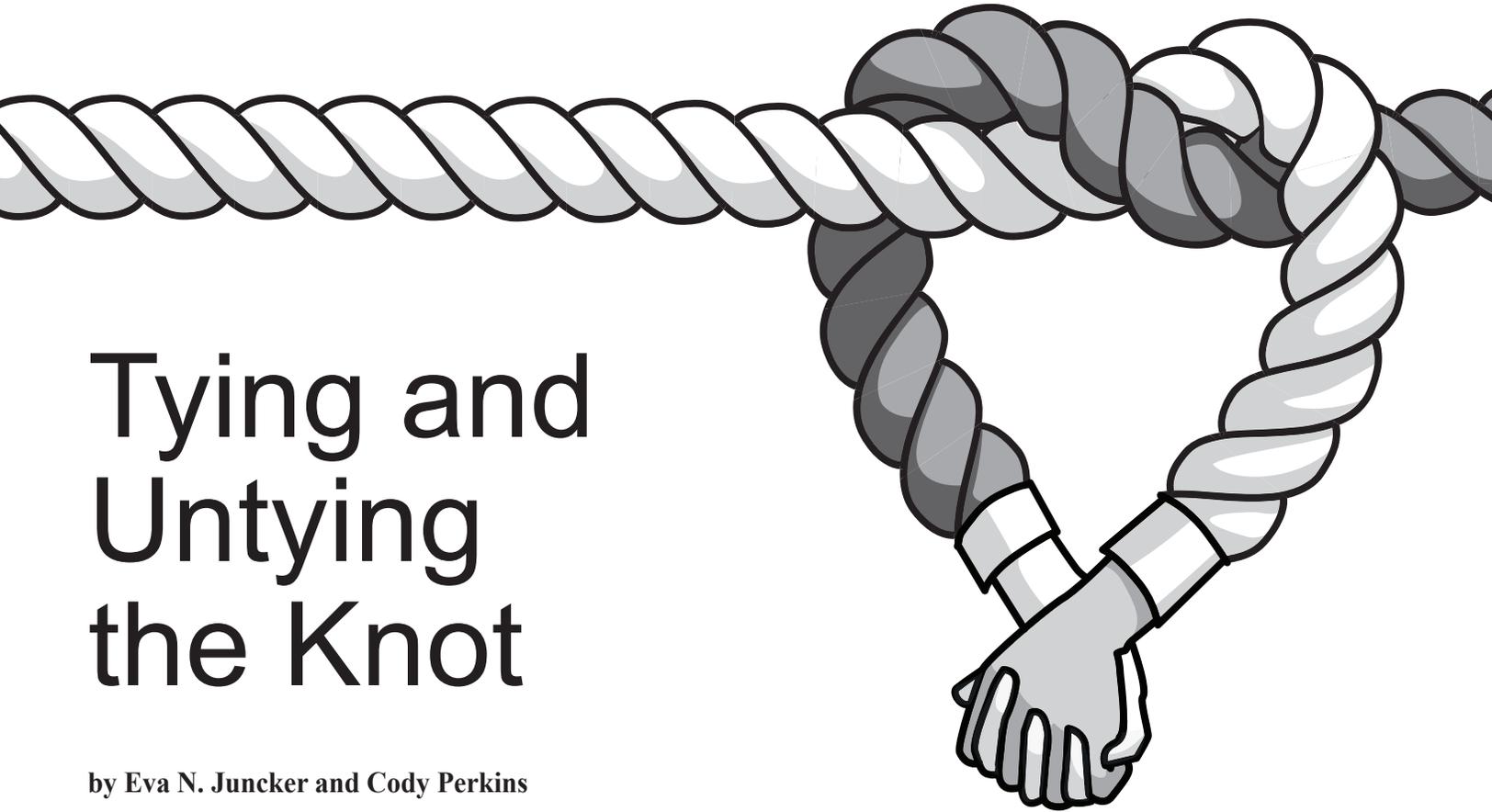

Family Law

Tying and Untying the Knot

by Eva N. Juncker and Cody Perkins

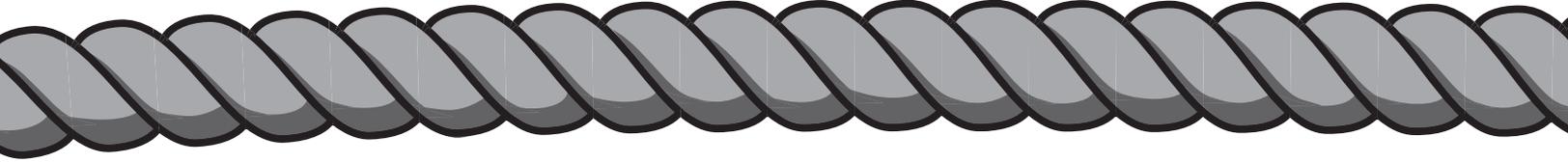


In the Commonwealth of Virginia and around the United States as a whole, laws surrounding marriage, divorce, parentage, and custody are rapidly changing for same-sex couples. For family law practitioners, the extent and impact of these changes may appear convoluted or unsettled, and questions often arise as to whether a new interpretation means that a couple is married, or in a civil union, or both, are parties both legal parents to their children, or legally related to any of their same-sex family members. Since the Commonwealth began recognizing same-sex marriage in October 2014, these questions have become extremely relevant to Virginia attorneys and practitioners unfamiliar with gay and lesbian issues. Attorneys working with LGBT families and the legal framework surrounding such families may find themselves ill-equipped to represent such clients. The following is a brief primer on some of the unique issues same-sex couples may face in the family law context, and how practitioners can best serve their clients in these situations.

Portability and Enforceability of Marriage

The United States is currently in a state of flux over same-sex marriage. Some states recognize same-sex marriage via act of their state legislature; some states recognize same-sex marriage because of a court decision based on the state constitution; and a growing number of states recognize same-sex marriage because of a decision in a federal court, under whose jurisdiction they fall. Still other states continue to refuse to recognize same-sex marriage at all, and until the U.S. Supreme Court renders a final decision as to the constitutionality of state bans on same-sex marriage, the U.S. is likely to remain a patchwork of states with vastly different laws and reasons for those laws.¹

Because of this patchwork and the uncertainty surrounding the U.S. Supreme Court's decision, it is currently unclear where any given same-sex marriage, along with its concomitant rights and responsibilities, may be recognized in the future. Currently, if a same-sex married couple enters Texas, the state will treat them as two single individuals; if the same couple enters Massachusetts



