

2015

Family Law Issues for Same-Sex Couples in the Aftermath of Minnesota's Same-Sex Marriage Law: A Family Law Attorney's Perspective

Gary A. Debele

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Family Law Commons](#)

Recommended Citation

Debele, Gary A. (2015) "Family Law Issues for Same-Sex Couples in the Aftermath of Minnesota's Same-Sex Marriage Law: A Family Law Attorney's Perspective," *William Mitchell Law Review*: Vol. 41: Iss. 1, Article 6.

Available at: <http://open.mitchellhamline.edu/wmlr/vol41/iss1/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**FAMILY LAW ISSUES FOR SAME-SEX COUPLES IN THE
AFTERMATH OF MINNESOTA'S SAME-SEX MARRIAGE
LAW: A FAMILY LAW ATTORNEY'S PERSPECTIVE**

Gary A. Debele[†]

I. INTRODUCTION..... 157
II. OVERVIEW OF THE STATUTE 159
III. DIVORCE AND LEGAL SEPARATION..... 164
IV. PARENTAGE, CUSTODY, AND PARENTING TIME 167
V. ADOPTION..... 174
VI. ASSISTED REPRODUCTION..... 176
VII. CONCLUSION 179

I. INTRODUCTION

Same-sex couples have long experienced significant challenges when dealing with family formation and family breakdown. These challenges arise not only from the social stigma and discrimination that same-sex couples have often endured, but also because of the unavailability of laws, procedures, and practices that heterosexual couples have always had at their disposal—whether married or not—to deal with family formation and family breakdown. Lawyers working with same-sex clients around these issues have had to be creative and adapt legal procedures and practices to fit these unique situations without any assurances that the remedies would hold up over time or be recognized in future disputes. Often, these legal work-arounds involved the creative use of estate planning

[†] JD, University of Minnesota, 1987; MA American Legal and Constitutional History, University of Minnesota, 1991; BA magna cum laude, St. Olaf College, 1984. The author is a shareholder and president of the Minneapolis-based family law firm of Walling, Berg & Debele, P.A., where he focuses his practice exclusively in the area of family law. His areas of expertise include adoption, assisted reproduction, third-party custody, the interplay of family court and juvenile court, premarital and cohabitation agreements, and family law and child welfare matters in tribal courts.

tools that may have statutorily only applied to a man and a woman, or devices such as second-parent adoptions that were not explicitly allowed for by statute.¹ Often the availability of these creative remedies depended on the county in which the couple resided, the willingness of the particular judge to partake in the action, the ongoing agreement of the parties, and the level of risk tolerance that the parties were willing to accept.

After a hard fought political battle and much heated discord and debate, on August 1, 2013, the Minnesota legislature passed new laws allowing same-sex couples to marry.² This legislative enactment addressed several substantive areas of law. It included statutory provisions indicating who may marry in the state of Minnesota, which state has divorce jurisdiction over same-sex couples who reside in Minnesota or who were married in Minnesota, and how other statutes are affected by the statutory change. For example, the statute provides that when implementing the rights and responsibilities of spouses or parents, gender-specific terminology—husband, wife, mother, father, widow, widower, or other similar terms—are to be construed in a neutral manner to refer to a person of either gender throughout the laws of the state.³ Because of the sweeping applicability of the same-sex marriage statute, this new law will have significant ramifications for same-sex couples who wish to form families or who face the unfortunate circumstance of a relationship breakdown affecting family structure.

Given that the same-sex marriage statute and related statutory provisions have only been in effect in Minnesota since August 1, 2013,⁴ family law practitioners and same-sex couples are still experiencing a good bit of uncertainty as to how these dramatic and important changes in the law will play out in a variety of circumstances affecting family formation and breakdown. The purpose of this essay is to offer some preliminary thoughts from a family law attorney as to how this impact will possibly unfold and to offer some practical suggestions to judges and lawyers working in this area of the law.

1. See *infra* Part V (discussing second-parent adoptions).

2. Act of May 14, 2013, ch. 74, § 2, 2013 Minn. Laws 404, 405 (codified as amended at MINN. STAT. § 517.01 (2012 & Supp. 2013)).

3. *Id.* § 6, 2013 Minn. Laws at 407 (codified as amended at MINN. STAT. § 517.201).

4. MINN. STAT. § 517.01.

II. OVERVIEW OF THE STATUTE

Chapter 74 of the 2013 Session Laws of the state of Minnesota affects same-sex couples in a variety of contexts. An overview of the statutory changes is an appropriate place to start to address the impact of the gender-neutral statute on family law issues for same-sex couples. The first statutory amendment, section 363A of the Minnesota Statutes, is commonly known as the Minnesota Human Rights Act.⁵ Here, the legislature was careful to indicate that private, nonprofit religious organizations and entities would not be required to provide goods, services, facilities, or accommodations directly related to the solemnization or celebration of a same-sex civil marriage that they felt was a violation of their religious beliefs.⁶ The legislature clearly indicated that it was not mandating same-sex religious marriage ceremonies, but rather, the same-sex marriage statute only applied to civil marriage contracts.⁷

Section 517.01 of the Minnesota Statutes, which is the statutory provision for civil marriage contracts, was specifically amended to provide that a civil marriage is a civil contract between two *persons* rather than as previously provided—between a man and a woman.⁸ All other statutory provisions for civil marriage, such as the required presence of two witnesses and the solemnization by one authorized to do so, remain in place.⁹ Language limiting marriage to two persons of the opposite sex was specifically stricken from the statute, as was the prohibition on recognizing same-sex marriages performed in other states.¹⁰ Other portions of chapter 517 that address the requirements of civil marriage remain unchanged.¹¹

Section 517.09 of the Minnesota Statutes specifically provides that religious organizations, associations, and societies will continue to retain exclusive control over their own theological doctrines, policies, teachings, and beliefs regarding who may marry within

5. MINN. STAT. ch. 363A (2012).

6. *Id.* § 363A.26.

7. *Id.* § 363A.26(2).

8. *Id.* § 517.01.

