Why Registered Domestic Partners/Same Sex Spouses Still Need Adoptions or Court Orders of Parentage

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In December 2008, Newsweek published an article about the Miller-Jenkins custody case. Lisa Miller and her partner, Janet Jenkins, entered into a civil union in Vermont in 2000. Civil unions in Vermont are similar to California's Registered Domestic Partner laws. After their civil union, Lisa Miller carried a child created with donor sperm. In 2002, their daughter was born. The couple broke up in 2003. Miller filed for dissolution in Vermont. The parties dissolved their civil union and entered into a custody and visitation order in the Vermont dissolution case. After the parties ended their relationship, Miller decided that she was no longer a lesbian and moved to Virginia, where she was raised. In 2004, Miller filed an action in Virginia for sole legal custody, claiming that the Marriage Affirmation Act just enacted in Virginia prohibited Virginia from recognizing civil unions and therefore it could not recognize Jenkin's parentage of their daughter. The Virginia judge awarded Miller sole legal custody. In June, 2008, the Virginia Supreme court ruled in favor of Jenkins when it held that the Vermont court order is entitled to full faith and credit in Virginia. In *Miller-Jenkins v. Miller-Jenkins* (Va. 2008) 661 S.E.2d 822, the Virginia court also held Vermont had continuing jurisdiction over all custody matters in the case, pursuant to the Parental Kidnapping Prevention Act.

Issues of recognition of other states' parentage judgments and adoption decrees for children of same-sex parents are arising all over the United States. So how does the full faith and credit clause apply to same-sex partners who have children together in California?

What is the full faith and credit clause?

Article IV, section 1 of the United States Constitution states "full Faith and credit shall be given in each State to the public Acts, Records and judicial Proceeding of every other State." In *Williams v. North Carolina* (1942) 317 U.S. 287, the United States Supreme Court held that the full faith and credit clause required North Carolina to recognize dissolution judgments that were entered in Nevada. In that case, a couple went to Nevada and established domicile there, to get divorced from their previous spouses, and then they married. They were charged with bigamy in North Carolina, as the state refused to recognize their divorces. Even though they were not able to divorce under North Carolina law, the United States Supreme Court ruled that North Carolina had to recognize their divorce if it was valid where entered.

Although the full faith and credit clause should force states to recognize all court orders of parentage, it has been a struggle getting states to do so when the parents are of the same sex. I recently obtained a Judgment of dissolution of domestic partnership, which included a decree of parentage. It ordered the state of Rhode Island to issue a new birth certificate for the child. However, the Rhode Island Department of Health has refused to issue the new birth certificate because parentage was established in the dissolution of domestic partnership action. In a letter from the Rhode Island State Registrar, they state they will only issue a new birth certificate to a same-sex couple if they complete an adoption, as they do not recognize parentage judgments for same-sex parents. This is a violation of the full faith and credit act.

How does having a court order of parentage or a decree of adoption protect the children of same-sex parents?

Many children are born in one state and then they grow up in another state. Many gay and lesbian couples have a child in a state that does not recognize their parentage and then they move to another state which allows recognition of their parentage. For instance, they may move to California and complete a second parent adoption (either by independent adoption or step parent adoption) to make their partner/spouse the legal parent of their child. They then ask the state that the child was born in to amend the

child's birth certificate to name both as parents. Couples may also have a child while living in California and then move to a state where their parentage would not be recognized by that state's laws. What follows is a summary of some of the cases that have arisen on this issue in the law few years.

In 2002, the Supreme Court of Nebraska was asked to rule on a same-sex parentage case. In *Russell v. Bridgens* (2002) 264 Neb. 217, 647 N.W. 2d 56, a lesbian couple adopted a child in Pennsylvania. Bridgens adopted first, then she and Russell completed a co-parent adoption, making them both parents. After the parties ended their relationship, Russell, now living in Nebraska, filed for custody and support. Bridgens filed a motion alleging the adoption by Russell wasn't valid and that she was the sole parent of the child. The Nebraska Supreme Court held that if Pennsylvania had subject matter jurisdiction at the time that the adoption order was made, then Nebraska had to recognize it under the full faith and credit clause.

In 2005, the Virginia Supreme Court ordered the Department of Vital Records to issue new birth certificates to children adopted by same-sex couples who obtained court orders in other states in *Davenport et al v. Little-Bowser et al* (2005) 269 Va. 546. However, it did so by interpreting existing Virginia law and did not make its ruling based on the full faith and credit clause.

