

## **SAME SEX MARRIAGE & RELATED ISSUES IN FAMILY LAW**

In Florida's landmark case *Brenner v. Scott*, 2014 WL 4113100, (N.D. Fla 2014), the court overturned Florida's statutory prohibition on same sex marriage, thus not only allowing same sex couples the opportunity to marry, but to divorce as well. In *Brenner*, a same sex couple sued Florida officials for state provisions that violated their 14<sup>th</sup> Amendment rights to Due Process and Equal Protection.

In its decision, the court declared same sex marriage a fundamental right and Florida's provisions against same sex marriage a violation of their rights to due process and equal protection. Upon entering its decision, the court entered an injunction against the enforcement of those provisions, but, at the same time, granted the state a temporary stay of execution of the judgment for appeal purposes.

The state's attempts to extend the stay were unsuccessful and the stay lifted allowing clerk's to begin issuing marriage licenses on January 5, 2015.

Not long after Florida started issuing marriage licenses, the United States Supreme Court would finally settle the conflict among states as to the constitutionality of same sex marriage.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), several same sex couples joined in a lawsuit to sue for their right to marry under the 14<sup>th</sup> Amendment right to Due Process and Equal Protection.

The parties in this case represented various issues that befall same sex couples when denied the right to marriage. An Ohio resident who legally married his partner in Maryland sued after being denied the right to be named the spouse on his Husband's death certificate, as Ohio did not recognize their marriage from Maryland as valid. Another issue involved a Michigan adoption wherein the state only allowed one parent the status of legal parent due to their ban on same sex adoption.

The Supreme Court held that marriage must be afforded to same sex couples in all states and that all states must recognize a valid marriage from out-of-state. The court declared that the fundamental right to marry extended to same sex couples through the 14<sup>th</sup> Amendment's Due Process and Equal Protection clause.

Same sex marriage and divorce is a still evolving concept not only in Florida, but across the country. While many would believe that lifting on the bans on same-sex marriage would end the discussion, previously litigated issues are now gaining more attention as it relates to same sex couples and their families and relationships.

In *Wakeman v. Dixon*, 921 So. 2d 669, (Fla. 1st DCA 2006), the court dealt with a same sex couple who entered into a sperm donation agreement with a sperm donor. The parties in this case had two (2) minor children with Dixon being the biological and birth mother. For each child the parties entered into an Agreement purporting to convey parental rights to the non-biological party, Wakeman, as a de facto parent.

Upon the parties' separation, Wakeman sought enforcement of the Agreement arguing she had parental rights. The court disagreed stating that it has no statutory authority to compel visitation with a person who is not a parent. The court turned to previous decisions by the Florida Supreme Court pointing out that even grandparents have no right to visitation with a child under Florida's constitutional privacy laws absent evidence of demonstrable harm to the child.

Under this case law, same sex couples cannot contract to create parental rights, which at the time of this decision, left the non-biological parent and other similarly situated same sex couples with no alternative due to Florida's prohibition on same sex adoption.

While the justices agreed on this decision, Justice Van Nortwick understood the dangerous precedent the court was setting, as demonstrated in her specially concurring opinion:

As well explained in the majority opinion, Florida law does not provide a remedy in the case before us, even if the relief Wakeman seeks would be in the best interest of the minor children here. The number of children in Florida raised in so-called non-traditional households, such as the Wakeman-Dixon household, is increasing. I am concerned that, when those households dissolve, Florida law ignores the needs of those children. I write to urge the Florida Legislature to address the needs of the children born into or raised in these non-traditional households when a break-up occurs.

This case however, was distinguished in *D.M.T. v. T.M.H.*, 129 So. 3d 320 (2013), when the Florida Supreme Court heard a case where the biological mother of a child, who donated an egg to her partner to give birth to the child, filed a petition to establish parental rights. The biological mother also challenged the constitutionality of Florida's state assisted reproduction technology statute that automatically terminated parental rights of a donor parent.

Unlike *Wakeman*, the court in this case held that T.M.H. did have parental rights to the child and found that the statute, as applied to her, was unconstitutional in violation of her due process and equal protection rights. The distinction in this case is that T.M.H. was in fact the biological parent to the child, but her partner, D.M.T., asserted that by being a "donor" within the statute terminated her parental rights.

The court disagreed holding that T.M.H. had an inchoate interest that developed into a protected fundamental due process right to be a parent to the child where she accepted responsibility for raising her child from the beginning and did in fact parent and support the child until her partner prevented her from doing so.

These are just two cases that outline the continuing struggle same sex couples face when dealing with family law issues stemming from their relationships. Several other issues are currently being litigated and are yet to be resolved as it relates to same sex couples in family law. How is a court to determine the length of a same sex marriage? It is from the date of the legal marriage, or can couples get "credit" for being in a civil union or other state recognized relationship that existed prior to their right to marriage? Does a spouse in a same sex marriage enjoy the

presumption of being the legal parent to a child born into an intact marriage the same as a heterosexual couple does? All these questions and more are currently being placed before the courts who are trying to provide answers and solutions to these complex issues. Unfortunately, the battle to ensure equal protection and uniform application of the law has only just begun for same sex couples.

- Katie Harper Knepper