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GLAD's Work in New Hampshire with the Legislature and in the Courts Produces Significant Gains for LGBT Families

This 2013-14 legislative session, GLAD worked to craft and pass two important laws that will protect LGBT families and parents in New Hampshire:

- Senate Bill 394,[1] which helped to correct some of the problems that were not solved by the New Hampshire marriage equality law, and
- Senate Bill 353,[2] which created one of the most comprehensive surrogacy laws in the country.

GLAD also represented a lesbian non-birth mother seeking parentage of her daughter in *In Re Guardianship of Madelyn B.*, which resulted in a decision from the New Hampshire Supreme Court that New Hampshire's "holding out" presumption of parentage must also apply to women, including our client. The holding out presumption, as originally written, provided that a man is the presumptive father, regardless if he is married to the other parent, as long as he receives the child into his home and holds that child out as his own,

The combination of these two laws and the lawsuit provides some of the strongest protections for LGBT families in New England, regardless of the marital status of the parents.

I. Senate Bill 394: Moving Closer to True Marriage Equality

Senate Bill 394 corrected a number of the problems that still existed after the passage of New Hampshire's Marriage Equality Law in 2009:

1. The law assures that all same-sex couples who married New Hampshire have valid marriages, regardless of where they lived at the time of the marriage or when the marriage occurred.
2. It makes clear that the date the marriage was solemnized will be considered the beginning date of the marriage, even if that date was before the date that same-sex couples were able to marry in New Hampshire (January 1, 2010).

[1] *See* http://www.gencourt.state.nh.us/legislation/2014/SB0394.html.
[2] *See* http://www.gencourt.state.nh.us/legislation/2014/SB0353.html.

3. It removes the requirement that if a couple had a civil union from another state and that same couple wanted to marry in New Hampshire, they had to dissolve the civil union before they were allowed to marry in New Hampshire.
4. It clarifies that all New Hampshire's family, marriage and divorce laws apply equally to same-sex and different-sex couples, regardless of any gendered language that is in the law.

Here are some questions and answers to further clarify what SB 394 does:

We came from Montana to marry in New Hampshire in 2010 and then returned home to Montana. Do we have a valid marriage?

Yes. Prior to the passage of SB 394, New Hampshire had what is called a reverse evasion law, which said that if you came to New Hampshire to marry from another state and your home state's laws said that marriages of same-sex couples are "void" (which basically means that the marriage never existed), then the New Hampshire marriage would also be void. Montana is one of those "void" states. SB 394 not only eliminates that provision in the law, but it does so retroactively. So regardless of when you married in New Hampshire or where you lived at the time, you have a valid marriage.

We live in Montana and want to come on vacation this summer to New Hampshire to marry. Will our marriage from New Hampshire be valid?

Yes, provided you don't violate any of the requirements to marry in New Hampshire (e.g. age, closely related by blood), you will have a valid marriage. Although your marriage will currently not be recognized by your home state, the federal government will recognize your marriage for some purposes (e.g. taxes, immigration), private businesses and employers are permitted to recognize it, and, when the state of Montana begins to recognize the marriages of same-sex couples, your marriage should be recognized without the need to get married again.

We married in Massachusetts on July 10, 2004 and now live in New Hampshire and are in the process of divorcing in a New Hampshire court. What date should the court use to determine the length of our marriage?

Even though same-sex couples could not marry in New Hampshire until January 1, 2010, the New Hampshire court should use July 10, 2004 as the date when your marriage began. If that is not the case, please contact GLAD Answers (at the bottom of this document) to let us know.

We have a civil union from Vermont and want to get married in New Hampshire. We heard that in order to do so we would have to first dissolve our civil union. Is that true?

It was true until the passage of SB 394, but is no longer. Now you can marry the same person you have the civil union with without first dissolving it.

Of course, if you have a civil union with one person and want to marry another, you must dissolve the civil union first. If you didn't, you would be guilty of bigamy and the marriage would be invalid.

We are a New Hampshire, married, lesbian couple and are planning on having a child through donor insemination. The New Hampshire law says that if a child is born into a marriage then the husband is presumed to be the father of the child. Does this law apply to our situation?

