Parenting Issues for Same-Sex Couples

This memo is about the legal status of same-sex couples with respect to the children they are raising. Washington law provides several ways that same-sex couples with children can legally establish the parental rights of both parents.

The law on these issues has changed significantly over the last decade and will probably continue to change. As a result, while this memo will provide you with basic information, we recommend that you consult with a qualified family law attorney before you make any significant changes in your relationships with your partner or children and before you petition a court regarding your parental rights.

Who is a “legal” parent?

In general, biological and/or adoptive parents are the legal parents of a child.

Washington law also provides a legal “presumption of parentage” if you and your spouse or partner have a child while you are legally married or state-registered domestic partners. That means you will legally be presumed to be a child’s parent if a child is born to your spouse or partner while you are married or state-registered domestic partners, even if you are not biologically related to the child. In addition, Washington law provides that you are legally presumed to be a child’s parent if, during the first two years of the child’s life, you lived in the same household as the child and openly held the child out as your own. However, those legal presumptions can be challenged in court.

Under Washington law, a person can also become a legal parent by going to court and proving that they are the child’s “de facto” parent. This process is explained later in this memo.

Being a legal parent means that you have legally recognized rights and responsibilities toward that child. A person remains a legal parent until he or she voluntarily gives up these rights or a court of law terminates a person’s parental rights.

There may be another adult in a child’s life that the child sees as his/her “mama” or “papa.” This person may live with the child, care for the child, and act like a parent in every way. Even so, if the person isn’t a legal parent, a judge may have to determine that person’s legal rights.
with respect to that child if there is ever a dispute with the child’s biological or adoptive parent(s).

**What does it mean to be a “legal” parent?**

Legal parents are usually entitled to residential time (custody or visitation) with their children. Legal parents are also responsible for their children’s care and support, including financial support. In general, they also have the right to make decisions regarding their children’s education, medical care, and general well-being, especially in an emergency.

**What rights and obligations do I have if I’m not a “legal” parent to the child I am parenting?**

In general, if you’re parenting a child but you don’t have a legally recognized relationship, the legal system will consider you to be a stranger to the child. This means that legally you have none of the responsibilities or obligations of a parent. In other words, you do not have any legal right to custody or visitation with the child. You also do not have the right to make major decisions regarding the child, including major medical decisions, even in an emergency. In addition, you do not have any obligation to support and care for the child.

**How does it affect the child I’m parenting if I’m not a “legal” parent?**

If you are not a legal parent, the child will not have any right to inherit from you if you die without a will, and he or she will not be able to receive any Social Security benefits from your account if you are disabled or die. Also, your non-legal child most likely will not be able to receive health insurance or other insurance benefits that are available to your legal child, as through your employer.

In addition, if you and the child’s legal parent end your relationship, the legal parent can deny you the right to see the child, because he or she, and not you, has the right to make decisions regarding the child.

**What can we do to make my partner, who is a non-legal parent now, a “legal” parent of my biological child?**

To make sure that your legal status will not be challenged in court and is recognized nationwide, the best thing to do is to petition for a second-parent adoption. This is a legal procedure that allows a same-sex parent to adopt his or her partner’s biological or adoptive child without the partner losing any parental rights. Second-parent adoptions
protect children in same-sex parent families by giving the child two legal parents. It grants adoptive parents the same rights as the biological parent in custody and visitation matters. This procedure ensures that both parents will continue to have a legally recognized parental relationship with the child if the two of you separate or if the biological parent dies or becomes incapacitated.

If someone other than you is also a legal parent of the child, you will need to obtain consent to the adoption from the other legal parent. As part of this process, the other legal parent will need to agree to terminate his or her parental rights. If the other legal parent will not agree, the adoption is “contested”. In contested proceedings, you will only be able to proceed with the adoption if:

1) You can show that the refusal to consent is against the best interests of the child and
2) That parent has substantially disregarded their parenting responsibilities.

Under Washington law, a person who donates sperm or eggs to be used in assisted reproduction (a method of causing pregnancy without sexual intercourse) is not a legal parent of the child, unless there is a signed, written agreement that provides otherwise.

Proceeding with a second-parent adoption is complicated, and we strongly suggest that you contact a qualified family law attorney to help you with this process. The QLaw Association has a directory of lawyers that includes attorneys who practice adoption law or lesbian/gay family law (www.q-law.org).

