The Invisible LGBT Family

By Jay D. Kaplan

Using data from the United States Census Bureau, the Williams Institute of UCLA reports that in 2010 there were close to 22,000 same-sex couples residing in Michigan, with couples living in every county. Almost 20 percent of those couples are raising children under the age of 18.[1] However, under Michigan's Constitution, statutes, and caselaw, these relationships and families do not exist.

Denial of the Fundamental Right to Marry

Since 1996, Michigan law has denied same-sex couples the fundamental right to marry and prohibited recognition of marriages between individuals of the same sex lawfully performed in other states.[2] In the same year, Congress passed and President Clinton signed the federal Defense of Marriage Act, which denies recognition of legal marriages of same-sex couples by the federal government. More than 1,100 federal and state benefits, rights, and protections are available to persons who have the ability to legally marry in the United States, such as the right to inherit property, make medical decisions for a spouse in the event of incapacity, be named as a beneficiary for state and federal pensions, and receive Social Security spousal benefits.

In 2004, voters approved a ballot initiative that amended Michigan's Constitution to limit marriage between "one man and one woman."[3] Unfortunately, the amendment's language was interpreted by the Michigan Supreme Court in *National Pride at Work v Granholm*[4] to also prohibit civil unions, domestic partnerships, and other forms of recognition of same-sex relationships by state and local governments. Michigan has one of the broadest prohibitions on legal recognition of same-sex relationships in the country. It is the only state in which this prohibition results from a court's interpretation of a "marriage amendment."

Adoption

Michigan's adoption law states that the spouse of a person who wishes to adopt a child must join in the adoption petition.[5] Although the adoption statutes do not specifically address the right of gay individuals and same-sex couples to jointly adopt, some Michigan judges have viewed this statutory requirement as limiting adoptions to individuals and legally married couples. As a result, since same-sex couples cannot marry in Michigan, they cannot jointly adopt children. The legal logic for this conclusion is suspect. Because Michigan's adoption laws must be strictly construed,[6] a court should not imply a prohibition that is not expressed in the statute. Illinois, Massachusetts, New Jersey, New York, Vermont, and the District of Columbia have adoption statutes with a similar requirement of joinder for spouses. Courts in those jurisdictions have held that this language does not prohibit two unmarried persons (including same-sex couples) from jointly

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adopting children.[7] Michigan appellate courts have yet to address the issue of adoption by same-sex couples. In the meantime, this judicially manufactured interpretation means that children of gay parents are denied the opportunity to have the legal protection of both parents, including the guarantee of continued care and custody with one parent in the event of the other parent's death or illness, the right to financial support by both parents until attaining the age of majority, and the ability to access health insurance benefits from either parent.

De Facto Parenthood

The concept of "equitable parenthood" or "de facto parenthood" was first recognized by the Michigan Court of Appeals in *Atkinson v Atkinson*.[8] In *Atkinson,* the husband was not the biological father of a child born during the marriage. He was granted standing to petition for parenting time after a divorce from the child's mother. Standing was based on an acknowledged parenting relationship with the child where the mother cooperated in the development of such relationship over time. However, more than 10 years later in *Van v Zahorik,*[9] the Supreme Court declined to extend this equitable concept outside of a legal marriage when the putative equitable father had not been married to the child's mother. Justice Taylor, writing for the majority, held that the doctrine of equitable parenthood was rooted in marriage.[10] Justice Brickley, writing for the dissent, maintained that the focus should be an equitable consideration of the facts rather than the adult's marital status.[11] For gay families raising children, this means that if the relationship dissolves, the nonlegal parent has no standing to petition for parenting time and no remedy if the legal parent is unwilling to let the former partner see the children they raised together. This has resulted in tragic consequences for many gay parents who jointly raised children with their former partners and have been denied contact and communication with their children by the legal parent. Michigan child custody law grants a presumption that continued contact with both parents after a divorce is in the best interests of the child.[12] Here the nonlegal gay parent, regardless of the facts concerning the child's best interests, has no standing and no ability to bring a custody and visitation dispute before the court.

A Closed Door

By denying recognition of lesbian, gay, bisexual, and transgender (LGBT) relationships, Michigan's legislature and courts have ultimately let down the children of gay parents. By rooting recognition of loving and committed relationships solely in marriage and at the same time denying same-sex couples the right to marry, Michigan has essentially denied the existence of LGBT families and helped to create both legal and economic instability for the children of these families. Michigan's families are diverse, and yet Michigan family law and courts continue to fail to recognize this diversity. LGBT families are residents of Michigan, and the courthouse doors should not be closed to them. ■

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FOOTNOTES

1. <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MichiganCensusSnapshot.pdf> (accessed December 12, 2011). I believe that such figures in 2011 are even greater, given the growing willingness of same-sex couples to disclose their partnerships on government surveys.
2. MCL 551.1 *et seq.*
3. Const 1963, art 1, § 25.
4. 481 Mich 56; 748 NW2d 524 (2008).
5. MCL 710.24(1).
6. *In re Adams,* 189 Mich App 540, 543; 473 NW2d 712 (1991), citing *Lincoln v Gupta,* 142 Mich App 615; 370 NW2d 312 (1985).
7. *In re MMD,* 622 A2d 837 (DC App 1995); *In the Matter of Jacob,* 660 NE2d 397 (NY 1995); *Adoption of Two Children by HNR,* 666 A2d 535 (NJ 1995); *In re Petition of KM,* 653 NE2d 888 (Ill 1995); *Adoption of BLVB,* 628 A2d 1271 (Vt 1993); *Adoption of Tammy,* 619 NE2d 315 (Mass 1993).
8. 160 Mich App 601, 608–609; 408 NW2d 516 (1987).
9. 460 Mich 320 (1999).
10. *Id.* at 329.
11. *Id.* at 342.
12. See MCL 722.27(1).