9. *Id.*

10. *See id.*

11. *See generally id.* § 517.02 (age requirement); *id.* § 517.03, subdiv. 1 (prohibited marriages); *id.* § 517.03, subdiv. 2 (limitations on developmentally disabled persons); *id.* §§ 517.07–08 (marriage license requirement); *id.* § 517.09 (solemnization); *id.* § 517.10 (marriage certificate and witnesses to the solemnization requirement).

that faith; a licensed or ordained member of the clergy, or other person authorized by section 517.04 to solemnize a civil marriage, will not be subject to fines, penalties, or civil liabilities for failing or refusing to solemnize a civil marriage for any reason.¹² However, religious associations, religious corporations, or religious societies operating secular businesses whose conduct is unrelated to the religious and educational purposes of the parent entity will be required to provide goods or services.¹³

One of the most important aspects of the new legislation are the rules of statutory construction found in chapter 74, section 6 of the 2013 Session Laws and codified at section 517.201, subdivision 2 of the Minnesota Statutes:

Rules of Construction. When necessary to implement the rights and responsibilities of spouses or parents in a civil marriage between persons of the same sex under the laws of this state, including those that establish parentage presumptions based on a civil marriage, gender-specific terminology, such as “husband,” “wife,” “mother,” “father,” “widow,” “widower,” or similar terms, must be construed in the neutral manner to refer to a person of either gender.¹⁴

Adding further to the broad scope of the statute’s impact, chapter 74, section 7, as codified at section 517.23 of the Minnesota Statutes, provides the following:

Meaning of Civil Marriage. Wherever the term “marriage,” “marital,” “marry,” or “married” is used in Minnesota statute in reference to the rights, obligations, or privileges of a couple under law, the term includes civil marriage, or individuals subject to civil marriage, as established by this chapter. A term subject to this definition must also be interpreted in reference to the context in which it appears, but may not be interpreted to limit or exclude any individual who has entered into a valid civil marriage contract under this chapter.¹⁵

12. *Id.* § 517.09.

13. *Id.*

14. Act of May 14, 2013, ch. 74, § 6, subdiv. 2, 2013 Minn. Laws 404, 407 (codified at MINN. STAT. § 517.201 (2012 & Supp. 2013)).

15. *Id.* § 7, 2013 Minn. Laws at 407 (codified at MINN. STAT. § 517.23).

Only one portion of the divorce statutes as found in chapter 518 was amended to incorporate the new provisions regarding civil marriage between same-sex partners. Section 518.07, subdivision 2, which addresses residency requirements for parties seeking a divorce, was amended to include a subdivision that allows divorce actions to be commenced by certain nonresidents. This provision provides the following:

Action for dissolution by certain nonresidents.

(a) If neither party to the civil marriage is a resident of this state at the commencement of the proceeding, a court of this state has jurisdiction over the dissolution if:

(1) the civil marriage was performed in this state; and

(2) neither party to the civil marriage resides in a jurisdiction that will maintain an action for dissolution by the parties because of the sex or sexual orientation of the spouses.

(b) There is a rebuttable presumption that a jurisdiction will not maintain an action for dissolution if the jurisdiction does not recognize the civil marriage.

(c) An action for dissolution authorized by this subdivision must be adjudicated in accordance with the laws of this state.¹⁶

From a family law attorney's perspective, the most important aspect of these statutory revisions is not only the legal recognition and sanctioning of civil marriage contracts between same-sex partners, but the extension of all the attendant rights that go with marital status in the state of Minnesota to same-sex married partners.¹⁷ The extension of these attendant rights include: (1) rights under the parentage statute in chapter 257;¹⁸ (2) rights under the third-party custody and visitation statute in chapter 257C;¹⁹ (3) adoption procedures and practices in chapter 259;²⁰ (4) provisions for estate planning,²¹ including cohabitation

16. MINN. STAT. § 518.07, subdiv. 2.

17. *See id.* § 517.01.

18. MINN. STAT. ch. 257 (2012).

19. *Id.* ch. 257C.

20. *Id.* ch. 259.

21. *Id.* chs. 523, 524.

agreements²² and marital agreements;²³ and (5) all the provisions of the divorce code found in chapter 518, including child support, maintenance, custody, parenting time, and the division of assets.²⁴ The statutory revision even extends to the patchwork of statutes and practices involved in assisted reproduction. Indeed, this seemingly simple legislative modification as to marital status will have broad ramifications for the family law bench and bar as well as for clients who seek assistance in these areas.

This monumental legislative action did not occur in a vacuum. Rather, it occurred in a fast-changing legal landscape where other state legislatures, state courts, federal courts, and federal agencies are addressing same-sex marriage and related family law issues on almost a daily basis. While uncertainty will continue to plague same-sex couples who choose not to marry when they are able to do so, a more troubling uncertainty is what happens when couples marry and create families in Minnesota and then move to other jurisdictions that do not yet recognize same-sex marriage. This question is working itself out with surprising rapidity. State courts and legislatures have been moving in this direction since Massachusetts' highest court first invalidated the state's prohibition on same-sex marriage in 2003. However, the current flurry of activity was truly ignited with the United States Supreme Court decision in *United States v. Windsor*, which struck down the part of the federal Defense of Marriage Act (DOMA) that defined marriage so as to exclude same-sex married couples from federal benefits, but left in place the part that allows states to decline to recognize same-sex marriage under the Full Faith and Credit Clause of the U.S. Constitution.²⁵ Despite that narrow ruling, federal district and appellate courts have rapidly been extending this decision to hold that states must allow or recognize same-sex marriages.²⁶ The United States Supreme Court's recent decision to

22. *Id.* §§ 513.075–.076.

23. *Id.* ch. 519.

24. *Id.* ch. 518.

25. 133 S.Ct. 2675, 2696 (2013).

26. Federal district court judges in these states have addressed the issue: Hawaii, Idaho, Kentucky, Michigan, Nevada Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Virginia. *Jackson v. Abercrombie*, Nos. 12-16995, 12-16998, 2014 WL 5088199 (9th Cir. Oct. 10, 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014);

deny certiorari to a significant number of petitions before the Court has led to the dramatic immediate implementation of same-sex marriage laws.²⁷

In addition to the activity in federal courts, the U.S. Attorney General issued a memorandum to all department employees on February 10, 2014, seeking to implement *Windsor* by directing the

Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *overruled by* *Latta v. Otter*, Nos. 14-34520, 14-35421, 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014). For a current listing of any cases before the courts on this issue, see *Marriage Litigation, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/litigation> (last visited Oct. 21, 2014).

