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# GENDER IN THE CONTEXT OF SAME-SEX DIVORCE AND RELATIONSHIP DISSOLUTION<sup>1</sup>

Suzanne A. Kim\* and Edward Stein

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This article identifies ways that judges, lawyers, researchers, and policy makers may attend to the role of gender and gender dynamics facing same-sex couples upon divorce or other relationship dissolution. When same-sex couples marry, the legal system and society at large may project conceptions of gender onto same-sex couples, often in a manner that conflicts with couples' intentions and practices. Gender and gender dynamics may affect the bases for dissolution, the financial aspects of dissolution, and the determination of child custody. The article also suggests directions for future research on the impact of gender on the dissolution of same-sex relationships.

Key Points for the Family Court Community:

- In the context of same-sex relationships, the legal system may apply standards or ideals upon couples in a manner in tension with the couple's expectations, in part because of assumptions rooted in the historically gendered nature of marriage.
- Gender and gender dynamics may affect the bases for dissolution, the financial awards made in the context of dissolution, and the determination of child custody.
- Researchers, judges, practitioners, and policy makers would do well to attend to the role of gender and dynamics in the context of the dissolution of same-sex relationships.

**Keywords:** *Annulment; Bisexual; Custody; Division of Labor; Divorce; Fault Divorce; Gay; Gender; Finances; Lesbian; Marriage; No-Fault Divorce; Parenting; Property Division; Sexual Orientation; Spousal Support; and Transgender.*

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For much of its existence, marriage in the United States has been highly gendered. Until 2003, U.S. law uniformly treated marriage as exclusively for couples consisting of one man and one woman (*Goodridge v. Department of Public Health*, 2003). Beyond the gender requirements for entry into marriage, both law and society have historically treated the roles that people play in marriage as gender-based, with the role of the husband envisioned as distinct from that of the wife. The gendered character of marriage extended to divorce as well, with legal decision making about obligations and rights post-marriage displaying gendered differences.<sup>2</sup> The gendered character of marriage and divorce has, however, changed as the law began to treat men and women equally, both in marriage and in general. Toward the end of the 20th century, most (but not all) of the structural gender asymmetries in family law had been eliminated (Kay, 2000).

Now that same-sex marriage has been legalized throughout the country (*Obergefell v. Hodges*, 2015), it might seem that marriage is no longer gendered because marriage is no longer available only to couples consisting of one man and one woman. We suggest that marriage is likely to remain gendered in a variety of ways in the near term, although how it may continue to be gendered over time is not clear. We focus here on some ways in which gender may continue to play a role in the dissolution of the relationships of same-sex couples in the United States,<sup>3</sup> specifically with respect to (i) the grounds for divorce, dissolution, and annulment; (ii) the financial aspects of relationship dissolution; (iii) the custody of children; and (iv) the social experience of divorce and relationship dissolution more generally. We draw on existing social scientific and legal research, but because same-sex marriage has only been legal for just over a dozen years and in place across the country

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for just over 3 years, many of the questions about gender and same-sex divorce cannot be answered without more research and the passage of time.

### GENDER IN MARRIAGE AND DIVORCE

Marriage in the United States developed within a paradigm of cisgender<sup>4</sup> individuals in heterosexual relationships. Historically, under the doctrine of coverture, a woman's legal rights and obligations were subsumed under those of her husband (Babcock et al., 1996; Blackstone, 1765). A married woman could not, for example, sell or acquire property on her own, nor could she have a legal residence different from her husband (Grossman & Friedman, 2011). Starting in the 1800s and continuing until the 1970s, the gendered character of marriage law gradually dissipated. Some rights that husbands—but not wives—had were extended to wives, while others were abolished. Marriage remained gendered in that only couples consisting of one man and one woman could legally marry; in some (limited) contexts, formal *inequality* still existed in the law; and, even in contexts in which formal equality had been achieved, men and women were still treated differently inside and outside the courtroom. Now that the entire nation has same-sex marriage, marriage is no longer gendered in the first way, but it remains gendered in the second and third ways, as we consider now.

Although men and women in marriage are for the most part formally equal under the law, inequality remains in a few areas of the law, including in the contexts of differences between paternity and maternity with respect to citizenship and in the context of debtor law (Coco, 2013-2014; McMahon, 2014). Consider naturalization laws that treat men and women differently in terms of passing their citizenship to their children. At issue in the case of *Nguyen v. Immigration and Naturalization Service* (2001) was a provision of U.S. naturalization law concerning children born out of the country to unmarried biological parents, only one of whom was a U.S. citizen. In *Nguyen*, the Supreme Court upheld the constitutionality of the provision that places substantially different requirements on such children depending on whether their mother or their father is a U.S. citizen.<sup>5</sup> The Court held that treating such mothers and fathers differently in terms of passing citizenship to their children was justified by the different positions of men and women in procreation and childrearing.

Setting aside such examples of formal gender inequality, significant gender differences remain in legal and social outcomes in marriage and divorce, even when there is formal legal equality. As we discuss herein, women are more likely to initiate divorce than are men, more likely to get custody of their children upon divorce, more likely to get spousal support when it is awarded, and have a lower level of satisfaction in marriage than men. Moreover, the division of labor in different-sex couples remains highly gendered.

