónoma de Cantabria, Boletín Oficial de Cantabria no. 98 of May 24, 2005.

²⁵ See <http://www.codigo-civil.net/blog/b2.php?p=364>.

²⁶ Art. 227, 228 Burgerlijk Wetboek.

²⁷ Art. 312 (1) Code Civil.

but also the Austrian³⁰ or German,³¹ view a husband (or male partner) who has consented to the heterologous insemination of his wife (or female partner) as the legal father of the child. Paternity cannot be challenged. The same holds true for those States in the US that have adopted the Uniform Parentage Act.³² The basis for legal parentage in these cases is the father's act of will, that the child to be conceived will be raised with the mother as his own. The same holds true in the consensual artificial insemination of a lesbian woman. The only real difference is that with a lesbian couple it is obvious that the consenting partner is not the biological parent, whereas a consenting father might pass as the biological father. However, this does not justify a difference in treatment: irrespective of the sex of the consenting partner, a child should know about his or her genetic origin (without, however, necessarily establishing a legal relationship). To grant a child access to information about his or her genetic origin seems important for a variety of reasons that can only be mentioned briefly in this context.³³ Obviously, there may be medical reasons, especially the desire to know about any possible hereditary diseases if he or she considers having children. More importantly, it is essential for the child's search for her or his identity and development of personality to know about her or his ancestors.³⁴ Consequently, the partner who consents to the artificial insemination should be considered the legal parent of the child regardless of his or her sex. Where the consent of the woman's lesbian partner has been established in the requisite form, she should therefore be regarded as the legal mother.

2. Adoption

a. Adoption of a stepchild

Adoption can offer appropriate protection in a number of scenarios: if the child was conceived by artificial insemination, the birth mother's lesbian partner who takes on parental responsibility should be able to adopt the child of her partner if she is not already presumed to be the legal mother by reason of her consent. The same holds true for the male partner of a man who decides to procreate by insemination with a woman willing to give birth to a child conceived with this partner's sperm. Regardless of whether such contracts or arrangements are allowed or enforceable, the biological father's male partner should be allowed to adopt the stepchild if the mother after the child's birth agrees that the child should live with the father and consents to the adoption by his partner. In both cases, if the child lives with the biological parent and his or her same-sex partner has taken on parental responsibility the factual parent-child relationships continues to exist anyway. Adoption merely protects this factual relationship by giving the social parent custody and the child a right to support and inherit. Such legal protection of the social relationship is not only important during the time that the partners live together. Should the parents later on separate or divorce, custody ought to be

²⁸ 28 (2) Human Fertilisation and Embryology Act.

²⁹ Art. 255 (1) Zivilgesetzbuch (ZGB).

³⁰ § 163 (3) Allgemeines bürgerliches Gesetzbuch (ABGB).

³¹ § 1592 no. 1 Bürgerliches Gesetzbuch (BGB).

³² See Sec. 201 (5) Uniform Parentage Act 2000 (last amended or revised in 2002), adopted in Delaware, Utah, Texas, Washington and Wyoming.

³³ With respect to the controversial positions, see Switzerland (Art. 27 Fortpflanzungsmedizingesetz) and Austria (§ 20 (2) Fortpflanzungsmedizingesetz), where access to medical files is granted in case of artificial inseminations, and Germany, where only the consenting father and mother are precluded from challenging paternity whereas the child may do so in order to know about his or her origin (§ 1600 (1), (4) BGB); in other countries, such as France and England, the child has no right to know about his or her origin.

³⁴ Cf. e.g. Rae, 'Parental rights and the definition of motherhood in surrogate motherhood', *S. Cal. Rev. L. & Women's Studies* 1994, 219 et seq.; Anderlik/Rothstein, 'The genetics revolution: conflicts, challenges and conundra', *American Journal of Law & Medicine* 2002, 215 et seq.

awarded according to the best interest of the child. He or she should receive financial support from both partners.

Adoption also seems to be a viable option if the child, although not conceived by artificial insemination, has lived with the biological parent and his or her same-sex partner from birth or from a very early age and has been raised by both partners. If the other biological parent is, for example, unknown, dead or has demonstrated a complete and permanent lack of interest in the child, it is in his or her best interest to be adopted by the stepparent.

b. Adoption of a foster child

Adoptions should, however, not be limited to stepchild adoptions, in particular to those of the biological child of the partner. Same-sex partners ought also to be allowed to adopt a child who is not the biological child of one of the partners. If a foster child lives with a homosexual couple over a prolonged period of time and there is no chance for him or her to return to the birth family, it is in the best interest of the child to protect the existing factual parent-child relationship through adoption. This could either be brought about by allowing a co-parent adoption after one partner has initially adopted the child her- or himself. Alternatively, it ought legally be possible to secure the existing relationship of the child with both partners by permitting joint adoption.