27. In addition to the District of Columbia, those states where the federal government will recognize same sex marriages for federal benefits based on the allowance of same sex marriage are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and Wisconsin. See Lyle Denniston, *Wyoming Added to the Same-Sex Marriage List*, SCOTUSBLOG (Oct. 21, 2014, 1:19 PM), <http://www.scotusblog.com/2014/10/wyoming-added-to-same-sex-marriage-list/#more-219972>; *Same-Sex Marriage in the United States*, CNN, <http://www.cnn.com/interactive/us/map-same-sex-marriage/> (last updated Oct. 21, 2014); see also CONN. GEN. STAT. ANN. § 46B-20 (West, Westlaw through 2014); DEL. CODE ANN. tit. 13, § 129 (West, Westlaw through 2014); D.C. CODE § 46-401 (Westlaw through 2014); HAW. REV. STAT. § 572-1 (West, Westlaw through 2014); 750 ILL. COMP. STAT. ANN. 5/201 (West, Westlaw through 2014); ME. REV. STAT. ANN. tit. 19-A, § 650-A (Westlaw through 2014); MD. CODE ANN., FAM. LAW § 2-201 (West, Westlaw through 2014); MINN. STAT. § 517.01 (2012 & Supp. 2013); N.H. REV. STAT. ANN. § 457:1 (Westlaw through 2014); N.Y. DOM. REL. LAW § 10-A (McKinney, Westlaw through 2014); R.I. GEN. LAWS ANN. § 15-1-1 (West, Westlaw through 2014); VT. STAT. ANN. tit. 15, § 8 (West, Westlaw through 2014); WASH. REV. CODE ANN. § 26.04.010 (West, Westlaw through 2014); *Connolly v. Jeanes*, No. 2:14-cv-00024[JWS, 2014 U.S. Dist. LEXIS 147950 (D. Ariz. Oct. 17, 2014); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481 (D. Wyo. Oct. 17, 2014); *Hamby v. Parnell*, No. 3:14-cv-00089, 2014 WL 5089399 (D. Ak. Oct. 12, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); *Geiger*, 994 F. Supp. 2d at 1147-48; *Garden State Equity v. Dow*, 79 A.3d 1036 (N.J. 2013); *Greigo v. Oliver*, 316 P.3d 865 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

federal government to recognize same-sex marriages for purposes of all federal statutes, regulations, and policies, regardless of where the parties live.²⁸ Several state attorney generals have refused to enforce state statutes prohibiting same-sex marriage.²⁹

As will be discussed in greater detail below, the fact that many states still do not recognize same-sex marriage means that things are still quite unclear for same-sex couples who choose not to marry. The legal issues facing family law attorneys and their same-sex clients are complex and ever changing. Clearly, the United States Supreme Court has decided that it is not yet ready to directly hold that bans on same-sex marriage are unconstitutional, but its decision to sweepingly deny certiorari allows lower federal court rulings to stand, nearly all of which have been rulings against bans on same-sex marriage. Although this may be an encouraging trend for same-sex marriage supporters, it nevertheless results in an unsettled state of the law for family law attorneys and their clients.

III. DIVORCE AND LEGAL SEPARATION

Prior to the enactment of Minnesota's same-sex marriage law, same-sex couples could not get married in the state of Minnesota, and there was no legal work-around to address that issue.³⁰ What followed from that prohibition was that same-sex couples who were married elsewhere could not get divorced in Minnesota. Many district court judges took the view that if it was not legal to grant a marriage in Minnesota, the courts of this state would also be without jurisdiction to grant a divorce. This created significant

28. Memorandum from the Office of the Att'y Gen. on Ensuring Equal Treatment for Same-Sex Married Couples to All Department Employees (Feb. 10, 2014), <http://www.justice.gov/iso/opa/resources/9201421014257314255.pdf>. The memorandum does not apply to domestic partnerships or civil unions, but only to legally recognized marriages. *Id.*

29. Michael Martinez, *Nevada Stops Defending Ban Against Same-Sex Marriage*, CNN, <http://www.cnn.com/2014/02/11/us/nevada-abandons-ban-same-sex-marriage/> (last updated Feb. 11, 2014) (Nevada); Eyder Peralta, *Virginia's New Attorney General Will Not Defend Gay-Marriage Ban*, NPR BLOG (Jan. 23, 2014, 12:17 AM), <http://www.npr.org/blogs/thetwo-way/2014/01/23/265050444/virginias-new-attorney-general-will-not-defend-gay-marriage-ban> (Virginia); Press Release, Ellen F. Rosenblum, Or. Att'y Gen., Statement of Oregon Attorney General Ellen Rosenblum on the Subject of Pending Litigation Challenging Same-Sex Marriage Ban (Feb. 20, 2014), available at <http://www.doj.state.or.us/releases/Pages/2014/rel022014.aspx> (Oregon).

30. See e.g., *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971).

problems for same-sex couples seeking divorce who were residents of Minnesota and who were married in other countries or states that allowed same-sex marriages. It is a near universal requirement that some type of domicile or residency must be established in the jurisdiction where the divorce is to be commenced. The new legislation provides a clear correction to that problem—allowing all same-sex couples residing in the state of Minnesota to end their marital relationships under Minnesota divorce law regardless of where they were married.³¹ Similarly, if they move to another state after getting married in Minnesota and do not have the option in that state to seek a divorce, such couples are entitled by the statute to obtain a divorce in Minnesota without having to meet Minnesota’s six-month residency requirement.³²

Typical divorce and relationship breakdown issues should now be much more straightforward for same-sex clients. No longer will they need to pursue partition actions in civil court to divide jointly owned real estate or pursue palimony-type claims for financial support from the former partner where the cohabitation statute did not provide for same-sex cohabitation agreements. Instead, the divorce and legal separation statutes and legal process familiar to all family law attorneys will be applicable.³³ Property can now be characterized as marital or non-marital and divided under the divorce laws of the state.³⁴ Partners can seek spousal maintenance from each other using standard statutory factors and appellate case law.³⁵ Custody and parenting time for children who are the legal

31. MINN. STAT. § 518.07 (2012 & Supp. 2013). This proposition flows from the fact that jurisdiction for a divorce in Minnesota rests on one of the parties having been either a resident or domiciliary in the state for at least 180 days prior to filing, as well as the unstated requirement that the underlying marriage was validly obtained in the jurisdiction where it was solemnized and such recognition would not violate strong public policies of the state. *Id.* If those criteria are met, then a court in Minnesota can hear the divorce proceeding. *Id.* Since same-sex marriages are now valid in Minnesota and in many other jurisdictions, a same-sex marriage in and of itself will no longer be a barrier to a divorce occurring in Minnesota, presuming residence and domicile requirements have been met. *Id.*

32. MINN. STAT. § 518.07 (2012) (explaining that Minnesota has jurisdiction over the dissolution of marriages that were “performed in this state”).