These examples indicate that, although same-sex couples now have access to marriage, marriage is likely to remain gendered in various ways, at least in the near term. Partly this is because marriage and divorce law arose in the shadow of the gender dynamics presumed to be associated with different-sex couples. Accordingly, various commentators have noted that same-sex couples—or at least some of them—should be wary of marriage. For example, Katherine Franke (2015) expressed the concern that “the pre-scripted roles of ... husband and wife [will be] mapped onto gay men and lesbians in ways that reproduce hetero-gendered subject positions” (p. 20). This can arise, she argued, in the retroactive treatment of same-sex marriages, with judges looking at same-sex relationships “through a heteronormative lens,” thereby “illuminat[ing] ... the way same-sex couples’ marriages enter a socio-legal landscape already mapped by gender” (Franke, 2015, p. 213).

### BASES FOR DIVORCE AND DISSOLUTION

For better or worse, we envision that gender and gender dynamics will likely impact the divorce and dissolution of same-sex relationships.<sup>6</sup> In particular, gender will plausibly affect the bases for divorce, annulment, and other types of relationship dissolution. In the context of divorce on fault

grounds, there may be significant gender differences. For example, male couples are more likely than other couples to have some sort of agreement that allows for nonmonogamy, but such agreements may not preclude being able to file for divorce on adultery grounds.<sup>7</sup> Moreover, same-sex couples as a class may be differentially affected than different-sex couples by the legal reasons for annulling marriages.

### FAULT-BASED GROUNDS

While every U.S. jurisdiction now has a pathway to divorce without having to prove fault, the majority of jurisdictions retain fault grounds as a pathway to divorce. Even in states where the spouse at fault for the breakup of the marriage faces no or few practical legal consequences, there may be social stigma for being the spouse responsible for the dissolution of a marriage. Further, in some jurisdictions, there are legal implications for being the at-fault spouse.<sup>8</sup>

Now that same-sex couples can marry, the character and continued existence of fault grounds could implicate gender in various ways; we mention two. First, women file for divorce more often than men do. This phenomenon continues in same-sex couples: couples consisting of two women (W-W couples) are more likely to divorce—or to dissolve civil unions and RDPs—than couples consisting of two men (M-M couples) (Andersson, Noack, Seierstad, & Weedon-Fekjaer, 2006; Dugan, 2013). As such, the existence of fault grounds impacts women more than men.

Perhaps more interestingly, the existence of adultery as a fault ground in 32 jurisdictions (Stein, 2016, p. 878 n.33) may impact married M-M couples more than married W-W couples or married couples consisting of one man and one woman (M-W couples) because M-M couples are more likely to have consensual nonmonogamous relationships (Conley, Moors, Matsick, & Ziegler, 2013; Gotta et al., 2011). In light of fault-based divorce laws, M-M couples might be differentially impacted compared to W-W or M-W couples.

### ANNULMENT

In contrast to a divorce, when an annulment is granted, the marriage is typically treated as if it never existed and thus carries no financial or legal obligations, such as property division or spousal support. While annulments are relatively rare, they are sometimes sought by those who, for cultural, religious, or financial reasons, seek to avoid a divorce. Among the limited justifications for granting annulments is fraud (Abrams, 2012). Case law limits fraud-based annulment to deceit regarding the “essentials of marriage” (Abrams, 2012), generally interpreted as pertaining to sexual relations, including hiding an intention not to consummate the marriage (*Eldredge v. Eldredge*, 1943; *Harding v. Harding*, 1941). Courts have also granted annulments based on incapacity to consummate (*D, Otherwise C v. C*, 1966; *Dolan v. Dolan*, 1969).<sup>9</sup>

Gender may influence annulments in the context of same-sex marriage because there is no clear legal definition of consummation for purposes of annulment; this could influence courts’ interpretation of whether someone has defrauded her/his spouse about an intention not to consummate the marriage. If courts look to fault-based divorce for guidance, they will discover doctrinal confusion about whether extramarital same-sex acts amount to adultery (*Glaze v. Glaze*, 1998; *S.B. v. S.J.B.*, 1992). This confusion stems from judges who interpret criminal law statutes that define adultery as requiring “sexual intercourse” in a manner that does not apply to same-sex couples consisting of two women (*In re Blanchflower*, 2003). Even when extramarital same-sex sexual activity is not considered adultery for purposes of divorce or annulment, some courts have granted divorces on the ground that extramarital same-sex sexual activity constitutes legal cruelty (*Freitag v. Freitag*, 1963; *Woy v. Woy*, 1987). Lefkowitz (2015) has shown that historically, judges were more likely to award fault-based divorce to men whose wives engaged in extramarital sex with women than they were to award fault-based divorce to women whose husbands engaged in extramarital sex with men. These types of gender-based differences could come into play if annulments—or fault-based divorce—are sought in the context of a same-sex marriage.<sup>10</sup>

## POST-RELATIONSHIP FINANCIAL ORDERING

Gender and gender dynamics also affect financial aspects of relationships. Our discussion focuses on financial implications for divorce and dissolution, specifically, in property distribution and spousal support. These financial issues are informed by the financial and labor arrangements that couples pursue during marriage, by whether same-sex marriages are retroactively recognized, and by broader structural factors that shape how divorce impacts wealth.