(which passed same-sex marriage through the legislature in 2003), the state will treat them as a married couple; and if the same couple enters South Carolina (which falls under the Fourth Circuit ruling), the state will currently treat them as a married couple, but may no longer do so if the U.S. Supreme Court determines that the state doesn't have to under the U.S. Constitution.²

The fact that a couple may be considered *married* in one state and *unmarried* in another can have incredibly significant implications, because this means that all of the rights and responsibilities associated with marriage may not be available to them as they travel. Same-sex couples should be very careful, then, to know the laws of each state through which they travel, and family law practitioners should advise their clients to have sufficient estate planning documents in place to protect each other and their children in case they are in a state which does not recognize their marriage. Such documents include, but are not limited to, Powers of Attorney for Health Care and for Finance, HIPAA Authorizations, Temporary and Permanent Guardianship Designations, Final Arrangements Designations, and Last Will and Testaments. Parents should also bring copies of the children's birth certificates, particularly if both spouses are listed as parents; while this will not be conclusive proof of parentage, it may be helpful nonetheless.

Portability of Other Kinds of Legal Relationships

While same-sex marriage remains in flux in the United States, other legal relationships (such as civil unions and domestic partnerships) are even more of a legal uncertainty in terms of portability. Many, though not all, of the states granting domestic partnerships or civil unions did so as a kind of "stop-gap" between no recognition for same-sex couples and affording same-sex couples full marriage. As a result, as same-sex marriage has become more prevalent, numerous states have either abolished these other forms of legal relationship recognition, turned them into marriages by operation of law, or have kept them on the books but provided no guidance as to how other states might recognize them. Although many states now recognize same-sex marriages, and some jurisdictions have provided answers on this subject (with the District of Columbia, for example, treating civil unions as domestic partnerships for benefits purposes, since the District does not perform civil unions itself), other states which are only newly recognizing same-sex marriages may have no plan, directive, or inclination when it comes to recognizing other legal relationships.