33. *See id.* § 517.01. The statute states that a civil marriage “between two persons” is valid. *Id.* Thus, a marriage between two persons of the same gender is, under Minnesota law, valid and subject to Minnesota marriage laws. *Id.*

34. *See id.* § 518.58 (“Upon a dissolution of a marriage . . . the court shall make a just and equitable division of the marital property of the parties . . .”).

35. *See id.* § 518.552, subdiv. 1 (“In a proceeding for dissolution of marriage

children of the couple will be handled just like any other custody and parenting time dispute between heterosexual married couples.³⁶ All of these processes and laws can even be used for couples who were married in Minnesota but now live in a state that does not recognize same-sex marriage without having to meet Minnesota's residency requirement.³⁷ The importance of this development cannot be overstated.

Given the diversity of laws and unsettled practices in other states and countries on the issue of same-sex marriage, and also given that same-sex couples have been entering into a variety of estate planning agreements and taking various legal actions to address family formation and breakdown, it is inevitable that challenges and unforeseen issues will arise. For example, same-sex couples may have entered into cohabitation agreements prior to their marriage and taken no action to revoke or modify the agreement—such as through the execution of a new prenuptial agreement—before getting divorced. Whether the cohabitation agreement will be of any force and effect is a question that can arise in such a scenario. Minnesota's cohabitation statute specifically provides for a man and a woman who enter into such an arrangement.³⁸ Regardless of that limitation, same-sex couples commonly entered into such agreements without statutory authority. The new same-sex marriage law at least provides an argument that this statute should be applied to all couples, although such agreements are used for couples who are not getting married. And now that same-sex couples can get married, prudent practice suggests that family law attorneys advise such clients to enter into new prenuptial agreements prior to marriage rather than rely on previously drafted cohabitation agreements.³⁹ While

... the court may grant a maintenance order for either spouse . . .”).

36. See, e.g., *id.* § 518.17 (citing “relevant factors” affecting child custody arrangements).

37. *Id.* § 518.07 (explaining that Minnesota has jurisdiction over the dissolution of marriages that were “performed in this state”).

38. *Id.* § 513.075.

39. These issues have already arisen in other jurisdictions that now recognize same-sex marriage. For example, in *Estate of Wilson*, a domestic partnership agreement was deemed to survive a same-sex couple's subsequent marriage, with the court treating it like an antenuptial agreement. 211 Cal. App. 4th 1284, 1296–97 (2012), *reh'g denied*, (Jan. 9, 2013), *rev. denied*, (Mar. 27, 2013). The court reasoned that the purposes of a domestic partnership agreement and prenuptial agreement were nearly identical, and since prenuptial agreements survived a

same-sex couples will have available to them all of the valuable estate planning tools that have long been available to heterosexual couples who plan to get married, care must be exercised in reviewing prior agreements and estate plans that may have been put in place before the legalization of same-sex marriage.

A few rather unusual situations have come to light since the statute was enacted, including instances where couples attempted to marry in other states, only to have their marriage seemingly nullified by some change or development in the law. These situations occurred with great rapidity as same-sex couples were allowed to marry one week, only to have the law change the next. Thinking that their prior marriage was somehow no longer valid, they have subsequently married again, perhaps to a different person, in a state where such a marriage is legal. This has led to questions regarding the ongoing validity of the first marriage if no formal steps were taken to end that marriage, and in some circumstances, the unintended specter of being married to more than one person at the same time. While these kinds of situations should be somewhat unusual, the careful family law practitioner will want to obtain a detailed marital history from same-sex clients to determine if any formal steps need be taken to terminate any prior marriages.

IV. PARENTAGE, CUSTODY, AND PARENTING TIME

No areas have been fraught with more challenges for same-sex couples than how to build their families, how to obtain legal recognition of their parent-child relationships, and how to address custody and parenting time in the event of a breakdown of the couple's relationship. The outcome of disputes involving parentage, custody, and parenting time hinges extensively on the marital status of the couple and whether legal parentage was established between the child and both persons claiming parentage status and seeking custody or parenting time.

subsequent marriage, so too should a domestic partnership agreement. *Id.* In *Dee v. Rakower*, when faced with a palimony claim by a same-sex couple, the New York court had no trouble applying the same principles that applied to heterosexual couples, including the requirement of a written contract for the claim against the other partner's assets and income to succeed. 112 A.D.3d 204, 210 (N.Y. App. Div. 2013).

The starting point in an analysis of this issue is to look to the legal notions of how parentage is established and defended. Under Minnesota law, and in most other jurisdictions, a child's parentage is proven by a birth certificate issued upon the child's birth, a parentage order issued in a parentage proceeding, or an adoption decree.⁴⁰ Birth certificates have long been automatically issued to heterosexual married couples when children are born during the marriage; the issuance is premised on the presumption that the subject child is the biological and genetic child of the legally married parents.⁴¹ Persons seeking to challenge that presumption—usually a putative biological father involved in an extramarital relationship with the wife and mother—have long had to overcome significant legal and procedural hurdles in order to prevail. Although the near sacred status of the marital presumption as to paternity⁴² has diminished slightly in recent years with the advent of more accurate and readily available genetic testing that determines actual parentage with a great degree of certainty, it is still a central tenet in how modern parentage is determined.⁴³

When a child is born outside of marriage, the determination of paternity is more complicated, as it is to be made under an elaborate set of presumptions as set forth in the Minnesota Parentage Act.⁴⁴ Under the Parentage Act, most fathers are adjudicated as a legal parent based on genetic testing. The demand and order for genetic testing is often made and obtained by a county child support officer who is seeking financial contribution for monies expended by the state to support a child born outside of

40. MINN. STAT. § 257.54 (detailing “[h]ow [a] parent and child relationship [is] established” in Minnesota).

41. *Michael H. v. Gerald D.*, 491 U.S. 110, 111–12 (1989) (describing the presumption of parentage in a marital relationship).