Yes, because SB 394 requires that all of New Hampshire's family laws be read in a gender neutral way. In your case, this law means that the non-birth mother will be presumed to be an equal legal parent under the laws of New Hampshire and her name will be placed on the birth certificate, provided that you are married at the time the child is born or within 300 days before the child is born.

II. SB 353 Modernizing New Hampshire's Surrogacy Laws

The New Hampshire General Court realized that its surrogacy laws had not kept up with the rapidly developing advances in assisted reproductive technologies and the increased number of people who wanted to become parents using these technologies. Senate Bill 353 is one of the most comprehensive and forward-looking surrogacy laws in the country. Here are the key elements of this law:

1. It ensures that there is appropriate and clear statutory language that establishes updated and consistent standards and procedural safeguards.
2. It facilitates the use of assisted reproductive technologies.
3. It defines, confirms and protects the legal status and best interests of children born as a result of gestational carrier agreements.
4. It protects the rights of the intended parents and gestational carrier.
5. It ensures that all parties in a gestational carrier arrangement (GCA) are legally protected and entering into the GCA with the same rights, expectations and responsibilities.
6. It standardizes the minimum requirements of gestational carrier agreements and recognizes that they are valid and enforceable legal contracts.

Here are some questions and answers to further clarify what SB 353 does:

Does NH's surrogacy law now apply equally to same-sex couples?

Yes. SB 353 is written in a gender-neutral way that should apply equally to same-sex couples seeking to use assisted reproduction in order to have a child together.

We are a gay male couple who want to have a child through a gestational surrogate in New Hampshire. What are we required to do prior to any medical procedures to impregnate the gestational carrier?

You must have a consultation with an attorney regarding the terms and potential legal consequences of the GCA before you sign it. Your attorney must be separate and independent from the attorney used by your surrogate. You must have completed a mental health consultation.

What are the requirements for a woman to be a gestational carrier?

1. She is at least 21 years of age.
2. She has given birth to at least one child.
3. She has completed a physical medical evaluation in substantial conformance with the guidelines set forth by the American Society for Reproductive Medicine.
4. She has completed a mental health consultation in conformance with the statutory requirements.
5. She and her spouse or partner, if any, have consulted with an attorney regarding the terms and potential legal consequences of the GCA.

Who will be the legal parents of the child resulting from gestational surrogacy?

Under the new law, the intended parents shall be the sole legal parents of a child resulting from gestational surrogacy. The gestational carrier, her spouse or partner, if any, shall not be found to be legal parents. This understanding must be included in the GCA before any medical procedure to impregnate the gestational carrier can occur

The law distinguishes between gamete(s) or embryo(s) from a "donor," who has no parental rights, and gamete(s) or embryo(s) that may be provided by an intended parent.

What are the minimum requirements for a GCA?

Yes, a GCA must meet the following requirements:

1. Be in writing;
2. Be executed before any medical procedures to impregnate the gestational carrier;
3. All parties must be represented by legal counsel, and the legal counsel of the gestational carrier and her spouse or partner, if any, must be independent from the legal counsel for the intended parents;
4. The gestational carrier must agree to:
    a. Undergo embryo transfer, become pregnant by means of assisted reproduction, and attempt to carry and give birth to the resulting child;
    b. Relinquish all rights, obligations, and duties as a parent of the child; and
    c. Surrender physical custody of the child to the intended parent(s) immediately upon birth of the child;
5. The gestational carrier's spouse or partner, if any, must agree to abide by the terms of the GCA including the relinquishment of all parental rights, obligations, and duties;
6. The intended parent(s) must agree to:
    a. Accept sole rights, obligations and duties as parent(s) of the child;
    b. Accept sole physical custody and responsibility for the support of the child upon birth;
7. Agreement of all parties as to how reasonable compensation, if any, will be paid to the gestational carrier;
8. Agreement of all parties as to how, if the gestational carrier breaches a provision of the GCA or the law in a way that causes harm to the child, the gestational carrier will cover her potential liability;

9. Agreement of all parties as to how decisions regarding termination of the pregnancy shall be made.

Can the intended parent(s) get a pre-birth order declaring them to be the child's parent(s)?