Although initially joint adoptions by same-sex partners met with considerable reluctance due to a variety of apprehensions concerning the welfare of the child, research has not confirmed that being raised by a same-sex couple is detrimental to a child's wellbeing and healthy development. While numerous studies have been conducted, they are not always entirely conclusive because of theoretical or methodological deficiencies: the samples have often been rather limited or not randomly chosen. Moreover, it is difficult to assess the impact of other factors, especially the unique situation of the current generation of same-sex parents, most of who grew up without being able to openly live their sexual identity, as a result of which their children experienced the difficult period of their parent's coming out. In addition, research has mostly been limited to the United States.³⁵ However, the growing consensus in social sciences is that same-sex couples are just as able and fit to raise a child as opposite-sex couples. Previously held prejudices that children who live in a homosexual family are more likely to develop a homosexual orientation or might even be abused, especially by gay men, have not been confirmed. Furthermore, there is no scientific evidence that children show behavioral or developmental disturbances as a result of their parents' sexual orientation. Yet some research has revealed that same-sex partners may raise children in a different way to opposite-sex couples; in particular, boys raised by lesbians tend to act less according to stereotypical gender roles. It has mostly been accepted though that such differences should not be considered as deficiencies. The only real concern is that due to persisting prejudices, children raised by same-sex couples may suffer from stigmatization or discrimination.³⁶ However, this is not necessarily an argument against adoption by same-sex couples. Discrimination is not limited to the social sphere but is also caused by the legal system. Treating same-sex couples just like couples of the opposite sex when it comes to adoption counteracts the prevailing discrimination. Moreover, children are more likely to be discriminated against because they are *raised* by a same-sex couple than because of being *adopted* by them. As long as a legal

³⁵ For an overview see e.g. Stacey/Biblarz, '(How) does the sexual orientation of parents matter?' *Sociological Review* 2001, 159 et seq; Patterson, 'Lesbian and Gay Parenthood', in: M. H. Bernstein (ed.), *Handbook of Parenting* (1996), pp. 255; Fthenakis, 'Gleichgeschlechtliche Lebensgemeinschaften und kindliche Entwicklung' in: Basedow/Hopt/Kötz/Dopffel, *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000), pp. 351.

³⁶ Stacey/Biblarz, *supra*, 177.

system does not entirely prevent children from *living* with same-sex couples, e.g. as foster children or as a consequence of a single-parent adoption by a homosexual, allowing a subsequent adoption will therefore lead to less and not more discrimination.

It is interesting to note that the position taken towards parenting of same-sex partners also stems from an entirely different concern than the welfare of the child, which is the scarcity or availability of foster or adoptive children in the society in question. In a country where large numbers of children are living in institutional care in order to be placed in a family, same-sex couples will more readily be accepted as foster or adoptive parents. For example in Germany, where foster parents are in demand, gay couples are allowed to act as foster parents. On the other hand, the number of adoptive children, in particular of healthy new-born babies, is very low; there are as many as 13 prospective parents per child in Germany. Consequently, joint adoption by registered partners was not even seriously considered in Germany during the reform of the Registered Partnership Act in 2005. In contrast, in England, where there are many more children up for adoption, joint adoption by same-sex partners is permitted. However, the overriding consideration should be the best interest of the children, and research has not yet shown that this depends on the sexual orientation of the parents. This holds true for both prospective foster and adoptive parents.

c. Adoption regardless of partners' legal status

Finally, adoption should be permitted regardless of whether the partners have formalized their relationship by marrying or entering into a registered partnership or whether they are living in an informal relationship. To limit adoptions to registered or married partners cannot be justified with the argument that the relationship otherwise lacks the requisite stability. First, the partners' decision to jointly create a life-long legal relationship already demonstrates a certain permanence and strength in their partnership. Secondly, the necessary stability of the partners' relationship, which is not guaranteed in a registered partnership or marriage either, can in both cases be ensured by additional requirements, such as a set minimum period of cohabitation.

