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Same-Sex Families and Adoption Discrimination Post Marriage Equality

Joel Viramontes-Gallegos

With the major judicial holding of *Obergefell v. Hodges*, the Supreme Court of the United States legally recognized same sex-marriage.¹ Advocates of the lesbian, gay, bisexual and transgender (LGBT) community celebrated in the granting of what many deemed a fundamental right. Now, with the ability to freely marry, same-sex couples are looking to grow their family through adoption, with some adoption agencies seeing a slight increase in upwards of 700 applicants a month.² This article will address the legal challenges, and proposed solutions, to expanding American same-sex couples' legal rights to adopt children outside of the United States.

SAME-SEX INTERNATIONAL ADOPTIONS

A couple looking to adopt a child from another country must comply with federal U.S. law, the laws of the child's home country, and the state laws of the parent's residence.³ Although *Obergefell v. Hodges* means that same-sex couples can legally marry and therefore access joint adoption across the United States, some potential parents are experiencing obstacles when it comes to adopting a child from another country.⁴ Given that there are no international countries who knowingly place a child with a same-sex couple, there are still discriminatory hurdles that LGBT couples face in an attempt to establish a family via adoption.⁵

Currently, when adopting internationally, same-sex couples bear the burden of having one of the potential parents adopt as a single parent, rather than having both parents adopt the child outright.⁶ Furthermore, according to Stephanie Murnie from Angel Adoption, before someone can begin the adoption

¹ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

² Telephone interview with Stephanie Murnie (Apr. 22, 2015).

³ *How to Adopt*, U.S. DEPARTMENT OF STATE, June 28, 2013, <https://travel.state.gov/content/adoption abroad/en/adoption-process/how-to-adopt.html>.

⁴ *Adoption by a LGBT Parent*, U.S. DEPARTMENT OF STATE, June 1, 2013, <https://travel.state.gov/content/adoption abroad/en/adoption-process/who-can-adopt/adoption-by-a-lgbt-parent.html>.

⁵ *Growing Your Family: A Guide for Prospective LGBT Adoptive Parents*, EQUALITY ILLINOIS, <http://www.equalityillinois.us/issue/adoption> (last visited Mar. 19, 2016).

⁶ *Id.*

process, they must complete a home study. While some states allow same-sex couples to complete this requirement together, other states do not allow them to complete it at all.⁷

Upon completing the single-parent adoption, couples would then have to seek a second-parent adoption to ensure that both parents have legal rights to the child.⁸ Unfortunately, there are more hurdles that same-sex couples face, because there are three states where second parent adoptions are not permitted by state adoption laws.⁹ In addition, there are 17 states where state adoption laws are unclear about whether second parent adoptions are permitted.¹⁰

Not having a second parent adoption can result in the non-custodial parent having a higher burden of proof to obtain visitation or custody rights should the marriage end in a divorce.¹¹ As it stands, second-non-custodial parents have no rights to the child and cannot pursue visitation or legal custody.¹² Allowing for blatant discrimination from international adoption agencies in disallowing same sex couples to jointly adopt is a matter of flawed United States foreign policy that should be rectified. The decision in *Obergefell* should not come with caveats that limit the full benefits of marriage and non-discrimination.

PROPOSED ALTERNATIVES

Domestically, current proposed state measures similar to those in the Michigan House of Representatives would condone discrimination by adoption agencies against LGBT individuals.¹³ Darlene Nipper, the Deputy Executive Director of the National Gay and Lesbian Task Force, called the proposed

⁷ Murnie, *supra* note 2.

⁸ *Joint Adoption Laws*, FAMILY EQUITY COUNCIL, http://www.familyequality.org/getinformed/equality_maps/joint_adoption_laws (last visited Mar. 19, 2016).

⁹ *Second-Parent Adoption in the U.S.*, NATIONAL GAY AND LESBIAN TASK FORCE, <http://www.outfront.org/files/pg332/Secondparentadoption.pdf> (last updated Nov. 4, 2008)

¹⁰ *Id.*

¹¹ Monica Lindstrom, *Legally Speaking: Next Gay Rights Battle in Arizona to focus on Children*, KTAR NEWS, (June 26, 2015), <http://ktar.com/story/492254/legally-speaking-next-gay-rights-battle-in-arizona-to-focus-on-children-adoption/>.

¹² Shae Irving, *Same Sex Couples: Child Custody Issues*, DIVORCE NET, <http://www.divorce.net.com/resources/divorce/same-sex/same-sex-couples-child-custody-issues.htm>. (last visited March 18, 2016)

¹³ *Task Force Urges Michigan House to Reject Anti-Adoption Bills*, NATIONAL LGBTQ TASK FORCE, <http://www.thetaskforce.org/task-force-urges-michigan-house-to-reject-anti-adoption-bills> (last visited March 18, 2016)

Michigan bills “discriminatory, unfair and immoral.”¹⁴ Mississippi takes it a step further and “prohibits adoptions by couples of the same gender.”¹⁵ Such measures should be found unconstitutional, and the damage should be rectified.

Allowing adoption agencies and governments, domestic or international, to discriminate against LGBT couples in their pursuit of adopting a child would eradicate the progress that this country has made in terms of equality. With the high number of children who are looking for a loving home, it is a matter of public policy that the United States government ensure that any family, including those made up of LGBT couples, should have a right to adopt them and not be discriminated against.

It is important that with the progress of *Obergefell*, the rights of the LGBT community, and those looking to adoption as a means of growing their family, be integrated into the framework of current family law. Doing so will ensure that they, too, can provide a nurturing and caring environment for a child that deserves as much.

¹⁴ *Id.*

¹⁵ *Adoption By Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NATIONAL CENTER FOR LESBIAN RIGHTS, (Nov. 2014), <http://www.nclrights.org/wp-content/uploads/2013/07/adptn0204.pdf>.