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Law and Family Formation Among LGBTQ-Parent Families

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Abstract

This article addresses how the law affects family formation among families with lesbian, gay, bisexual, and queer (LGBQ) parents in the United States. Our discussion draws on a socio-legal approach to law that focuses not only on the law on the books (what we refer to as “legal barriers”) but also on issues like how the law is practiced, how people experience the law in everyday life, and how the law serves as an interpretive framework through which people understand themselves and their families (what we refer to as “social barriers”). In our review, we highlight how attorneys can play a role in valuing and advancing rights for LGBQ-parent families and LGBTQ prospective parents.

Key Points:

- Up-to-date review of research on the law and its impact on LGBTQ-parent families
- Synthesis of nearly 100 articles
- Recommendations for attorneys on how they can work with LGBTQ-parent families

Keywords: family, law, LGBTQ, parent, sexuality, same-sex couples

In the *Obergefell v. Hodges* (2015) ruling that extended marriage to same-sex couples, the Court referenced lesbian, gay, bisexual, and queer (LGBQ) parents, arguing that the lack of marriage equity “harm[s] and humiliate[s] the children of same-sex couples” (p. 15). Findings from social science literature underscore the negative impact that a lack of recognition of same-sex relationships has on parents and children alike (Bernstein & Taylor, 2013; Goldberg & Kuvalanka, 2012; Kimport, 2014; Meezan & Rauch, 2005; Richman, 2014; Riggle, Rostosky, Prather, & Hamrin, 2005). Moreover, the lack of marriage rights in the United States also resulted in LGBQ people facing a number of legal barriers when pursuing parenthood (Ball, 2012; Kazyak & Woodell, 2016). For instance, both parents could not be listed on the birth certificate; some states excluded same-sex couples from adoption because they were not married; and, in general, much uncertainty and variation existed across states (Baumle & Compton, 2015; Ball, 2012; Shapiro, 2013). Following *Obergefell v. Hodges* (2015), nearly all of these legal barriers have dissipated. Married same-sex couples are thus generally afforded the same rights regarding parenthood as married heterosexual couples. For example, laws regarding adoption that require marriage no longer exclude same-sex couples. In addition, at the birth of a child, both same-sex spouses can be listed on the birth certificate in all states.

Nonetheless, we argue that the law continues to be an important issue to consider in LGBQ-parent families and that marriage equality does not alleviate all of the legally related problems that these families face. Reviewing social science literature that examines how LGBQ-parent families are impacted by the law,¹ we discuss legal barriers as well as social barriers connected to the law that exist for LGBQ parents and prospective parents. Our discussion draws on a socio-legal approach to law that focuses not only on the law on the books (what we refer to as “legal barriers”) but also on issues such as how the law is practiced, how people experience the law in everyday life, and how the law serves as an interpretive framework through which people understand themselves and their families (what we refer to as “social barriers”) (Ewick & Silbey, 1998; Sarat & Kearns, 1995). Our review underscores that there continues to be an unsettled legal landscape even in the wake of marriage equality, as well as a lasting legacy of the prior legal inequity that LGBQ individuals faced. We also highlight how attorneys can play a role in valuing and advancing rights for LGBQ-parent families and LGBQ prospective parents.

Legal Barriers

In this section, we outline the legal barriers that either currently exist at the time of this writing or have existed for each of the different routes that LGBQ individuals take to become parents, including donor insemination, adoption, and surrogacy (Patterson & Riskind, 2010; Tornello & Patterson, 2015).² Overall, it is important to note that very few formal legal barriers currently exist for LGBQ people (with the exception of those pursuing surrogacy). Yet as we explain further in the next section, it is nevertheless important for attorneys to be cognizant of how the law matters for LGBQ parents and prospective parents in light of the legal barriers that do still exist, coupled with the saliency of legal inequity in recent decades.

With regard to donor insemination, there is no legal restriction on LGBQ women pursuing insemination (Mamo, 2007; Murphy, 2001). One legal barrier that existed in the past for female same-sex couples who become parents through donor insemination was that the nonbiological parent was not able to be immediately listed as a parent on the birth certificate. Rather, to be legally recognized as a parent, the nonbiological parent had to do a second-parent adoption, which was not available in all states (Boggis, 2001; Dalton, 2001; Sterett, 2009). This legal barrier has changed for married same-sex couples following *Obergefell v. Hodges*. In all states, both parents, if they are married, are now immediately listed on the birth certificate and thus legally recognized as parents. Married couples who had children prior to the ruling are also able to pursue stepparent adoption to create a legal tie between the nonbiological parent and her children (*Pavan v. Smith*, 2017).