The U.S. Tenth Circuit Court of Appeals ruled on the issue of birth certificates for children of same-sex parents who were born in Oklahoma. In *Finstuen v. Crutcher* (2007) 496 F. 3d 1139, same-sex couples adopted children who were born in Oklahoma but whose adoptions were granted in Washington, California, and New Jersey. After the adoptions, the couples applied for new birth certificates in Oklahoma for their children. Birth certificates were issued for the children of two of the couples. But the state refused to issue a birth certificate for one couple. The Circuit Court applied the full faith and credit clause in ordering the state to issue a birth certificate for all of the children adopted in other states.

In a recent case, a child was born in Louisiana and adopted by two men in New York. When they applied for a new birth certificate for the child, the Louisiana State Registrar refused to issue the new birth certificate because the state doesn't recognize adoption by unmarried parents. In December, 2008, in *Adar v. Smith* (E.D. La., 2008) U.S. Dist. LEXIS 106549 the U.S. District Court held that the state had to issue a new birth certificate with both fathers listed as the parents because the full faith and credit clause required it. In January, 2009, the state of Louisiana filed a notice of appeal.

In L.E. v K.R, a same-sex couple had two children together, each giving birth to one. Each adopted the other's child in a second parent adoption action in the state of Washington. The couple ended their relationship after moving to Florida. After their break up, K.R. decided that she no longer wanted to co-parent with her former partner. L.E. filed an action in Florida to obtain custody and visitation. The Florida trial court refused to recognize the adoption and held that L.E. had no relationship with K.R.'s biological child. On May 13, 2009, the Florida Court of Appeals reversed the trial court decision and held that the adoption order was entitled to full faith and credit and must be recognized.

The issue of full faith and credit also arises in the area of federal benefits. In *Application of A.W.*, a California administrative law case, a same-sex couple obtained a parentage judgment naming both women as parents. The non-biological parent became disabled, filed for and was awarded social security benefits. The Social Security Act provides that if a parent receives benefits, their children are also entitled to benefits. Here the application for the child was initially denied because the social security administration refused to recognize the non-biological mother's parentage. At an appeal hearing, the Administrative Law Judge ruled that the child was entitled to benefits and the parentage judgment must be recognized

However, a gay father in Florida didn't find his application for benefits for his children to be as easy. Gary Day was awarded disability benefits in 2006. Mr. Day has two children. He obtained parentage judgments in Los Angeles County for both of his children prior to filing for disability. However, the Social Security Administration refused to rule on his application for benefits for his children. In 2008, Mr. Day filed a complaint in the United States District Court for the District of Columbia to force SSA to rule on his application for benefits. Finally, in April 2009, over three years after his initial application, SSA granted benefits to his children.

Court orders are not the same as birth certificates

States do not have to recognize other states' licenses and birth certificates. In *Finstuen v. Crutcher* (2007) 496 F. 3d 1139, the U.S. District Court of Appeals held there is a distinction between statutes and judgments. Although the full faith and credit clause applies to judgments, it applies with less force to other state's statutory laws. As such, if a

child is born in California to registered domestic partners, other states and possibly the federal government do not have to recognize the second parent's parentage that was created by virtue of our domestic partner laws and not by court order. Therefore, it is imperative to counsel same-sex clients who are having children about the importance of obtaining a court order establishing parentage.

When we first interview gay and lesbian clients who have children, whether for family law or estate planning purposes, we must inquire about how they obtained parental status for their children. Did they just get a birth certificate listing both of them as parents? Did they do an adoption or obtain a parentage judgment? If they have not taken steps to obtain a court order making the non-biological parent a parent, we must strongly encourage them to take this action otherwise their children may not be protected as we have seen from the cases cited above.

If our clients are registered domestic partners, they should do a step-parent adoption of their children under Family Code section 9000. Due to disputes between states in recognizing parentage judgments versus adoption decrees, it may be preferable to do a step-parent adoption instead of a parentage judgment. Adoption decrees may be recognized in other states and by the federal government with less scrutiny, as adoptions are a more familiar form of creating parentage by a non-biological parent. Additionally, under federal tax law, adoption of a child by an unrelated adult who is not a spouse of the parent (as defined by federal, not state law) is entitled to an adoption tax credit. Therefore, a registered domestic partner who adopts her partner's child may be entitled to the adoption tax credit.

Lastly, if the parties end their relationship and have not previously obtained an adoption decree or judgment of parentage, it is imperative that the dissolution judgment include a finding of parentage. It may also be good practice to file a parentage action with the dissolution action so that parentage is established in an action that is not tied to the parents' relationship status. Leaving children of same-sex parents without a court order establishing their parentage leaves them at risk if they need federal benefits based on that parentage or if they leave the state of California. ■