### BACKGROUND ON PROPERTY DIVISION AND SPOUSAL SUPPORT

Most U.S. jurisdictions rely on equitable distribution for allocating property upon marital dissolution. This framework proceeds from an understanding that wages earned and property obtained during marriage are subject to distribution between spouses upon dissolution based on several equity-related factors. Spousal support (as well as child support, discussed below) presents an additional avenue for settling financial affairs at the time of marital dissolution. While judicial decisions about property division are intended to include considerations of equity, spousal support—historically called alimony—is, in most jurisdictions today, meant to be awarded sparingly, primarily to address situations of serious financial need (Uniform Marriage and Divorce Act, 1973, §308).

### GENDER AND FINANCIAL OUTCOMES

#### IMPACTS OF GENDER-BASED ECONOMIC STANDING

Gender is likely to play a role in financial outcomes of dissolution insofar as it shapes behavior and structural factors during marriage that have economic consequences after marriage (Kim, forthcoming). Research shows that women who were married to men experience a decline in economic well-being after they divorce (Sayer, 2006).<sup>11</sup> This may be attributed to a variety of factors, including the intersection of gender-based wage gaps (National Women's Law Center, 2016, p.1) and gendered labor specialization within many different-sex marriages (Kim, forthcoming).<sup>12</sup>

Gender may also play a role in post-dissolution financial outcomes for same-sex couples in two principal ways. First, there may be gender-based differences in post-dissolution economic standing insofar as women on average have less wealth to divide than men (Kahng, 2016). Recent data based on married couples that file tax returns jointly suggest that W-W couples earn lower incomes than M-W couples in the same geographical area (Fisher, Gee, & Looney, 2016, p. 12). Relatedly, scholars have posited that W-W couples are less likely to receive marital tax benefits than M-M couples, due to overall gender-based differences in income and wealth in the United States (Kahng, 2016). This may play out in the divorce or dissolution context, resulting, on average, in less property being available for equitable distribution and/or for lower incomes being available for spousal support. Additional gendered effects are likely to play out in the context of race, given the wider gender pay gap for women of color (National Women's Law Center, 2016, p. 1).<sup>13</sup>

Further data is needed to study the intersection of gender and sexual orientation in post-dissolution financial outcomes for M-M couples. While there is at least one study that has suggested that men in M-M couples earn less money than men in M-W couples (Tebaldi & Elmslie, 2006),<sup>14</sup> a more recent study indicated that married M-M couples who file tax returns jointly earn relatively higher incomes than M-W and W-W couples in the same geographical area (Fisher et al., 2016).

Moreover, further research is needed concerning post-dissolution outcomes for couples with at least one transgender member. These outcomes are likely to be affected by the high correlation between transgender identity and poverty (Badgett, Durso, & Schneebaum, 2013, p. 4), stemming

from societal discrimination against transgender individuals. The economic status of such couples will likely affect financial outcomes post-dissolution.

### IMPACT OF FINANCIAL ORDERING DURING MARRIAGE

Gender-based differences between same-sex and different-sex couples as a whole may emerge in their interactions with prevailing legal approaches to financial reorganization post-marriage that are predicated in part on encouraging joint financial planning and cooperation and jointly enjoying the fruits of marital labor (Tait, 2015, pp. 1255–1259; Kim, forthcoming). There is evidence to suggest, however, that assumptions about financial arrangements in marriage may not hold true for all couples when one takes race and sexual orientation into account (Kim, forthcoming).<sup>15</sup> As Mignon Moore has found, African American lesbian couples' domestic arrangements, especially financial ones, show greater independence than those of White counterparts (Moore, 2009, p. 214).

Even among couples more generally, data about household economics suggest that same-sex couples may exhibit greater diversity in domestic and financial arrangements than different-sex couples (Badgett, 2001; Burns, Burgoyne, & Clarke, 2008, p. 685; Kim, forthcoming).<sup>16</sup> Same-sex couples' departures from heteronormative models of financial management based on sharing may stem from the prior lack of legal protection for same-sex relationships (Dolan & Stum, 1998, p. 344).

If some same-sex couples (many of whom are in long-standing committed relationships) choose to maintain their existing financial arrangements that depart from different-sex-based models despite marriage, the default assumptions in divorce law may run afoul of such couples' intent (Kim, forthcoming), highlighting a gender-based distinction between same-sex and different-sex couples. If this is the case, gender may play a role in divorce or dissolution as between these two groups of couples, wherein judges deem greater proportions of income and property available to apportion between partners than they might have intended. Despite these potential differences, however, marital status and its accompanying legal security effects may strongly influence financial behavior and expectations of couples, thus mitigating gender differences between same-sex and different-sex couples (Kim, forthcoming).<sup>17</sup>

### IMPACTS OF SPECIALIZATION OF LABOR DURING MARRIAGE

Gender may play a nuanced role in post-dissolution financial outcomes insofar as it influences couples' negotiations of labor within the marital household (Kim, forthcoming). Who undertakes paid labor and unpaid domestic work in a relationship affects financial outcomes post-relationship by influencing assessments of need relevant to property division and spousal support. Existing literature concerning same-sex cohabiting couples' division of labor provides some insight into potential effects of gender on post-dissolution financial outcomes (Kim, forthcoming).