3. Custody

a. Necessity

In many cases, adoption of a stepchild does not correspond to the existing familial ties. This is especially true if the child was older when her or his parents separated and there is still a continuing relationship with the other biological parent. But even if the child was younger and the same-sex partner is raising him or her as his or her own, an adoption is usually not in the best interest of the child. First, a full adoption completely and almost irrevocably terminates all legal relationships with the other biological parent and his or her family, for example, the grandparents and siblings. Even if there is only limited contact, this typically does not reflect the emotional ties of the child. Secondly, an adoption creates a life-long legal relationship that continues to exist even if the partnership of the biological parent and the adoptive parent should fail. Although the factual relationship between same-sex partner and child may well continue after a separation or divorce of the biological parent and his or her partner, adoption that necessarily survives the termination of the partners' relationship and establishes an enduring relationship does not always conform to the parties' wishes and the child's best interest. Custody rights often fit the factual parent-child-relationships in reconstituted families much better.

b. Conditions

Custody must take into account the great variety of forms of family life found in reconstituted families. It might therefore be worth considering whether custody ought to come into existence automatically under certain conditions, for example, if a child has been accepted into the family home or has lived in a household for a certain period of time. The registered or married partner could be granted joint custody with the parent of the child if no other person has been legally recognized as parent, as is the case in the Netherlands.³⁷ In other cases, custody could be subject to a joint application of the parent and his or her partner.³⁸ The consent of older children could be required for a stepparent to be granted custody. If the social reality is that there are multiple parents, this fact must be reflected in the law. Consequently, more than two persons might have custody. This obviously requires provisions to deal with potential conflicts among custodial parents. Moreover, provisions for financial support by the stepparent could be established.³⁹ With the growing acceptance of social parenthood, even the right of inheritance could eventually be taken into consideration.

c. Separation

In the case of separation of the partners, it should be possible to attribute custody according to the best interest of the child, regardless of the preceding custodial arrangement. The emotional ties of the child to the social parent can continue after separation. A child that has been raised since its early infancy by the same-sex partners and has in fact been cared for mostly by the stepparent should not have to remain with his or her biological parent without any consideration as to what would be in his or her best interest. A mere right to contact with the stepparent might not in all cases reflect the existing familial ties.

d. Custody regardless of partners' legal status

Custody that corresponds to social parenthood should not depend on the legal relationship between the partners and should consequently not be reserved to registered or married partners of the biological parent. There is no justification for any differentiation between reconstituted families where the partners have formalized their partnership and those where they live in an informal relationship. The need for legal protection results solely from the factual relationship between parent and child. This relationship is independent of the legal nature of the partnership.

IV. Conclusion

A comparative overview has shown that although the majority of legal systems do not yet accept same-sex parentage, the international trend is to legally recognize not only same-sex partnerships, but also same-sex parentage. Thus in a growing number of countries adoptions by same-sex partners are permitted. The prevailing adoption of stepchildren constitutes an important step in the protection of children and their factual relationship with a parenting same-sex partner. However, the law does not currently reflect the great variety of forms of life found in homosexual families, ranging from families created by consensual artificial insemination to reconstituted and foster families. The law must provide adequate protection for these different forms of social parenthood that takes into account the best interest of the child both during the existence of the parents' partnership as well as after their separation or divorce. In cases of medically assisted reproduction, parentage should be attributed to the consenting same-sex partner. Furthermore, joint legal parenthood ought to be possible by adoption. In particular, the same-sex partner must be able to obtain custody in reconstituted

³⁷ Art. 1:253sa Burgerlijk Wetboek.

³⁸ Art. 1:253t Burgerlijk Wetboek.

³⁹ Cf. e.g. Sec. 2e and 8b of Maintenance and Custody Act 2000 of Nova Scotia (Canada) and further Rogerson, 'The Child Support Obligation of Step-Parents', *Can J. Fam. L.* 2001, 18 et seq.

families. It is imperative that children who live in a same-sex family receive just as much legal protection as other children. Therefore social parenthood of gay and lesbian partners ought to be legally recognized. Such recognition not only reduces the discrimination against children which is still in evidence today, but also that against parents in same-sex families. Since at least in the foreseeable future significant differences in the legal positions towards same-sex parents will most probably prevail as a result of different cultural or religious positions, international law will have to provide for rules in order to solve cross-border cases involving same-sex parents.