42. This speaks directly to paternity determinations, as questions of maternity were never in dispute until the relatively recent emergence of assisted reproduction technology services (ARTS) and the medical reality that a mother serving as a gestational carrier could give birth to a child who was not genetically related to her. Hence, the presumption that the legal mother is the person who physically gives birth is also no longer a sacred axiom true in all situations.

43. See generally *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001), for a modern discussion of a court's decision to grant standing to the mother and her extramarital partner to challenge the marital presumption of paternity as to a child born during the marriage that the partner claimed was his child.

44. MINN. STAT. §§ 257.51–.85.

marriage.⁴⁵ A biological mother may also initiate the action in order to obtain child support, as may a father who wants a relationship with the child.⁴⁶ Under the Parentage Act, other presumptions that could form a basis for a parentage determination include publicly holding out a child as one's own, providing financial support to the child, residing with the child, and other comparable actions.⁴⁷ Another device to establish parentage under the Parentage Act is the now ubiquitous Recognition of Parentage (ROP).⁴⁸ A ROP is a short and simple document, usually signed at the hospital at the time of the child's birth, whereby both parents voluntarily agree that they are the legal and biological parents of the child in question. This results in both the mother and the identified father having their names placed on the birth record as parents, with the ROP providing the basis for the near automatic issuance of a parentage order if one is requested.⁴⁹

Many county attorneys across the state are increasingly concerned that ROPs are being used in situations for which they were never intended to be used, primarily by same-sex couples or intended parents involved in assisted reproduction situations where donated genetic material was used for conception and where the intended parent is not necessarily the genetic or biological parent of the child. It is important to remember that ROPs are submitted as an efficient mechanism to obtain a birth certificate and an order adjudicating parentage, without going through a formal judicial process where intended parents are not married to each other, but both believe they are, and could actually be, the biological and

45. *Id.* § 257.62.

46. *Id.*

47. *Id.* § 257.55. In other parts of the country, the Uniform Parentage Act (UPA) provides a legal basis for adjudications of parentage brought by same-sex couples, even those who are not biological or genetic parents. Colorado courts have held that you can have both a biological mother and a presumptive mother who has held the child out as her own. *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 587 (Colo. App. 2013). This holding followed a handful of other jurisdictions that interpreted the presumptions of parentage found in the UPA to be applicable to same-sex couples as well as heterosexual couples. *See id.* California has addressed the issue legislatively, providing that a child can have more than two legal parents under the UPA: a sperm donor, the person who gave birth to the child, and a person who held the child out as his or her own. CAL. FAM. CODE § 7613(b) (West, Westlaw through ch. 931 of 2014 Reg. Sess., Res. Ch. 1 of 2013–2014 2nd Ex. Sess., and all propositions on 2014 ballots).

48. MINN. STAT. § 257.75.

49. *Id.*

legal parent of the subject child. According to some county attorneys, the ROP should only be used if the parents have reason to believe that they are—and could be—the biological or genetic parents of the child in question. In other situations, these county attorneys believe that an adoption is the proper legal process to have legal parentage established.⁵⁰

Given that only orders and judgments provide full recognition and protection under the Full Faith and Credit Clause of the U.S. Constitution,⁵¹ a parentage order has always been the preferred proof of parentage since birth certificates, which are documents issued through an administrative process, do not qualify as either. Obtaining parentage orders has long been a significant goal of same-sex couples as a means to further solidify the legal status of the parent-child relationship between one or both of the partners and their children. Thus, relying on a ROP, even if it were appropriate, is not something a same-sex couple should do. Instead, they should take the necessary steps to obtain an actual parentage order.

Adoption has long been another option to establish parentage. Chapter 259 of the Minnesota Statutes addresses adoption in this state.⁵² There are very strict requirements for adoption that must be complied with depending on the particular kind of adoption that is being sought. Before the adoption is granted, nearly every adoption requires a criminal background check.⁵³ In many instances, it also requires: (1) an adoption home-study prepared by a licensed child placing agency,⁵⁴ (2) review by courts,⁵⁵ and (3) either consent documents from biological parents that vigorously

50. Gary A. Debele, Custody and Parentage for Same-Sex Couples: Legal Issues, Litigation Strategies, and the New Gender Neutral Marriage Law, Breakout Session at the 35th Annual Family Law Institute Conference (Mar. 24, 2014). This discussion, involving the views of many concerned county attorneys, occurred at a presentation given by this author that became the basis for this article. *Id.* One county attorney who attended the session indicated that now that the Minnesota Department of Vital Statistics is aware of this issue, ROPs with names of two intended parents who are of the same gender will be rejected; no birth certificate will be issued with both names of the intended parents unless a parentage order or adoption decree is obtained. *Id.*

51. U.S. CONST. art. IV, § 1.

52. MINN. STAT. chs. 259, 259A.

53. *Id.* § 259.41, subdiv. 3.

54. *Id.* § 259.41.

55. *Id.* § 259.57.

follow the statutory requirements or orders terminating parental rights that result from a formal termination of parental rights proceeding.⁵⁶ Adoption is a heavily supervised and judicially controlled process, which, like a parentage action, results in a judgment and an order of legal parentage that receives full protection from state to state.⁵⁷ Adoption decrees are truly the gold standard of parentage determinations, receiving not only full faith and credit protection, but also *res judicata* protection in any future litigation challenges.

Determinations of parentage—whether by marital presumption, a parentage order, or an adoption decree—are critically important in the same-sex community. Very detailed agreements have long been entered into by same-sex couples, including (1) cohabitation provisions and other written contracts spelling out how the parents will conceive, bear, and support a child; (2) what their respective parenting roles will be; and (3) what steps each partner must take in order to obtain some form of legal recognition of the parent-child relationship. While same-sex couples who choose not to get married will still face significant challenges in establishing sound legal parentage and should continue to memorialize agreements and obligations in written agreements and contracts, the same-sex marriage statute opens up significant opportunity for easier determinations of legal parentage by operation of law. There are, however, some important caveats as a result of the unsettled nature of same-sex marriage in other jurisdictions. The names of both same-sex married partners should now, by operation of law, appear on the child's birth certificate.⁵⁸ However, the family law attorney advising a same-sex couple about family formation in this changed environment must not stop there. In order to have the full protection of the law for this parent-child

56. *Id.* § 259.25.