Notably, social science literature demonstrates that same-sex couples are more likely than different-sex couples to share household maintenance and childcare labor fairly evenly (Goldberg, 2010; Goldberg, Smith, & Perry-Jenkins, 2012; Kurdek, 2007; Solomon, Rothblum, & Balsam, 2005; see also Kim, 2017).<sup>18</sup> In addition, compared to different-sex couples, same-sex couples less frequently bundle housework and childcare—that is, the partner who does the most housework is less frequently also the one who does the most childcare (Goldberg, 2013).<sup>19</sup> This equal division is less likely to be the case when one member of a couple brings children from a previous relationship into the new relationship, as in *de facto* stepparenting families, as opposed to a couple having children of the relationship. A greater tendency toward specialization has been found to be the case in lesbian stepparent families (Moore, 2008; Tornello, Sonnenberg, & Patterson, 2015).<sup>20</sup>

Both male and female same-sex couples tend to share household and childcare labor more evenly than do different-sex couples. For instance, in their study of gay, lesbian, and heterosexual adoptive parents, Farr and Patterson found that “lesbian and gay parents were more likely than heterosexual parents to report sharing child-care labor...Specialization was significantly greater among

heterosexual couples than among lesbian and gay couples” (2013, p. 8). Although less research exists about gay fathers, Tornello, Kruczkowski, and Patterson found, in a study of gay male couples who had become parents through surrogacy, relatively equal divisions of household and child-care tasks (2015).

There are notable gaps in the social science literature concerning division of labor. For instance, researchers know very little about how division of labor affects children (Farr & Patterson, 2013). Moreover, there is little information about variations among ethnic, racial, and social class groups concerning specialization of labor. Further, researchers know almost nothing about how legal marriage will affect division of labor among same-sex couples (Kim, forthcoming).<sup>21</sup> Future inquiry can help illuminate the influence of gender, gender identity, race, and ethnicity (both among interracial and monoracial couples), on division of labor, and how such divisions impact divorce (Kim, forthcoming). Without sex-based distinctions for entry into marriage, a question remains as to whether same-sex couples will, due to the influence of law<sup>22</sup> and social scripts, gravitate toward—or, to the contrary, resist—more labor specialization in marriage, thus influencing financial outcomes post-dissolution (Widiss, 2016; Kim, forthcoming).

### RETROACTIVITY

In addition to gender-related behavior within marriage, disparities in the frequency with which W-W couples—as compared to M-M couples—marry or pursue commitment rituals (Badgett & Mallory, 2014) may result in gendered outcomes as courts interpret long-term same-sex couples as having been common-law married at a time when they were unable to marry, thereby justifying wide-ranging financial distributions upon dissolution.

Since the advent of same-sex marriage, courts have begun to consider how to deal with same-sex relationships that began before same-sex marriages were allowed. As one example of this retroactivity problem, consider Stella Powell and Sonemaly Phrasavath, two women in Texas who began dating in 2006. In 2008, they had a wedding that did not constitute a valid marriage in Texas. In 2014, Powell passed away. Powell’s biological family sought to inherit Powell’s entire estate. Phrasavath, in opposition, argued that she should inherit the entire estate because she and Powell had a common-law marriage. A significant challenge for Phrasavath’s position was the requirement that a couple be capable of marrying in the relevant jurisdiction in order to qualify for a common-law marriage because Texas did not allow same-sex couples to marry until *after* Powell’s death. Despite this, the probate court—over the objections of the Texas attorney general—held that Phrasavath and Powell had a valid common-law marriage (*Estate of Stella Maria Powell*, 2015; Lindell, 2015).

Retroactivity also can come into play in jurisdictions that do not have common-law marriage (*Hard v. Attorney General*, 2016; *Schuetz v. FedEx Corp.*, 2016). Consider a same-sex couple in a relationship for more than 20 years. When they started to live together, there was no formal legal recognition for their relationship. They may have shared living expenses and co-owned a house and other property, but, for the most part, the law saw them as legal strangers. If they marry, it will be an open question as to how to treat, for example, assets acquired before their marriage but after they started living together. Some couples address such issues in a prenuptial agreement, but most do not. If not, questions about assets acquired before the legal recognition of their relationship in their state of domicile are likely to emerge upon divorce or upon the death of one of the spouses.

### CHILD CUSTODY

Historically, the idea of LGBT people as parents has been a flashpoint in the struggle for LGBT rights (George, 2016; Rivers, 2013).<sup>23</sup> For this reason, there has been a significant amount of research done on lesbian and gay parents,<sup>24</sup> research that has conclusively determined that there are no significant differences between the parenting capabilities of gay men and lesbians as compared

to those of heterosexuals (Biblarz & Stacey, 2010; Farr & Patterson, 2009; Goldberg, et al., 2012; Patterson, 2006; Tasker, 2013).<sup>25</sup> With respect to parenting, our focus is on the relevance of gender to resolving questions about the post-dissolution parenting of children of same-sex parents.

