

## **“I Should Not Have to Adopt My Own Child”: Parentage Statutes for Lesbian Couples in the 21<sup>st</sup> Century**

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The earliest legal issues facing lesbian mothers arose in the 1970's, primarily in the context of custody and visitation disputes concerning children they had while married. In the 1980's and 90's new issues arose when lesbians had children as lesbians, alone or with their female partners. To protect the planned relationships, lawyers turned to adoption statutes and argued that the nonbiological mother should be able to become a second parent through adoption.

Second-parent adoptions have proved a powerful legal device for gay and lesbian families. They are modeled on step-parent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating that biological parent's rights, thereby leaving the child with two parents. There is a conceptual flaw, however, in analogizing same-sex couples to a step-family.

A step-family forms after a child already exists. A lesbian couple, on the other hand, plans for a child together. From before birth, the child-to-be has two parents. The nonbiological mother is not a step-parent. The closest analogy to her situation is that of an infertile husband whose wife, with his consent, conceives using donor semen. *That husband does not have to adopt his child.*

Nonbiological lesbian mothers often ask this question: “Why should I have to adopt my own child?” In this paper, I describe what statutes would need to be in place for that mother to be a legal parent-to-be from the moment of conception and a legal parent from the moment of birth. No adoption necessary.

I describe existing American statutes under which a lesbian partner of a biological mother is the legal parent of their child. These fall into two groups: statutes extending the legal consequences of marriage to same-sex couples who marry or enter civil unions or domestic partnerships; and general parentage statutes, enacted without contemplating lesbian couples, that courts have applied to find the partner of a biological mother a parent. None of the existing frameworks answer all the questions needed in a comprehensive approach to parentage determinations in these families.

Then I describe what a statutory scheme might encompass if written with lesbian couples specifically in mind. First, I explain statutory reforms in Quebec Canada that specifically contemplate parentage for same-sex couples. Then I offer a model for the US that tries to resolve the issues that current statutory frameworks overlook. I turn to recent model statutes on assisted reproduction and to the law that has emerged from courts' experiences resolving parentage by weighing the relative importance of biology, intent, function, and relationship with the child's mother. It is possible to draw on these precedents to create a legal regime that meets the needs of lesbian couples and their children in the 21<sup>st</sup> century.