As a result, a couple could be considered to be in both a civil union and a marriage in Vermont (which also recognizes same-sex marriage), solely in a marriage in New Hampshire (which made all civil unions into marriages by operation of law upon recognizing same-sex marriages), a domestic partnership and a marriage in the District of Columbia (see above), and nothing in Louisiana, which recognizes none of these relationships (except in New Orleans, which does recognize domestic partnerships if at least one partner is a resident). Any rights or responsibilities associated with these legal relationships may be subject to crossing state lines, and it may not even be clear exactly which rights and responsibilities exist or upon doing so.

Retroactivity

Even if a state is perfectly clear about how and whether they recognize same-sex marriages, civil unions, and/or domestic partnerships, a critical question remains: how retroactive will that recognition be? Put another way, how long will a same-sex couple be deemed to have been in a legally recognized relationship? Will the recognition be from the date they entered into a civil union in another jurisdiction, which was later merged by operation of law into a marriage? Will it only be from the date that that other jurisdiction merged the civil union into the marriage? Will it be when the couple moved to their current jurisdiction? Will it be the date of the first court decision in their present jurisdiction finding that a same-sex marriage ban is unconstitutional? Will it be the date a federal Circuit Court of Appeals found that the ban was unconstitutional? Perhaps the date any legal stay was lifted? Could it be the date the U.S. Supreme Court denied certiorari? Or will it be from some other date altogether?

The length of a couple's marriage can have monumental implications, and for couples who may have been together for 20 or 30 years or more, long before their relationship was legally recognized at all, it may be difficult to determine when the relationship "legally" began. If the couple ultimately splits up, the length of their marriage will be a factor in terms of determining equitable distribution of assets, particularly with regard to: defining separate property and marital property; determining whether one spouse gave up certain educational or career opportunities in favor of the other spouse during the marriage; etc. Additionally, the length of the same-sex marriage will be taken into account in determining whether and how much spousal support should be awarded, and what the contributions of each party were during the marriage. The length of the couple's marriage may also affect

what grounds for divorce are available; for example, if the couple's out-of-state marriage began to be recognized by Virginia in October 2014, but in reality the couple had lived separate and apart for a year or more, can that couple count that entire year of separation in order to obtain a no-fault divorce in Virginia? Or must they wait until October 2015? These and many other areas may be impacted by the legal length of the marriage.

As of yet, few other states which recognize same-sex marriage have provided any clarity as to determining when they will deem those marriages to have begun. The federal government has provided a few clues, with the Social Security Administration stating that, for its purposes, the duration of marriages would be determined by the actual date of marriage and not the date the federal government began to recognize these marriages.³ However, no binding authority on the issue currently exists, and as such judges may be free to determine for themselves what the law requires.

Custody and Parentage

According to the 2010 U.S. Census,⁴ more than 2,500 same-sex couples in Virginia are raising children together, with an average of 1.6 children under the age of 18 per household. In many respects, these families have gained significant protections and recognitions over the last year, not the least of which relate to Virginia's recognition of same-sex marriage beginning in October 2014. However, while the advent of same-sex marriage recognition has recently conferred numerous benefits and responsibilities upon those couples who have chosen to marry, same-sex couples (both married and unmarried) who are raising children in the Commonwealth are still vulnerable to numerous inequities, particularly in matters related to the legal parentage and custody of their children. This is because generally only one parent is considered the children's "legal" parent, regardless of whether the couple is married, and this can have implications in terms of benefits, rights to custody and visitation, obligations for child support, and decision making power, including those decisions related to medical treatment and education, among others.