Similarly, few legal barriers currently exist with regard to LGBQ individuals pursuing domestic adoption. All states now permit LGBQ individuals to adopt since the ban in Florida was overturned in 2010 and following *Obergefell v. Hodges*, married same-sex couples can petition to jointly adopt in all states (Pertman & Howard, 2011; Shapiro, 2013). Yet there are seven states with laws that allow state-licensed agencies to decline placement based on religious beliefs that could restrict LGBQ individuals and same-sex couples in their pursuit of adoption, though to date, no known case exists (Eggert, 2015; Cadei, 2017). There are, however, many legal barriers for LGBQ people pursuing international adoption. Specifically, no country currently allows same-sex couples to adopt internationally and not all countries allow single

LGBQ people to adopt (Goldberg et al., 2014; International Lesbian, Gay, Bisexual, Trans, and Intersex Association, 2015).

Finally, many legal barriers exist for same-sex couples who become parents through surrogacy. Only nine states recognize surrogacy contracts, grant pre-birth parentage orders that declare both intended parents as legal parents, and name both parents on the birth certificate; other states do not, resulting in difficulties for intended parents to be legally recognized as parents (Berkowitz, 2013; Carroll, 2015; Creative Family Connections, 2015; Spivack, 2010).³

Although few legal barriers currently exist for LGBQ individuals who are interested in parenting, it has only been relatively recent that some of these barriers have fallen. Prior to *Obergefell v. Hodges*, LGBQ people faced a legal landscape that varied drastically by state and set up inequities between same-sex couples and different-sex couples (Connolly, 2002; Davis, 2013; Shapiro, 2013). The law often resulted in LGBQ people facing difficulty in a number of avenues, including being able to pursue parenthood (in the case of adoption in some states) and being legally recognized as a parent (in the case of donor insemination and surrogacy). Moreover, even now not every pathway to parenthood is equally free of barriers. International adoption and surrogacy are particularly challenging pathways for LGBQ individuals. Similarly, conscience clauses that provide exceptions to service provision based on religious beliefs may also present challenges in some states as private adoption agencies may refuse to assist same-sex couples in their pursuit of adoption. Although LGBQ individuals experience relatively few legal barriers to parenting, these are not the only issues LGBQ people experience when navigating the legal landscape to pursue parenting.

Social Barriers

In this section, we discuss social barriers that exist for LGBQ parents and prospective parents. Again, we draw on a perspective that focuses on some of the ramifications of the laws on the books and thus the social barriers we address are ones that are directly tied to the legal barriers discussed above (Ewick & Sibley, 1998). In this way, even though legal barriers may fall, their impact may take longer to dissipate. Specifically, we address: perceptions about whether parenthood

is an attainable goal, perceptions about which pathway is most legally secure, decision making during the process of becoming parents, the lack of comprehensive understandings of the law, difficulty accessing accurate and current legal information, and ramifications of the law with regard to an individual's mental health.

First, previous research suggests that parenthood aspirations are impacted by the law. Although not all LGBQ people desire to become parents—indeed, some are happily childfree (Kazyak, Park, McQuillan, & Greil, 2016; Riskind & Patterson, 2010; Stacey, 2011)—legal inequities have been prominent as LGBQ people have thought about parenthood and have negatively affected those who would otherwise want to become parents. Scholars have assessed the impact of a variety of legal barriers that LGBQ people faced in the past, including the lack of access to marriage, bans on joint adoption and second-parent adoption, and bans on surrogacy contracts. Of course, perhaps most significantly, living in a state that had banned LGBQ people from adopting (e.g., Florida) means that LGBQ people will understandably have seen adoption as impossible. Berkowitz and Marsiglio (2007) recount one gay man's experience of living in Florida when there was such a ban; he stated: "I really thought to myself this was never going to happen unless I get out of the country... but I mean, more and more, the country is becoming a little more accepting. There's, you know, Massachusetts, New York, and California" (p. 376). Other work underscores the finding that legal barriers can negatively impact LGBQ people's perceptions about their ability to become a parent (Brown, Smalling, Groza, & Ryan, 2009; Riskind, Patterson, & Nosek, 2013; Wall, 2011). For instance, based on analysis of survey data from 1,098 gays and lesbians without children, Riskind et al. (2013) found that those living in favorable social and legal climates believed they could become parents while those in unfavorable social and legal climates were more likely to report doubts as to whether they could become parents.