57. U.S. CONST. art. IV, § 1.

58. Surprisingly, it is difficult to locate specific statutory authority for the proposition that legal parentage is automatically established by birth of a child to parents who are married. In practice, hospitals routinely place both spouses names on the birth record at the time of birth, which in turn is sent to the Department of Vital Statistics. A birth certificate is then issued. One source of statutory support is found in the Parentage Act, where presumptions of parentage are set forth, one of which includes the presumptive father and mother having been married to each other at the time of the child's birth. MINN. STAT. § 257.55, subdiv. 1(a). As an aside, in Minnesota, the Department of Health has long recognized two parents on a birth certificate, rather than "mother" and "father."

relationship, including both full faith and credit in states that do not recognize same-sex marriage and *res judicata*, it is still highly recommended that either a parentage order or a stepparent adoption decree be obtained for the parent who is not the biological or genetic parent of the child.

While resolution of parentage, custody, and parenting time disputes between married same-sex couples will now be easier to address under well-developed divorce laws and procedures, enormous challenges will remain for those unmarried same-sex couples who engage in litigation involving custody and parenting time disputes. Indeed, issues of custody and parenting time between unmarried same-sex couples has long been the bane of family law attorneys, largely because there were no clear guidelines and procedures to help determine how the disputes would be resolved. Inevitably, the partner who was not the biological or genetic parent and who had not solidified legal parentage would be at an enormous legal disadvantage, regardless of the nature of the actual parenting relationship that he or she previously had with the subject child.⁵⁹

Because same-sex couples could not be married in Minnesota until the recent statutory amendments, custody and parenting time disputes between couples who created families together often played out in the context of chapter 257C of the Minnesota Statutes.⁶⁰ This chapter addresses third-party custody and third-party visitation rights.⁶¹ Underlying this entire statute, and indeed in the common law history of third-party custody and visitation that preceded the enactment of the statute, is the constitutionally protected and fundamental right of a legal parent to raise his or her child without interference by the government (including the courts) or other persons.⁶² This means that the legal parent litigant

59. For an excellent discussion of custody and parenting time challenges faced by same-sex parents, including challenges with adoption and assisted reproduction, see J. HERBIE DIFONZO & RUTH C. STERN, *INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES* chs. 5–7 (2013).

60. See MINN. STAT. § 257C.01, subdiv. 2 (de facto custody); *id.* § 257C.01, subdiv. 3 (interested third-party custody); *id.* § 257C.08, subdiv. 4 (third-party visitation).

61. *Id.* ch. 257C.

62. See *Troxel v. Granville*, 530 U.S. 57, 75 (2000); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (discussing the constitutionally protected right of a parent to control access to, and the upbringing of, his or her child); see also Gary A. Debele, *Custody and Parenting by*

and the non-parent litigant are not on a level playing field where the only consideration is the best interest of the child. Rather, in order to obtain third-party custody rights, the non-legal parent must meet the heavy burden of showing, by clear and convincing evidence, parental unfitness, harm to the child, abandonment, or some extraordinary need of the child that could not be met by the legal parent.⁶³ Those allegations are often very difficult to prove in cases involving the unraveling of a same-sex relationship. Often both partners have been good and involved parents, but, to the great legal detriment of the non-biological, non-legal parent, they never had legal parentage established for both parents.

In addition to these constitutional and evidentiary considerations, chapter 257C also has very stringent standing requirements that must be met before a non-legal parent can file a petition or motion for custody or visitation.⁶⁴ Many former same-sex partners who were not recognized as legal parents could not meet these requirements to proceed with litigation, let alone prevail under the strict constitutional and evidentiary standards. As a result of this reality, unmarried same-sex partners who never established legal parentage before the family breakup are often left without any legal recourse to establish custody and visitation rights when their relationships end. Marriage may now be the most prudent course of action for same-sex couples who are planning to start a family together or for a partner who wants to be actively involved in the parenting of his or her partner's child. Absent marriage, a good plan would include a solid cohabitation agreement addressing custody and parenting time, and if possible, a parentage order or a second-parent adoption.⁶⁵

Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution, 83 N.D. L. REV. 1227, 1228 (2007).

63. MINN. STAT. § 257C.03, subdvs. 6(1), 7(1).

64. MINN. STAT. § 257C.03.

65. To understand the complex procedural requirements for third-party custody and parenting time proceedings in Minnesota, see *Lewis-Miller v. Ross*, 710 N.W.2d 565 (Minn. 2006). For same-sex situations, see *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007). See *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000)—a saga that played out over many years and involved many courts in two states—to really appreciate the complexity of these matters, especially in a situation where same-sex marriage is prohibited.

V. ADOPTION

Adoption is a creature of statute and was not provided for under common law. As a result, all adoptions, in order to be legally valid and fully recognized, must closely comply with the statutory requirements found in chapter 259 of the Minnesota Statutes.⁶⁶ This was a significant issue and concern for the same-sex community, where the parties could not marry and where the adoption code specifically—and explicitly—provided that only married couples or single persons could adopt a child.⁶⁷ In response to this reality, another work-around was developed over time to assist same-sex couples in building families when statutory processes did not apply to them. This process, which was not provided for in the adoption code and was never approved by an appellate court, was put together by innovative adoption attorneys with the sympathetic assent of district court judges. It came to be called a “second-parent adoption.”

In many respects, second-parent adoption is simply a hybrid adoption, taking on aspects of a direct placement adoption and a stepparent adoption, whereby an unmarried same-sex couple would adopt a child together. The child would often be either unrelated to both partners, or it would be the biological or adopted child of one of the partners and would then be adopted by the other partner. There are numerous kinds of adoptions with various types of requirements—international, direct placement, agency, state ward, relative, and stepparent adoptions, as well as the previously referenced second-parent adoptions.⁶⁸ Stepparent adoptions are provided for by statute, whereas second-parent adoptions are not.⁶⁹ There has been litigation both in Minnesota and elsewhere regarding the validity of second-parent adoptions, and given the ongoing uncertainty, it remains preferable whenever possible that the same-sex couple get married and then obtain a

66. Private adoptions, including stepparent, direct placement, agency, relative, and the second-parent work-around, are all addressed in MINN. STAT. §§ 259.20–.65 (2012 & Supp. 2013). State ward adoptions, where parental rights have been terminated and the subject child becomes a ward of the state, are addressed in a separate chapter that is part of the child protection laws. *Id.* §§ 260C.601–.37 (2012).