Adoption

The lack of same-sex households with two legally recognized parents results from a long history in the Commonwealth of restricting adoption based on marital status. In Virginia, only married couples or single individuals can adopt, meaning that any same-sex couple wishing to adopt could not jointly apply until recently.⁵ Instead, one member of the couple would have to adopt as a single individual, and the other partner would thus remain an effective legal stranger. This means that, prior to Virginia recognizing same-sex marriage, a same-sex couple could live together, commit to one another (and even be married in another jurisdic-

tion), decide to adopt a child together, and actually go through the emotionally taxing and expensive process of adopting a child, with only one parent listed as the "adoptive parent" because said same-sex couple could not marry in Virginia and therefore were unable to meet the statutory requirements of adoption. Unmarried couples, both same-sex and opposite-sex, still cannot jointly adopt in the Commonwealth.

However, same-sex couples have faced and continue to face an additional hurdle: private adoption agencies and foster care agencies, both licensed by the state, may refuse to approve adoptions or foster parents based on the prospective parent's sexual orientation. This "conscience clause" law states that such agencies may refuse to approve such placements if doing so "would violate the agency's written religious or moral convictions or policies." Va. Code Ann. §63.2-1709.3(A) (2012). This law prohibited many couples from even attempting to adopt children while expressing that the household would contain two parents of the same-sex. Even now that married same-sex couples may adopt jointly in the Commonwealth, this "conscience clause" law may deter some from attempting to do so, in fear that they might be rejected as adoptive or foster parents.

Same-sex "second parent" adoptions⁶ had also not occurred in Virginia prior to marriage recognition. In fact, unmarried couples in the Commonwealth are still not eligible to take advantage of "second parent" adoption. As a result, although some couples were and are able to obtain joint custody orders, ensuring that both parties have custody rights, many courts refused (and continue to refuse) to grant⁷ these orders, and such orders do not confer legal parental status. As a result – although many couples planned for, raised, and in every respect were both parents to their children – only one partner was generally deemed the child's legal parent.

Now that Virginia recognizes same-sex marriage, married couples *may* get a second-parent/step-parent adoption in the Commonwealth, and thereby both be legal parents to their children. In doing so, they may also amend the children's birth certificates to list both spouses as parents. However, family law practitioners and clients should be aware that this process is not automatic; simply getting married or having your marriage recognized will not confer legal parental status on existing children, and for many couples who were raising children before October 2014, a second parent adoption is likely necessary in order for both spouses to be legal parents to their children.

Marital Presumption

"Automatic" legal parentage, while not available historically to same-sex couples having children, may be available in the future, since the "marital presumption" should arguably apply. The "marital presumption" means that one spouse is considered

the presumptive legal parent of a child if the other spouse gives birth to or adopts the child, and the parties are married *at the time of the child's birth or adoption*.⁸ This should be true even if the married couple consists of two men, for example, and so one spouse is clearly not biologically related to the child. For couples who were legally married in another state before they had their children, or were legally married in Virginia (after October 6, 2014) before they had their children, the marital presumption arguably applies – meaning that both parents should be named on the birth certificate.⁹ The most significant problem with both parties in a same-sex marriage merely having a birth certificate to identify their status as legal parents relates to portability and the inability to have a jurisdiction recognize their status as a legal parent absent a *judgment* from a court of competent jurisdiction. In so far as a birth certificate is merely a vital record, clients are often surprised to learn that their child's birth certificate listing each same-sex party as a parent may not be afforded full faith and credit in a non-recognition jurisdiction.

Notwithstanding the foregoing, Virginia's marital presumption provides limited protection for same-sex couples. For one thing, the law still only mentions a husband and wife,¹⁰ as does much of Virginia's Code. As a result, until the law is updated to include gender neutral terms,¹¹ couples cannot definitively rely on the marital presumption to ensure that they will both be considered legal parents to their children born during their marriage. In addition, such a reliance by same-sex couples would be dangerous and short sighted given that the marital presumption will not be honored in jurisdictions which do not recognize same-sex marriage, and parents may risk losing the rights and responsibilities of parenthood simply by crossing state lines. A birth certificate is not a court order and thus not afforded full faith and credit in portability situations. Further, marrying *after* having children will not automatically confer legal parenthood on both parents, so same-sex couples who already had children before marriage will still be seen as having only one legally recognized parent under the law of this Commonwealth even after marriage.