Yes. Any of the parties to the GCA may petition the court for a parentage order declaring that the intended parent(s) are the sole parent(s) of the child and directing that the birth certificate reflect that. The parties may also seek such an order after the birth of the child.

III. *In Re Guardianship of Madelyn B*: New Hampshire Supreme Court Rules That a Parent Is a Parent

In an important win for LGBT families, on July 2, 2014, the New Hampshire Supreme Court ruled GLAD's case *In re Guardianship of Madelyn B.*[3] that Susan B. is an equal legal parent to the daughter she brought into the world with her now ex-partner, Melissa D., even though Susan and Melissa had no legal relationship to each other. GLAD and co-counsel Kysa Crusco represented Susan in her effort to establish her legal role as Madelyn's parent after Melissa, Madelyn's birth mother, cut off contact between them.

Susan and Madelyn decided to bring a child into the world and then raised Madelyn together from her birth in 2002, including establishing a guardianship for Susan, the only legal option available to them at the time. The couple continued to co-parent after they split up for over five years until Madelyn was eleven years old.

Melissa began a relationship with a man she eventually married, and she went to court in 2013 both to end Susan's guardianship and to obtain a stepparent adoption for her husband. A New Hampshire family court terminated Susan's guardianship and prevented her from intervening in the stepparent adoption proceedings. It was at this point that GLAD appealed these decisions to the New Hampshire Supreme Court and sought to have Susan declared a legal parent.

The New Hampshire Supreme Court reversed the family court rulings and recognized that Madelyn can have two mothers under New Hampshire's "holding out" statute, which states that someone is a parent if "[w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his child." The NH Supreme Court made it clear that this statute must be read to apply to women, including a lesbian non-birth mother, as well.

This decision is not only an incredibly important victory for one family, but for all LGBT families, no matter how those families are formed or whether those parents are married. However, having to go through a court process to establish parenthood is painful and costly, so anything people can do outside of court to formalize their intentions around parenting, including adoptions, is strongly encouraged. For more information, see GLAD's publication, *Protecting Families: Standards for LGBT Families*, at

[3] *See* http://www.courts.state.nh.us/supreme/opinions/2014/2014052madelyn.pdf.

http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf.

Here are some questions and answers concerning this decision:

Does the decision in Madelyn B. mean that a couple no longer needs to marry or have a second parent or stepparent adoption in order for the non-biological parent to be a legal parent?

For any couple raising a child together, it is in the best interests of the couple and the child that both parents are considered legal parents. Although the ruling in *Madelyn B.* is a great victory and means that in certain cases someone who resides in New Hampshire and acts as a parent may be able to be declared a legal parent by a New Hampshire court, it is not the best or surest way to obtain parentage, nor is mounting such a court case inexpensive.

If a couple is married and has a child born into the marriage, then both spouses are presumed to be legal parents of the child and will be listed as such on the birth certificate. Another way for married couples to obtain legal parentage is through a stepparent adoption. For unmarried couples, second parent adoptions have been awarded in certain counties, but their availability is not guaranteed. If you are an unmarried couple who has been denied the ability to petition for a second-parent adoption, please contact us at GLAD Answers (see contact information at the end of the document).

Does this decision mean that Susan B. is a "de facto" parent?

The New Hampshire Supreme Court opted not to decide the question of whether Susan was a "de facto" or "in loco" parent, because it already found that she should be afforded full and equal parental rights through the holding out statute. That is good, because some courts have held that a "de facto" parent does not have the same standing as a legal parent, but instead can only seek limited parental rights, such as visitation.

Does the decision indicate how long someone must "hold themselves out" as a parent in order for a court to declare that person a legal parent?

No. A court would review each case on an individual basis.

GLAD is looking for pro bono or reduced fee attorneys who are willing to help gay and lesbian parents seeking to enforce these new rights. In particular, so many non-birth lesbian mothers have been alienated from their children over the last few years, and these changes in the law finally provide a glimmer of hope to see their children again – but only if they have attorneys to represent them.

Questions? Need more information about your rights? Contact GLAD Answers by email or live chat at www.GLADAnswers.org or by phone at 800-455-GLAD (4523).