67. The adoption code in Minnesota defines an adoption petitioner as “a person with spouse, if there be one.” *Id.* § 259.21, subdiv. 7.

68. *Id.* ch. 257C; *id.* §§ 259.47, .60, .75.

69. *Id.* ch. 259.

stepparent adoption rather than relying on second-parent adoptions.⁷⁰

The most significant impact of the new same-sex marriage statute is that it should now make same-sex adoptions easier, as a same-sex married couple will now be able to do a regular stepparent adoption that is clearly and explicitly provided for by statute under chapter 259.⁷¹ Despite this newly available and easier process, challenges will still exist in the realm of same-sex adoptions where the child being adopted was born in a state in which same-sex marriages or adoptions are not recognized. Being married in possession of an adoption decree should theoretically withstand any recognition challenges under the Full Faith and Credit Clause.⁷² The challenge will arise if the child was born in a state other than Minnesota or in a state that does not recognize same-sex marriage, and the parties need to obtain a new amended birth certificate from the state where the child was born. Some states have refused to issue birth certificates with both of the same-sex parents' names on them, even when they are married or where they have a valid adoption decree from another state.⁷³ Even if the parties are married at the time the child is born and both parents' names appear on the birth certificate by operation of law, it may still be prudent to do a stepparent adoption in Minnesota. This would cause an adoption decree to be issued, thereby giving the parents a judgment protected by full faith and credit wherever they

70. In *In re Adoption of T.A.M.*, 791 N.W.2d 573 (Minn. Ct. App. 2010), the Minnesota Court of Appeals, for the first and only time in Minnesota, considered a challenge to the second-parent adoption process. The court sidestepped deciding that issue, holding instead that the challenge to the second-parent adoption was filed too late, and the action was dismissed without any comment on the validity of second-parent adoptions. *Id.* at 583. More concerning is what happened in North Carolina, where that state's supreme court, in *Boseman v. Jarrell*, 704 S.E.2d 494, 539 (N.C. 2010), held that adoptions are a creature of statute; the statutes do not allow for second-parent adoptions. Therefore, all second-parent adoptions done in North Carolina—past, present, and future—are deemed void. *Id.* For a helpful and detailed discussion of this North Carolina case and other adoption challenges faced by same-sex couples, see DiFONZO & STERN, *supra* note 59, at 99–103.

71. See MINN. STAT. ch. 259.

72. See U.S. CONST. art. IV, § 1.

73. See *Adar v. Smith*, 639 F.3d 146, 157 (5th Cir. 2011) (en banc) (ruling that the same-sex adoptive parents of their child who was born in Louisiana, but adopted in New York, lacked standing in federal court because their request to have the State Registrar of Louisiana issue a revised birth certificate did not present a federal question under the Full Faith and Credit Clause).

may live in the future. This assumes that a Minnesota court is willing to take that added and unnecessary step for parental recognition. As an example, one court in New York refused to take those protective extra legal steps in order to inoculate the party from problems in another state when New York law did not require such steps to complete a valid adoption.⁷⁴ The court said that it is the other state's problem to straighten out its legal procedures for same-sex couples.⁷⁵ While we now have more options in Minnesota to solidify parent-child relationships for same-sex couples, problems still exist and will require careful planning by family law attorneys.

VI. ASSISTED REPRODUCTION

In some sense, the area of assisted reproduction technology services (ARTS) is among the most complicated areas of family law at the present time.⁷⁶ ARTS is a legal process whereby single persons and couples, whether married or not, seek to build their families through assisted reproduction medical technologies and legal procedures where parentage determinations are issued based on the intent of the parties as set forth in elaborate donor and gestational carrier contracts. The area of law is almost completely unregulated, and state statutes have not kept up with the medical technology advances and ever-increasing numbers of people seeking to build families through alternative processes. Both infertility issues and the biological realities of same-sex relationships drive the demand for ARTS.

There remains enormous variance between states as to whether ARTS is allowed or prohibited, tolerated or criminalized,

74. *Matter of Seb C-M, No. X 2013-21*, BLOOMBERG BNA, <http://pub.bna.com/fl/201321.htm> (last visited Oct. 21, 2014).

75. As an example of the persisting challenges in solidifying legal parentage recognition for same-sex couples, see *In re Adoption of Doe*, 326 P.3d 347, 353 (Idaho 2014) (refusing to both recognize the marital status of a same-sex couple married in California and grant either a stepparent or second-parent adoption).

76. ARTS refers to methods of causing pregnancy through means other than sexual intercourse. Charles P. Kindregan, Jr., *The Current State of Assisted Reproduction Law*, FAM. ADVOC., Fall 2011, at 10, 11. See generally SUSAN L. CROCKIN & HOWARD W. JONES, JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES (2010); CHARLES P. KINDREGAN, JR., ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW & SCIENCE (2d ed. 2011).

regulated or not addressed in the law.⁷⁷ The majority of states are like Minnesota; they have an old and outdated artificial insemination law in their parentage statutes, which usually only applies to heterosexual couples proceeding under the supervision of a medical doctor. There are virtually no other laws specifically addressing assisted reproduction.⁷⁸ Once again, creative lawyers seeking to help their clients have resorted to constructing work-arounds, using the existing statutes to cobble together a process approved by district court judges without legislative or appellate case support.⁷⁹

It is well beyond the scope of this essay to discuss all of the intricacies and practices of ARTS, other than to say that it has had an enormous impact on same-sex family building by allowing same-sex couples to procure genetic material in order to have a child born to one or the other partner and to take steps to legally recognize the other partner's parental status. In ARTS cases, there are at least three categories of possible parentage: legal, biological, and genetic.⁸⁰ The legal complexity and need for various contracts are determined by the nature of the medical proceedings undertaken. The proceedings are usually more complicated if the situation involves a same-sex couple, with the same-sex male couple being the most complicated, as neither intended parent is giving birth to the child. As mentioned, in Minnesota, there are virtually no statutory laws other than the antiquated artificial insemination statute, which only applies to a heterosexual married couple undertaking the medical procedures with the supervision of a

77. See Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, FAM. ADVOC., Fall 2011, at 32, 32–36; *Family Advocate Home*, ABA, www.ambar.org/familyadvocate (last visited Oct. 21, 2014) (addressing ARTS laws in all fifty states); see also DIFONZO & STERN, *supra* note 59, at 94–95.