While the marital presumption may be helpful and could provide a simpler avenue to legal parentage which was heretofore unavailable to same-sex couples, family law practitioners should be wary of relying solely on this presumption, and the prudent course of action would still be to complete a second-parent/step-parent adoption in these situations.

Why is Legal Parentage Important?

Being a "legal parent" is crucial to ensuring that both parents and children have the legal protections and rights associated their relationship. A parent's "legal" status may impact their ability to make health care or other decisions for a child in an

emergency, or the child's eligibility for certain benefits (such as health insurance or Social Security). If the parent is a "legal" parent, both parties acquire the concomitant inheritance and intestacy rights; additionally, a legally established parent can take steps to determine guardianship of a child upon the other parent's death or incapacity, and can ensure that the child is not ripped away from them to live with a relative or as a ward of the state. Without this legal status, a "non-legal" parent will be a legal stranger to their own children.

These issues become magnified if a same-sex couple raising children later decides to break up or get divorced. As may be evident, if only one parent is considered the "legal" parent of the child, that parent is endowed with all of the constitutional protections of parenthood, including deciding who gets custody and/or visitation with that child; the other parent has no such protections. This becomes incredibly important if a same-sex couple splits up; one parent could, in effect, deny the other (non-"legal") parent any access to their mutual child. Although the Commonwealth now recognizes same-sex marriage, even if the parties are married, the non-"legal" spouse will be considered a mere step-parent with no automatic rights as to custody or visitation.¹² In the same vein, the non-"legal" spouse will not be liable for child support, as the children will not be considered legally theirs to support.¹³ While the case law surrounding custody of and visitation with children when a non-"legal" parent asks for such is laid out in more detail in the next section, it is clear that the process is smoother, surer, and infinitely safer for these families when the parties have secured both of their legal parental statuses ahead of time.

Impact of Sexual Orientation on Custody Determinations

Although many judges do not cite a parent's sexual orientation as a factor in determining custody arrangements, even when both parents are "legal" parents to their children, practitioners should be aware that stereotypes and biases may inform such determinations. Under Va. Code Ann. §20-124.3, the court may take into account any factor "the court deems necessary and proper to the determination," and courts have used this in the past to determine that gay or lesbian parents should not be given custody of their children upon divorce, especially when that parent was previously in a heterosexual marriage. When a parent has a new same-sex partner or spouse, the court has restricted custody or visitation on that basis as well; in *Sirney v. Sirney*, No. 0754-07-4, 2007 WL 4525274 (Va. Ct. App. Dec. 27, 2007), the court agreed to restrict the visitation rights of a mother so that her partner could not spend the night during visitation. Courts in years past have even used a parent's sexual orientation to deny them custody in favor of a non-parent third party; in *Bottoms v. Bottoms*, 457

S.E.2d 102 (1997), the court awarded custody to the child's grandmother instead of his mother, in part because the child's mother was a lesbian.

Of course, not all Virginia courts have made such determinations, and in fact the Virginia Supreme Court stated specifically in *Doe v. Doe*, 222 Va. 736 (1981), "[w]e decline to hold that every lesbian mother or homosexual father is per se an unfit parent." However, practitioners should still be aware of Virginia's history and be prepared to rebut any arguments that an LGBT client is unfit just by virtue of his or her sexual orientation or relationship.

Third Parties and Step-Parents with Legitimate Interests

If a same-sex parent is still not legally recognized as a parent when it comes time to determine custody or visitation with the child, a non-legal parent can still petition the court for custody or visitation; however, the standard is incredibly high and difficult to meet. In Virginia, a third party who the court determines has a "legitimate interest" may petition for court-ordered visitation and/or custody of a child under Va. Code §20-124.1 and §20-124.2.B, and the court may award such visitation and/or custody upon a showing by clear and convincing evidence that the best interest of the child would be served thereby. However, if the child's legal parent objects to non-parental visitation or custody, two possible standards may be applied: the "actual harm" standard or the "special circumstances" standard. It is not clear exactly which standard should control in each circumstance, as Virginia courts have applied both standards sporadically to both custody and visitation cases. Practitioners should be aware of both standards.