Second, social science research also indicates that LGBQ people have perceived certain pathways to parenting as more legally secure than others. Specifically, many LGBQ people view donor insemination and surrogacy as the most legally secure pathways to parenthood (Baumle & Compton, 2015; Berkowitz, 2007; Lev, 2006; Park, Kazyak, & Slauson-Blevins, 2016; Ryan & Berkowitz, 2009). Ryan and Berkowitz (2009), for instance, found that many lesbian women viewed donor insemination as more secure from a legal perspective than other

pathways to parenthood, given that the birth mother would automatically be recognized as a parent on the birth certificate. Baumle and Compton (2015, p. 44) further discussed how some women felt they had “greater control” and a greater sense of family security pursuing donor insemination as opposed to other routes to parenthood. Again, we note that all of this research took place when the legal landscape looked very different than it does today. Thus, although no adoption bans are currently in effect, the legacy of such laws (coupled with some states’ recent passage of laws that provide conscience clauses that have garnered quite a bit of media attention) may live on in the minds of LGBQ people and continue to shape their perceptions about the viability of adoption as a pathway to parenthood. It is also important to note that people’s perceptions about the law are not always accurate. Nonetheless, the existing scholarship in this area highlights how the law has been salient in LGBQ people’s decision-making processes about how to become a parent.

Third, the law impacts people’s perceptions, decisions, and experiences of becoming parents regardless of which pathway they pursue (Bergstrom-Lynch, 2015). For instance, research outlines how the varied state legal contexts for surrogacy can necessitate gay men working with agencies outside of their state of residence (Bergstrom-Lynch, 2012; Berkowitz, 2013; Bergman, Rubio, Green, & Padron, 2010; Berkowitz & Marsiglio, 2007). Sexual minority women pursuing donor insemination consider the law in deciding on whether to use a known or unknown sperm donor (Chabot & Ames, 2004; Hequembourg, 2004; Park et al., 2016); often they decide on an unknown donor “to avoid any threats to their custody rights by a [known] donor” (Hequembourg, 2004, p. 758). Further, although all adoptive parents must navigate the law, this process can be especially challenging for LGBQ adoptive parents (Brooks, Kim, & Wind, 2011; Wells, 2011). Based on a national survey of both heterosexual and gay or lesbian adoptive parents, Brooks et al. (2011) reported that more gay or lesbian adoptive parents said that they needed legal advice than heterosexual adoptive parents. In the face of adoption bans, LGBQ people and same-sex couples have felt the need to hide their sexual orientation in order to be able to complete domestic and international adoptions (Baumle & Compton, 2015; Berkowitz, 2007; Bergstrom-Lynch, 2012; Goldberg, Moyer, Weber, & Shapiro, 2013; Park et al., 2016). Even in the absence of laws that ban adoption, adoption professionals

may not be aware of state laws concerning adoption for LGBQ people and same-sex couples. In addition, adoption agencies may not explicitly state their willingness to work with members of sexual minorities (Brodzinsky, 2011; Brown et al., 2009; Goldberg, Downing, & Richardson, 2009; Kinkler & Godlberg, 2011; Kimberly & Moore, 2015; Mallon, 2011). Such factors led Brown and colleagues (2009) to note that “some [lesbian and gay] families clearly fear that this is not equal protection under the law for their adopted children” (p. 239). In this way, even in the absence of legal barriers, social barriers may still exist.

The fourth social barrier is the fact that LGBQ people can face difficulty obtaining legal information. Many LGBQ individuals spend a lot of time researching the laws and can find the process of trying to gain knowledge about the legal landscape to be stressful, nonetheless they do not always have accurate knowledge about the law (Baumle & Compton, 2011, 2015; Brown et al., 2009; Kazyak et al., 2016; Kazyak, 2015). Rather than consult attorneys, LGBQ parents often obtain legal information from other avenues such as friends and others in their social networks and the media (Baumle & Compton, 2015; Gash & Raiskin, 2016; Kazyak, 2015). Even those who consult attorneys can obtain inaccurate information, as highlighted by a story from one couple who asked a lawyer about second-parent adoption (prior to *Obergefell v. Hodges*) and were incorrectly told that even if they could complete it in another state, it would not be recognized in their current state of residence (Kazyak, 2015). Parents working with adoption agencies may face service providers who are unaware of the laws impacting LGBQ parents (Brodzinsky, 2012; Brodzinksky, Patterson, & Vaziri, 2008; Kimberly & Moore, 2015). Brodzinksky and colleagues (2008) conducted a nationwide survey of directors of adoption agencies and found that 14% were unaware of their state’s law concerning gay and lesbian adoption and a small percentage (3%) reported incorrect knowledge of their state’s law. Additionally, given the high cost involved in hiring lawyers or executing legal documents, LGBQ parents are all the more disadvantaged if they do not have the economic resources needed to obtain these services (Bergman et al., 2010; Berkowitz & Marsiglio, 2007; Boggis, 2001; Dalton, 2001; Kazyak, 2015).