As Biblarz and Stacey (2010, p.16) noted, with the possible exception of lactation, “[r]esearch has not identified any gender-exclusive parenting abilities.” That said, gender and gender dynamics likely influence how people parent, how parenting responsibilities are shared within a relationship, and how judges make custody and related decisions. Beyond the fact that W-W couples are more likely to have children than M-M couples, gender has the potential to affect custody, visitation, and child support upon dissolution. For example, differences in whether and how same-sex parents divide childcare and household labor, as compared to different-sex parents, may be reflected in post-dissolution parenting arrangements. Moreover, the open-ended nature of the “best interests of the child” test for determining custody, precisely because of its open-endedness, leaves custodial decision making subject to gender-, race-, ethnicity-, and class-based conceptions of appropriate parenting (Pearson, in press).

Focusing on custody, the relationship between the gender of parents and the custody of children in the United States has changed dramatically over the centuries (Mason, 1994). Until relatively recently, there was a presumption that mothers should get custody, typically justified by the distinctive role that (some) women compared to men play in procreation (namely, gestation and birthing) and the notion that women are generally more nurturing than men. The conclusion, based on these two ideas, was that all else being equal, mothers were better caregivers for children than fathers. While the maternal presumption has been rejected as unconstitutional and as bad public policy, in practice, when a different-sex marriage dissolves and there are children, the mother is much more likely to receive custody than the father.<sup>26</sup>

How will gender matter upon the dissolution of relationships of same-sex couples who are parenting? This question can be broken down into two distinct questions. First, what differences will there be between how courts will deal with the dissolution of M-M couples who parent as compared to W-W couples who parent? Second, will the individuals in same-sex relationships where there are children be treated differently depending on the gender typicality/gender atypicality of the parenting roles they play?

Challenges arise in attempting to answer both of these questions. First, until recently, LGBT people raising children, even when they did so in the context of a same-sex relationship, “confront[ed] a world rife with legal uncertainty” (Shapiro, 2013, p. 293). After *Obergefell*, the legal uncertainties facing LGBT couples and parents have been significantly reduced, although not eliminated (Knauer & Stern, in press). There has not yet been enough time since *Obergefell* to study same-sex couples who parent in the now more stable legal environment for same-sex marriage; nor has there been much time to study how the dissolution of such same-sex relationships will impact same-sex couples’ parenting. Further, there have been far fewer studies of M-M couples who parent than of W-W couples who parent.<sup>27</sup>

To see the impact of these two points, consider the following observations about W-W couples who parent. Many W-W couples, compared to M-W couples, may find it easier to navigate post-separation co-parenting arrangements and tend to resolve disputes about parenting post-dissolution through mutual consent or mediation, rather than litigation (Goldberg, Moyer, Black, & Henry, 2015, p. 154). This is quite possibly explained because they may encounter fewer of the gendered incongruities that many heterosexual couples tend to encounter post-separation, such as pressure to (re)gain power in the relationship via custody disagreements (Walzer & Oles, 2003). But this could also be explained by the W-W couples not wanting to confront pre-*Obergefell* legal uncertainties related to the status of same-sex relationships combined with the uncertainties of how nontraditional relationships will be viewed in the context of determining custody of children.

More generally, even despite formal gender equality, gender seems to play a role in a “best interest of the child” analysis when it is applied to married M-W couples. It remains to be seen what will happen when courts deal with custody decisions in the dissolution of same-sex marriages. In such cases, when one—but not both—of the parents has a biological or genetic tie to the child, a court



might opt to give custody to that parent rather than the parent without the biological or genetic tie.<sup>28</sup> Before second-parent adoption, de facto parenthood, and same-sex marriage became entrenched legal realities, biological parents almost always won custody battles against nonbiological parents. So long as there are legal connections between a nonbiological parent and the children whose custody is in question, the playing field between the biological and nonbiological parent who both seek custody will be more level.<sup>29</sup> Further, there has been a lively debate among scholars about whether the existence of a biological connection is a good heuristic for determining custody (Du Nucci, 2016; Haslanger, 2009).

When making a “best interests of the child” determination, some courts look to whom the primary caregiver of the child is or to the allocation of parenting time before dissolution. These heuristics for determining custody can be gendered in M-W couples (*Young v. Hector*, 1999). The same may be true in the context of custody battles involving same-sex couples, although it is far from clear how this will cut. For example, in the context of a M-M couple’s relationship dissolution, a judge might be influenced by gender by favoring the father who is more like a stereotypical mother (i.e., the one who is more nurturing, who spends more time at home, and/or who is more feminine in one way or another). Alternatively, a judge might be influenced by gender by favoring the father who is more like a stereotypical father (i.e., who is the primary breadwinner, who is the disciplinarian, who provides security for the family, and/or who is more masculine in one way or another). Gender will no doubt play a role in custody determination in the context of the dissolution of same-sex relationships, but for reasons we have sketched, it is uncertain what the impact will be.

In the context of decision-making about custody, further research is needed with along a range of dimensions. These include more research on the division of labor, including childcare, within same-sex marriage as well as more inquiry into the division of labor and parenting arrangements among M-M-parent families. This research can inform future inquiry into whether—and if so, how—courts treat W-W couples differently than M-M couples at dissolution regarding custody and visitation. Further, such research can focus on the extent to which the “best interests of the child” standard for custodial decision making may be differently applied to M-M and W-W couples, as influenced by the biological connection to the child, the gender typicality/gender atypicality of the parenting roles played, or comportment with norms of parenting concerning caregiving or breadwinning. Further research is also needed concerning the roles of race, ethnicity, and class on judicial conceptions of appropriate parenting in the context of same-sex marriage. Lastly, the dearth of research concerning custodial decision making involving bisexual and transgender parents invites more inquiry.