Under the "actual harm" standard, a trial court will hold off on applying the "best interests" standard and will instead defer to the legal parent's preference unless and until the third party petitioner has shown that *actual harm* to the child will result if visitation and/or custody are not awarded.¹⁴ This actual harm must be proven by clear and convincing evidence.¹⁵

Virginia courts have generally been reluctant to find "actual harm" in these situations. In *Stadter v. Siperko*,¹⁶ two women were involved in a cohabiting lesbian relationship and agreed to have a child through artificial insemination of the biological mother. The parties shared prenatal responsibilities and expenses throughout the pregnancy, and shared parenting responsibilities after the birth of the child. The partner did not legally adopt the child, nor did the parties enter into any agreement concerning the partner's parental rights. When the parties later separated, even though both women had planned for and raised the child in question since birth, the biological mother was considered the sole legal parent of the child. Initially, the partner was awarded temporary, supervised visitation by the juvenile and domestic relations district

court, but upon appeal, the circuit court found that, although the partner was "a party with a legitimate interest" in the child, she had failed to prove by clear and convincing evidence that the child would suffer actual harm if visitation were not awarded. In subsequent cases, the courts have solidified their reluctance to find "actual harm," stating in one such case that, "the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But that is not what we meant by "*actual harm* to the child's health or welfare."¹⁷ Absent a showing of such "actual harm," third party visitation will be denied, even if the "third party" has been the child's parent for all intents and purposes for his or her entire life.

The other possible standard to be applied in third-party custody and/or visitation cases is the "special circumstances" standard. Under *Bailes v. Sours*, 340 S.E.2d 824 (1986), a showing by clear and convincing evidence of "special facts and circumstances ... constituting an extraordinary reason for taking a child from its parent, or parents," may rebut the presumption that the child's best interests will be served when in the custody of its [legal] parent. See *Wilkerson v. Wilkerson*, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973); *James v. James*, 230 Va. 51, 54, 334 S.E.2d 551, 553 (1985); *Higgins v. Higgins*, 205 Va. 324, 330, 136 S.E.2d 793, 797 (1964). In *Bailes*, the Court found that such special facts and circumstances existed to custody of the child to the child's stepmother over the biological mother, because the biological mother was a virtual stranger to the child, had only seen the child once a year over a nine-year period, and the child had a strong relationship with the stepmother. Such special facts and circumstances are extremely rare and case-specific.

Although some jurisdictions will recognize such third parties as "de facto" parents, Virginia has declined to recognize any such a status.¹⁸ For same-sex couples raising children in Virginia, this means that the non-legal parent can, for all intents and purposes, lose all access to their children if the legal parent so determines.

Conclusion

Family law practitioners who work or wish to work with same-sex couples should be aware of the aforementioned issues and work to ensure that legal parentage of both partners is solidified. Additionally, practitioners should consider and strongly recommend the applicable estate planning documents (such as powers of attorney) so that their clients are best protected no matter where they travel/relocate. Because not all of these issues have a clear-cut "fix" or answer, practitioners should especially be cognizant of keeping their clients informed about

all these potential issues, so that the clients can make the best decisions for themselves in terms of travel, having children, and generally protecting their families on a daily basis.