Finally, the law is important to acknowledge when considering LGBQ parents and prospective parents insofar as research illustrates how the legal inequities in family and parenting laws can negatively affect people’s mental health. LGBQ parents and prospective parents

living in contexts without legal protections have worse mental health outcomes compared to their peers with legal protections (Bauermeister, 2014; Bos, 2013; Goldberg & Smith, 2011; Shapiro, Peterson, & Stewart, 2009). For instance, Bauermeister (2014) analyzed survey data from 1,487 gay and bisexual men. He found that men who desired parenthood and considered fatherhood to be of high importance to them but were living in states with an unfavorable legal climate reported lower self-esteem and higher depressive symptoms. Another study that focused on mothers in Canada and the United States illustrated similar results; that those living in more supportive legal contexts (Canada) reported less depressive symptoms than those living in less supportive legal contexts (United States) (Shapiro et al., 2009).

Same-sex couples' relationships also suffer when both parents are not legally recognized (Acosta, 2013, 2017; Butterfield & Padavic, 2014; Goldberg & Gianino, 2011; Moore, 2008). Research shows that one result of legal inequity between parents can be a power imbalance between partners. This can lead to difficulties in making child-related parenting decisions and it can foster resentment between partners. Goldberg and Gianino (2011, p. 217) highlighted an example from a lesbian couple who reported feelings of "vulnerability," "exclusion," and "frustration" during the adoption process as a result of not being able to pursue a joint adoption. The negative impact of both partners not being recognized as legal parents is especially salient in custody disputes following relationship dissolution. In this context, it can be difficult for the non-legally recognized parent to retain child custody or visitation rights (Acosta, 2017; Allen, 2007; Holtzman, 2013; Vargas, Miller, & Chamberlain, 2012).

Without legal recognition, LGBQ parents also have difficulty advocating for their children in settings such as schools or hospitals, especially if care providers do not consider them to be parents (Brown et al., 2009; Gash & Raiskin, 2016; Kellas & Suter, 2012). Even with legal recognition, LGBQ parents can experience problems. For instance, Gash and Raiskin (2016) described a range of strategies that parents pursue to avoid difficulties, including carrying documents to prove their parenthood or lying about their sexual orientation and/or relationship status to avoid anticipated problems. Speaking of LGBQ parents, Gash and Raiskin argued that for lesbian and gay parents to navigate public settings effectively requires that "institutional gatekeepers" must "share a similar view of our legal standing" (p. 3).

Given changes to the legal context following *Obergefell v. Hodges*, it will be important for social scientists to document the extent of changes in LGBQ people's experiences.

Discussion

Our review underscores a number of ways in which the law is salient for LGBQ parents and prospective parents. With the exception of international adoption and surrogacy, few formal legal barriers exist for LGBQ parents and prospective parents. Indeed, courts have increasingly recognized LGBQ parents (Ball, 2012; Richman, 2009). Nonetheless, the law remains an important element in LGBQ people's decisions about whether and how to create families with children. Of course, it is important to note that LGBQ parents create expansive understandings of family and parenthood that reject legal classifications (Baumle & Compton, 2014, 2015; Bernstein & Taylor, 2013; Bernstein & Reimann, 2001). In fact, given the history of legal restrictions, some LGBQ people sought to legitimize their families in other ways without relying on the law. Moreover, not all LGBQ individuals want to become parents (Riskind & Patterson, 2010; Riskind & Tornello, 2017) and the law is not the only factor in shaping decisions about parenthood (Mezey, 2008, 2013). It is, however, important for attorneys to be cognizant of the degree to which the law has played a role in both restricting LGBQ people's ability to pursue parenthood and in affecting LGBQ people's experiences of becoming parents.