## SOCIAL EXPERIENCES OF DIVORCE AND DISSOLUTION

Research on the social experiences of relationship dissolution of same-sex couples and same-sex-parented households is sparse. While same-sex couples generally, including those who parent, experience greater stigma than different-sex couples (Frost & LeBlanc, in press), research also suggests that same-sex couples experience a feeling of heightened social scrutiny at the time of a relationship’s end (Gartrell, Bos, Peyser, Deck, & Rodas, 2011; Berger, 2000). Moreover, legal uncertainties about the feasibility of divorce for same-sex couples prior to nationwide marriage equality (Byrn & Holcomb, 2012; Joslin, 2011) have also informed the social experience of divorce and dissolution to date.<sup>30</sup>

Research does suggest that there are some potential influences of gender in evaluating dissolution experiences. Gender differences may exist regarding attitudes concerning reasons for relationship dissolution. Women in W-W couples are more like women in M-W couples (and less like men in M-M couples) in how they feel about nonmonogamy (namely, they more often view it as “not acceptable”; van Eeden-Moorefield, Martell, Williams, & Preston, 2011, p. 567). Accordingly, women’s psychological experiences of dissolution may differ from those of men when nonmonogamy occurred during the relationship.

Gendered differences in social experiences of dissolution may also be manifest in the context of parenting. As W-W couples are more likely to enter legal unions over M-M couples (van Eeden-Moorefield et al., 2011) and as same-sex couples who have obtained legal recognition for their relationships are twice as likely to raise children as couples without legal recognition (van Eeden-Moorefield et al., 2011; Gates, 2009), gender differences are likely to emerge in how frequently custody and visitation play a role in relationship dissolution.<sup>31</sup> Adoptive mothers in M-W couples and adoptive mothers in W-W couples, when experiencing relationship dissolution, both report “practical challenges (e.g., financial insecurity) and emotional challenges (e.g., feeling of guilt)” following relationship dissolution (Goldberg et al., 2015, p. 141).

Little is known about the social experiences of dissolution of men in M-M couples and even less about such men who co-parent. Studies of stepfamilies headed by two men in a relationship after one of them was married to a woman, however, suggest the influence of gender, with men and their new partners facing particular challenges and stigma in being recognized as families (Jenkins, 2013; Berger, 2000).<sup>32</sup>

In addition to a lack of information about men’s dissolution experiences is a dearth of information about transgender and bisexual individuals’ social experiences of relationship dissolution. What is known about transgender parents’ dissolution experiences indicates that, in cases of contested custody, they have often been assumed to be sexually non-conforming by virtue of being gender non-conforming (Holtzman, 2013).<sup>33</sup> Regarding bisexual individuals’ dissolution experiences, Holtzman (2013) has observed that because “sexual orientation is often assumed based on a person’s current partnership choices,” “bisexuality is rendered invisible in the context of relationships and marriage,” and, thus, bisexual parents are less often the focus of research (pp. 365–66). This dearth of literature concerning the social experiences of transgender and bisexual parents’ and individuals’ dissolution experiences highlights the need for further research.

## CONCLUSION

This article identifies various ways in which gender and gender dynamics are important to understanding the experience of same-sex relationship dissolution. Gender and gender dynamics may plausibly affect the bases for divorce, dissolution, and annulment. Gender and gender dynamics may also affect financial ordering post-dissolution, particularly in the context of property division and spousal support, both of which are influenced by background economic standing, financial arrangements during marriage, and allocation of domestic work. Further, disparities in the frequency with which W-W couples—as compared to M-M couples—marry or pursue commitment rituals may result in gendered outcomes as courts interpret long-term same-sex couples as having been common-law married at a time when they were unable to marry, thereby justifying wide-ranging financial distributions upon dissolution. Similarly, gender and gender dynamics influence the roles people adopt in the context of parenting, which, upon dissolution, affect custodial decision making. Moreover, the open-ended nature of the “best interests of the child” standard leaves custodial decision-making subject to gender-based conceptions of appropriate parenting as well as race-, ethnicity-, and class-based conceptions. Lastly, same-sex couples face unique challenges in divorce that shape their experiences of divorce and dissolution. We suggest that more research is particularly needed in this domain.

In sum, same-sex couples are likely to encounter gendered assumptions embedded both through the law and through their social experience of marriage and dissolution. Gender roles associated with different-sex couples might be projected onto same-sex couples who marry, both socially and by judges adjudicating their relationship dissolutions, perhaps in a manner that conflicts with the intentions of some couples and in ways that might differentially affect couples based on gender. Moreover, gender-based differences between various same-sex couples’ social and legal experience are likely to emerge based on background gender dynamics that affect those in same-sex as well as different-sex marriages.

## NOTES

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1. This is an abridged and somewhat revised version of a chapter we have written (Kim & Stein, in press) for a multidisciplinary anthology about lesbian, gay, bisexual, and transgender (LGBT) divorce and relationship dissolution (Goldberg & Romero, in press).