Endnotes

1. The following states currently recognize same-sex marriage: by state legislature: Delaware (July 1, 2013), Hawaii (Dec. 2, 2013), Illinois (June 1, 2014), Minnesota (Aug. 1, 2013), New Hampshire (Jan. 1, 2010), New York (July 24, 2011), Rhode Island (Aug. 1, 2013), Vermont (Sep. 1, 2009), and Washington, DC (Mar. 3, 2010); by popular vote: Maine (Dec. 29, 2012), Maryland (Jan. 1, 2013), Washington (Dec. 9, 2012); and by court order: Alabama (Feb. 9, 2015 – although the Alabama Supreme Court ordered the state’s 68 probate judges to stop issuing marriage licenses to same-sex couples on Mar. 3, 2015), Alaska (Oct. 17, 2014), Arizona (Oct. 17, 2014), California (June 28, 2013), Colorado (Oct. 7, 2014), Connecticut (Nov. 12, 2008), Florida (Jan. 6, 2015), Idaho (Oct. 13, 2014), Indiana (Oct. 6, 2014), Iowa (Apr. 24, 2009), Kansas (Nov. 12, 2014), Massachusetts (May 17, 2004), Montana (Nov. 19, 2014), Nevada (Oct. 9, 2014), New Jersey (Oct. 21, 2013), New Mexico (Dec. 19, 2013), North Carolina (Oct. 10, 2014), Oklahoma (Oct. 6, 2014), Oregon (May 19, 2014), Pennsylvania (May 20, 2014), South Carolina (Nov. 20, 2014), Utah (Oct. 6, 2014), Virginia (Oct. 6, 2014), West Virginia (Oct. 9, 2014), Wisconsin (Oct. 6, 2014), and Wyoming (Oct. 21, 2014). This list does not include those jurisdictions where marriage bans have been overturned, but appeals below the U.S. Supreme Court-level are in process or stays have been granted
2. On January 16, 2015, the U.S. Supreme Court announced it would take up four cases, including the Sixth Circuit case, on the constitutionality of same-sex marriage bans in the United States, limiting consideration to the following two questions: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?
3. GN 00210.100 Same-Sex Marriages and Nonmarital Legal Relationships – Aged Spouse and Spouse with Child-in-Care, <http://secure.ssa.gov/poms.nsf/lnx/0200210100#b3>.
4. See <http://williamsinstitute.law.ucla.edu/wp-content/uploads/VA-same-sex-couples-demo-apr-2014.pdf>.
5. Va. Code Ann. §63.2-1225 (2014).
6. These are available in a variety of states, most significantly in Maryland and the District of Columbia. See D.C. Code §16-312 (2014); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); Md. Estates and Trusts Code Ann. §1-207 (2014); *In re Petition of D.L.G. & M.A.H.*, No. 95-179001/CAD, 2 MFLM Supp.21 (1997) (Cir. Ct. Balt. City, June 27, 1996).
7. The arguments against issuing these orders in the Juvenile and Domestic Relations District Courts of this Commonwealth are based upon the lack of actual case

- and controversy in so far as a Consent Joint Custody Order is being presented to the court for entry.
8. Va. Code Ann. §63.2-1202(D) (also allowing the marital presumption to apply within 300 days of the termination of the marriage).
9. See Laura Kebede, Lesbian Couple Wins Right to Have Names on Children’s Birth Certificates, RICHMOND TIMES-DISPATCH, January 25, 2015, http://www.richmond.com/news/virginia/article_de7cfa92-72aa-5d19-835b-f87853b07a1a.html.
10. Va. Code Ann. §63.2-1202(D).
11. Numerous bills have been proposed in the Virginia State General Assembly to update gender-specific language in the Code of Virginia, in response to the state’s recognition of same-sex marriage. See S.B. 1211, General Assembly, 1st Session (2015); H.J. 546, General Assembly, 1st Session (2015); H.B. 1600, General Assembly, 1st Session (2015).
12. See VA Code Ann. §20-124.1.
13. See *Russell v. Russell*, 35 Va. App. 360 (Va. Ct. App. 2001).
14. See *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998); *Stadter v. Siperko*, 52 Va. App. 81, 661 S.E.2d 494 (2008).
15. See *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899, 2003 Va. App. LEXIS 337 (2003).
16. 52 Va. App. 81, 661 S.E.2d 494 (2008).
17. See *Griffin*, 41 Va. App. at 85 (citing *Williams*, 24 Va. App. at 784-85, 485 S.E.2d at 654) (emphasis added).
18. See *Stadter*, 52 Va. App. at 91.



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