Attorneys can play an important role in making accurate legal information more accessible to LGBQ individuals. Providing accurate legal information and assistance for LGBQ people interested in adopting may be particularly important. Some LGBQ people are more open to adoption and have more expansive understandings of family and parenthood than do their heterosexual peers (Goldberg et al., 2009; Kazyak et al., 2016). Yet research indicates the need for all LGBQ prospective parents, regardless of pathway chosen, to have adequate legal information. Attorneys can aid in disseminating information about legally secure pathways to parenthood for families headed by same-sex couples; if such information were disseminated more widely, individuals and couples would be able to access it without first needing to cover the cost of an attorney. In this way, more LGBQ people may

be able to realize their goals with respect to parenthood through pathways of their choice. Our review underscores the potential for lawyers to play a pivotal role not only in helping to educate prospective parents but also in educating adoption agencies. Given a recent research finding that 44% of adoption agency directors were not familiar with law in their state related to working with sexual minorities (Kimberly & Moore, 2015), such educational efforts are clearly needed.

The need for legal information and expertise to be accurate and accessible is perhaps especially urgent given the degree to which the legal landscape is changing following *Obergefell v. Hodges*. Moreover, the introduction and passage of some state laws that outline conscience clauses, which provide exceptions to service provision based on religious beliefs, could present additional challenges. The impact of *Obergefell v. Hodges* even on married same-sex couples with regard to parenting is yet to be fully examined (Giambrone, 2015; Nejaime, 2015). Further, as discussed above, the cost associated with hiring an attorney can be high. Many individuals and couples may be reluctant to hire attorneys, especially if they are uncertain as to whether they can achieve parenting goals at all. Broader dissemination of basic legal advice (perhaps through LGBTQ community centers, family groups, and online forums) can help to provide people with the information they need to bring children into their families.

In addition, the law currently privileges married couples above others with respect to most, if not all, aspects of family life. However, social scientists have documented the existence of alternative ways of conceptualizing family outside of marriage. For example, joint adoption by unmarried same-sex couples (or unmarried different-sex couples) present difficulties. Attorneys may be able to find solutions to the legal barriers that exist for these couples and help them develop legal ties to their children. These kinds of endeavors may also benefit prospective adoptive parents in polyamorous relationships. As family formation processes change, collaborative efforts among social scientists and attorneys will become more important to ensure the legal rights of all individuals and families are being maintained.

Finally, our review also highlights several avenues that will be fruitful for future research. First, given that the law is not the only factor affecting family processes discussed here, it will be important for researchers to examine the interplay between the law and other factors. As Gash and Raiskin (2016) have cautioned, *Obergefell v. Hodges* will

not necessarily solve some of the problems that LGBQ parents experience in their daily lives. In that way, for instance, LGBQ prospective parents can face professionals who hold homophobic attitudes that may deter them when pursuing donor insemination, surrogacy, or adoption (Woodford et al., 2010). Even possession of a birth certificate that legally secures ties to a child may not always guarantee that one is treated as a parent by health care providers or others; homophobia may continue to shape LGBQ people's experiences in this regard. We also need further research into both the legal and social impact of so-called religious freedom laws, which would allow agencies to discriminate against same-sex couples and LGBQ individuals. Further research could also examine how these laws impact LGBQ people's ability to become foster parents, a pathway to parenthood often pursued by African American sexual-minority women (Moore & Brainer, 2013). Overall, our review suggests the important roles that attorneys might play in supporting LGBQ parents and prospective parents.

Notes

1. We use the term "LGBQ" to align with the research reviewed (i.e., some of the studies reviewed include self-identified gay, lesbian, bisexual, and queer individuals in the sample). There is limited research focusing on the legal contexts and issues facing transgender parents. Thus, our review focuses on LGBQ parents. For work addressing transgender parents, including the legal context they face, see Ball (2012), Downing (2013), Pfeffer (2012, 2017), Pyne, Bauer, and Bradley (2015), Ryan (2009), and Veldorable-Griffin (2014). Also, the bulk of the research reviewed here was conducted prior to the *Obergefell v. Hodges* ruling, but we draw implications from the findings to speak to the current moment.
2. It is important to note that LGBQ individuals also become parents prior to coming out (and/or in the context of a different-sex relationship; Gates, 2013; Goldberg, Gartrell, & Gates, 2014). However, almost all of the research we review centers on LGBQ parents who had children after coming out (and/or within the context of a same-sex relationship). For work looking at the legal issues facing LGBQ parents who had children prior to coming out, particularly being denied custody of their children because of their sexual orientation in custody disputes, see Ball (2012), Falk (1989), Haney-Caron and Heilbrun (2014), and Watkins (2011).
3. There is variation across states in terms of whether laws require marriage and/or a biological connection for a pre-birth order that names both intended parents as legal parents. Thus, legal barriers are not all related to sexual orientation of parents; different-sex couples can also face legal barriers pursuing surrogacy.

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