2. For example, upon divorce, it used to be that husbands but not wives could be required to pay alimony. Even when it became possible for wives to pay alimony, courts were more likely to order a more-moneyed husband than a similarly situated wife to pay alimony (Grossman & Friedman, 2011).

3. Same-sex relationships have received and continue to receive legal recognition in other ways besides same-sex marriage, including through civil unions and registered domestic partnerships (RDPs) (Stein, 2012). In some jurisdictions, these alternatives to marriage are (or were) only open to same-sex couples, while in others, they are (or were) also open to different-sex couples. Also, in some jurisdictions, civil unions and RDPs were, for purposes of local law, the equivalent of marriage in terms of rights, benefits, and duties, while in others there were significant legal differences between marriages and these other forms of relationships. When we talk about divorce and annulment, to some extent, and in ways that we will not specifically explore, the points we make also apply to dissolution of civil unions and RDPs.

4. A cisgender person is one whose biological sex and gender identity are concordant. This is in contrast to a transgender person, whose sex and gender identity are in some way discordant.

5. The Supreme Court took a different approach in *Sessions v. Morales-Santana* (2017), which involved other portions of U.S. law concerning the acquisition of citizenship, namely the different treatment of unmarried citizen mothers compared to unmarried citizen fathers (specifically, the law at issue allowed an unwed U.S. citizen mother to transmit her citizenship to a child born abroad if she had lived in the United States for 1 year prior to the child's birth, while an unwed U.S. citizen father could only transmit his citizenship to his child if he had lived in the U.S. for 5 years prior to the child's birth). In *Morales-Santana*, the Court found this gender-based difference unconstitutional under the Equal Protection Clause of the U.S. Constitution given the "stunningly anachronistic" differential "requirements for unwed mothers and fathers who have accepted parental responsibility." The Court distinguished *Nguyen* in two ways: (1) "unlike the parental-acknowledgement requirement at issue in *Nguyen* ..., the physical-presence requirements [in *Morales-Santana*] relate solely to the duration of the parent's pre-birth residency in the United States, not to the parent's filial tie to the child," and (2) "unlike *Nguyen*'s parental-acknowledgement requirement, the ... physical-presence requirements [in *Morales-Santana*] cannot fairly be described as "minimal."

6. Historically, for example, gender played a significant role in being able to obtain a divorce based on adultery, with a wife being required to prove a "course of conduct" and husband needing only to prove a wife's "single act" (Weisberg & Appleton, 2013, pp. 463–64).

7. It is unclear whether courts will enforce nonmonogamy agreements. Some courts have refused to enforce marital agreements that could be viewed as encouraging nonmonogamy because such contracts undermine the sanctity of marriages (*Boudreaux v. Boudreaux*, 1999), while others have been willing to enforce contracts relating to nonmonogamy in some contexts (*Eason v. Eason*, 2009).

8. For example, in South Carolina a spouse who has committed adultery cannot receive alimony (S.C. Code. Ann. § 20-3-130 (1976)). Illinois includes adultery as a factor in finding a parent unfit. 750 Ill. Comp. Stat. § 50/1(D)(j) (2017).

9. Gender may also arise in dissolution if one seeks to annul—or dissolve in another manner—a marriage because a spouse seeks a gender transition. Such annulments highlight the entanglement of conceptions of sex and gender in family law that all dissolving couples encounter.

10. Judicial language in legal cases concerning annulment does not explicitly suggest, however, that courts will treat fraud-based annulments differently in the context of same-sex marriage.

11. This effect is even greater for African American women than for White women (Sayer, 2006).

12. Women in different-sex marriages often reduce or withdraw from labor market participation after the birth of children (Bianchi, Robinson, & Milkie, 2006).

13. In the United States, marriage rates to date are correlated with race, income, and educational level, at least in a context of different-sex marriage (Cahn & Carbone, 2014). It is unclear how the demographics of same-sex married couples compare with those of different-sex married couples. Differences that do result, if any, are likely to inform patterns in post-dissolution outcomes across same-sex couples, including those based on gender.

14. This study indicates that men in M-M couples generally work fewer hours than men in M-W relationships, suggesting the gender wealth gap could be smaller between men in same-sex relationships and women in general.

15. For example, while the partnership model upon which equitable distribution is based may comport with certain segments of different-sex couples, some evidence suggests that African American different-sex couples' financial arrangements are characterized by greater independence than White couples' (Moore, 2009; Kenney, 2006).

16. Research in the United Kingdom suggests that same-sex couples are more likely to depart from a model of "merging" finances (Burgoyne, Clarke, & Burns, 2011, p. 685), using "partial-pooling" or "independent management," with "an emphasis placed on egalitarianism and devising a fair money management strategy" (Burns et al., 2008, p. 481). Some U.S. data suggest that same-sex couples may pay for various household expenses following stronger norms of independence and equality, in the form of equal contribution, than different-sex couples (Gotta et al., 2011).

17. Negrusa and Orefice (2011), for example, found that cohabiting but unmarried different-sex couples show greater propensity to engage in precautionary behavior like saving money than their married counterparts. Even among same-sex couples, certain variables make merged financing more common, with couples holding money in joint bank accounts more often when in longer-term relationships and when rearing children (Klawitter, 2008).