78. See MINN. STAT. § 257.56 (2012).

79. In Minnesota, there have been three appellate cases that have addressed ARTS, and the two most directly addressing the current processes and issues are unpublished. See *A.L.S. ex rel. J.P. v. E.A.G.*, No. A10-443, 2010 WL 4181449 (Minn. Ct. App. Oct. 26, 2010); *In re Paternity & Custody of Baby Boy A.*, No. A07-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007); *LaChapelle v Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000).

80. For a detailed discussion of the various categories of parentage that are in play in ARTS cases, see the somewhat dated, but still useful, article John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 524, 526 n.13 (2001).

licensed medical doctor.⁸¹ The reality is that people can now obtain “kits” on the Internet to do their own home-based insemination.⁸² Many of the people doing this are unmarried couples or single persons, and they are doing it without medical supervision. While Minnesota has very little statutory authority for home-based insemination, it is nevertheless occurring within the state. Parties are entering into artificial insemination contracts, egg and sperm donor agreements, embryo donation contracts, and gestational carrier and surrogacy arrangements. These arrangements are all negotiated through contracts, and then the contracts are used as a basis for an intent-based parentage action of some sort.⁸³

The same-sex marriage statute will come into play through the application of the various types of parentage determination options that are now available that could be used to solidify legal parentage for these same-sex couples. Couples can now get married, undertake the assisted reproduction process, and, if the child is born to one of the partners, an argument can be made that parentage automatically flows from the marital status. All of the options previously addressed about the need to take additional steps with same-sex couples to obtain a parentage order or an adoption decree would still apply.⁸⁴ Same-sex couples that go through this process will also be able to rely on adoption in order to have the parentage established because they can now marry. Adoption will be a more viable and permanent option, as they will no longer have to rely on the legally vulnerable second-parent adoption process.⁸⁵

In situations where a same-sex couple is not married and they undertake an ARTS procedure to build their family, there will undoubtedly be the temptation use an ROP in order to obtain a birth certificate as a verification of parentage. As previously discussed, this has created significant concern among county attorneys and the Department of Vital Statistics; it would be prudent to steer unmarried same-sex couples away from using an

81. MINN. STAT. § 257.56, subdiv. 1.

82. See, e.g., *Artificial Insemination Kits*, INSEMINATION HELP, <http://www.insemination-help.com> (last visited Oct. 21, 2014).

83. For a good discussion of these trends and practices, as well as the historical development of ARTS in the United States and the concept of “intent-based parenting,” see DIFONZO & STERN, *supra* note 59, at 64–84.

84. See *supra* Parts IV–V, notes 44–69.

85. See *supra* Part V.

ROP in these circumstances.⁸⁶ The better approach for unmarried same-sex clients using ARTS to build a family is to either attempt a second-parent adoption, taking into account the concerns and cautions discussed previously,⁸⁷ or to obtain a parentage order.⁸⁸

The same-sex marriage statute will certainly assist in making ARTS processes more user-friendly for same-sex couples, but clearly, more legislative clarity is needed for this fast-changing area of the law.

VII. CONCLUSION

The purpose of this essay is to not only alert family law practitioners in Minnesota to the complexities that can arise when representing same-sex couples who are either married or

86. See *supra* Part IV, note 54.

87. See *supra* Part V.

88. There has long been a procedural debate between ARTS practitioners in Minnesota as to the proper way to obtain parentage orders in ARTS proceedings. The debate comes into play when seeking a parentage order for a same-sex couple, whether married or not. One school of thought is that this parentage proceeding must be pursued under Minnesota's Parentage Act as found in Minnesota Statutes, sections 257.51–.74. See Mary Patricia Byrn & Steven H. Snyder, Symposium, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, FAM. L.Q., Fall 2005, at 633, 661. The other approach is to seek a parentage determination before the birth of the child by petitioning under Minnesota's Uniform Declaratory Judgment Act. MINN. STAT. ch. 555 (2012). When proceeding under the Declaratory Judgment Act, the petition is accompanied by affidavits from all of the participants in the ARTS process—thereby providing evidence of “parentage by intent”—along with a medical affidavit from the fertility doctor vouching for the origins of the genetic material and verification of its implantation and anticipated birth of the child. The practitioners who rely on the Parentage Act run into the provision of the Act that requires a child to be born before parentage can be determined, thus requiring at least a two step process with the court, with no final determination of parentage prior to the child's birth. MINN. STAT. § 257.57, subdiv. 5 (stating that actions brought before the birth of the child must be stayed until after the birth). The declaratory judgment approach allows for a final determination of parentage before the child is born. The practitioners who proceed under the Parentage Act believe courts in Minnesota are without subject matter jurisdiction to adjudicate parentage outside of the Parentage Act; the declaratory judgment practitioners believe that courts in Minnesota retain jurisdiction under the common law to declare parentage outside of the Parentage Act. For a discussion of some model statutes that have addressed this issue and the general concept of “intentional parentage” and how this contrasts with parentage determinations under the Uniform Parentage Act and Minnesota's Parentage Act, see DIFONZO & STERN, *supra* note 59, at 94–99.

unmarried and who are either building families or ending relationships, but also to highlight how Minnesota's new same-sex marriage statute has provided many more options for same-sex couples seeking to build families and those needing to end their relationships. It remains critically important to understand possible legal challenges that may arise when same-sex couples and their children move to other states that do not recognize same-sex marriages. Additional planning and strategizing is necessary in whatever action is being taken—whether it is to build a family or to end a marital relationship. The best practice remains a careful consideration of all options, understanding the ramifications of both getting married or making the choice not to get married, and then planning for the maximum amount of protection for legal recognition of the family, no matter where the family comes to reside. While the challenges facing family law attorneys and their same-sex clients may seem monumental, the opportunities to now better serve clients as a result of Minnesota's same-sex marriage statute cannot be overstated.