18. Goldberg (2013) has observed that gender imbalances in the distribution of domestic labor in M-W marriage are linked to lower feelings of well-being in women in such relationships.

19. Moreover, while individuals in different-sex marriages tend to specialize in particular groups of tasks understood as “more feminine” or “more masculine,” those in same-sex relationships have been shown to engage less in “gendered” task allocation (Goldberg, 2013, p. 95; Goldberg et al., 2012).

20. Moore (2008) has observed that, among these African American W-W couples, the biological mothers of children born into former relationships undertook the greater share of household and childcare work than their stepparent partners because of the greater decision-making authority this division of labor affords.

21. Jepsen and Jepsen (2015) found that “[o]f all household types, married couples exhibit by far the highest degree of specialization with respect to labor-market outcomes” (p. 109).

22. Existing law governing marriage favors specialized labor division, providing greater financial rewards, for example, in the tax realm, for those couples with disparate incomes (Kahng, 2016; Engler & Stein, 2016).

23. Many early legal cases about lesbian and gay parents concerned whether a gay man or lesbian who became a parent in the context of a relationship with a person of *different* sex received custody or visitation of his/her offspring (Tasker & Rensten, in press). More recent cases have, instead, focused on the children of lesbians and gay men in same-sex relationships.

24. As research on bisexual and transgender parents is sparse, we focus on research about lesbian and gay parents.

25. With respect to same-sex couples who parent, social scientific research clearly establishes that in terms of the impact on their children—their well-being, mental health, success in school, and other measures of quality of life—there are no differences between children raised by same-sex parents and those raised by different-sex parents (Ball, 2014; Biblarz & Stacey, 2010; Goldberg, Gartrell, & Gates, 2014). The only statistically significant difference uncovered in a few studies comparing similarly situated same-sex parents and different-sex parents is that the children of same-sex parents tend, on average, to have, in one way or another, more nontraditional attitudes about gender and sexuality (Stacey & Biblarz, 2001; Bos & Sanford, 2010; Ball, 2014). In light of these results, in custody battles between an LGB parent and a non-LGB parent, virtually every state now accepts that sexual orientation per se is not a reason to deny (or grant) custody or visitation (Shapiro, 1996, 2013; Kim, 2012).

26. For example, a recent study found that 75% of child custody cases in Nebraska resulted in the mother receiving either primary custody or joint legal custody with primary physical custody (Saini, 2013). U.S. Census Bureau data indicate an even higher percentage (81.7%) of custodial parents are mothers (Grall, 2013; Waller & Jones, 2014; Bajackson, 2013). On the other hand, some studies suggest that in those relatively rare cases in which fathers in M-W relationships contest custody, they are at least as likely as mothers to receive custody (Massachusetts Supreme Judicial Court, Gender Bias Study Committee, 1990). Despite this, most studies concerning the custody of young children indicate that, even when fathers contest custody of such children, mothers are more likely to receive custody (Kohn, 2015).

27. This is partly because fewer M-M couples decide to parent (Fisher et al., 2016), which is, in turn, partly explained by the greater complexity and expense involved for M-M couples, compared to W-W couples, to have children without making use of adoption due, in particular, to the costs of surrogacy (Holcomb & Bym, 2010).

28. Holtzman’s (2013) study of custody disputes involving biological and nonbiological parents concluded that “in the absence of arguments based on children’s best interests... [judges] generally ... favor biological parents... [but when they] focus on the child’s best interests, the relationship between the child and the nonbiological co-parent is significantly more likely to be protected” (p. 378). It is unclear whether this conclusion will hold post-*Obergefell* and whether will it apply with equal force to M-M couples and W-W couples.

29. In some jurisdictions, the unmarried partner of the biological parent can seek custody and visitation even absent adoption (*In re Matter of Brooke S.B. v. Elizabeth A.C.C.* 2016).

30. The social experience of divorce or dissolution can be read in the context of differences in how couples may interpret the duration of their relationships apart from legal marriage, which can influence the psychological impact of a relationship’s end. For example, while different-sex couples might define their relationship as starting on the date they were married, same-sex couples might be more inclined to define their relationship as starting on other important relationship dates (e.g., first date or first commitment ceremony; Gartrell et al., 2011).

31. A study of planned lesbian families found that 71% of separated W-W couples shared custody of their children in contrast to the majority of women from separated M-W couples, who have sole physical and legal custody of their children (Gartrell et al., 2011).

32. According to Tasker (2013), as compared to lesbian parents post-heterosexual divorce, gay fathers and their new partners are more likely to have children who visit them than to have children residing with them. Without a custodial relationship, stepfamilies headed by M-M couples experience particular challenges regarding whether and how the stepfamily is recognized and respected (Jenkins, 2013). This experience arises in a broader context of the triple stigma faced by LGB stepfamilies based on (i) sexual orientation; (ii) failure to live up to the intact first-marriage family ideal; and (iii) discrimination against LGB people who parent, especially gay men (Berger, 2000). More research is needed on men’s social experiences in dissolution, including the experiences of men as parents.

33. This is reflected in the intense judicial focus on questions of sex, gender, and sexual orientation regarding transgender parents.

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