In addition to the legal paperwork, there are a number of other steps that you must take to complete any type of adoption. In general, the court will require only a “post-placement report” for a second parent adoption. This report evaluates the home environment, family life, health, facilities, and resources of the prospective adoptive parent, as well as the physical and mental condition of the child, and any other factors relating to whether the proposed adoption is advisable. The report will also review the criminal record of the prospective adoptive parent. Overall, this report is designed to evaluate whether the proposed adoption is in the best interest of the child as determined by the court. Again, a family law attorney and/or an adoption agency can assist you in this process.

Finally, a judge needs to approve the adoption. While there is nothing in our state law that prohibits second-parent adoptions, unfortunately it is possible that some judges in this state may refuse to grant them. If that happens, please let Legal Voice know.

An experienced family law attorney in your area can help you consider the potential biases of the judge assigned to hear your adoption petition before proceeding. If you feel strongly that a particular judge will not give you a fair shake, you can petition the court to assign a different judge to your case.
What is the best time to do a second-parent adoption?

It’s important to put these legal protections in place as soon as possible so as to protect your parent-child relationship in the event that you and your spouse or partner break up or your spouse or partner suddenly dies.

Should we do a second-parent adoption if our child was born while we were legally married or registered as domestic partners in Washington?

It is advisable to take this step in order to have the fullest protection under the law. As discussed earlier, Washington law creates a legal presumption that both you and your spouse or partner are the parents of a child born to either of you while you are legally married or registered as domestic partners. This means that you are considered the parent in Washington as a matter of law. You are legally the parent unless someone proves in court that you are not. This law also allows for the names of both spouses or partners to appear on the birth certificate of those children.

However, we still advise couples who are legally married or registered as domestic partners in Washington to complete second-parent adoptions to make sure that both parents have a legal relationship with their child. This is because some states will not recognize marriages or domestic partnerships of same-sex couples, but an adoption approved by a court in Washington must be recognized everywhere. When traveling in other states or moving to another state, parents should not rely only on the presumption afforded by Washington’s marriage or domestic partnership law for their legal parental status, because other states may not recognize it.

If we got married in another state or country that recognizes marriages of same-sex couples, should we still do a second-parent adoption?

In theory, both of you should be considered legal parents to any children who were born during the course of your marriage. Washington should recognize your marriage from another state or country as valid, including the presumption of parentage if your child was born while you were married. However, other states may not; the laws are different in every state. Because of this, you should not assume that you will be legally recognized as the parent of any non-biological children. We therefore recommend that you complete a second-parent adoption even if you were legally married in another state or country at the time your child was born.

If we entered into a civil union or domestic partnership in another state or country, should we still do a second-parent adoption?
It is advisable. Different states have different laws regarding the parental rights of non-biological parents in same-sex relationships. Also, the law in many states is changing and it is impossible to predict what actions state legislatures or courts will take on these issues. Due to these uncertainties, we recommend that you complete a second-parent adoption.

Other than adoption, is there any other way for a non-biological parent to become a “legal” parent?

Yes, there are several ways this could happen. But none of them will necessarily assure recognition by all other states or create permanency for your family as well as a second-parent adoption will.

Presumption of Parentage

Under Washington’s Uniform Parentage statute, there are two presumptions that can help same-sex couples establish the legal status of both parents:

1) People who are married or in a state-registered domestic partnership with each other are both presumed to be the parents of a child born to one of them while the couple is married or registered as domestic partners. This presumption also applies if a child is born to one spouse or partner within 300 days after a marriage or domestic partnership is legally dissolved.

2) Whether or not the parties are married or in a domestic partnership, “a person is presumed to be the parent of a child if, for the first two years of the child’s life, the person resided in the same household with the child and openly held the child as his or her own.”

A “presumed parent” is legally a parent unless someone proves in court that they are not.

When a child has a presumed parent, a court action to challenge the parent’s legal status as a parent must be brought within four years of a child’s birth – unless:

1) the presumed parent did not live with (or have sexual intercourse with) the other parent during the probable time of conception and

2) the presumed parent never held the child out as his/her own.

In either one of these situations, the parentage action can be brought at any time.

De Facto Parentage

Additionally, in Washington State, a person who is not a biological or adoptive parent of a child can petition the court for legal parental rights if s/he can prove that s/he is a de facto parent (a person who has acted as a parent). If the petition is successful, a de facto parent is entitled to equal parental rights.

Before the court will recognize you as a de facto parent, however, you must file a court action and show all of the following:
• that you (as the non-legal parent) have an actual parent-like relationship with the child;
• that the biological or adoptive parent agreed to and encouraged your parent-like relationship with the child;
• that you (as the non-legal parent) and the child have lived together in the same household;
• that you have assumed obligations of parenthood without expecting payment;
• that you have been in a parental role for a long enough period of time that you have established with the child a bonded, dependent relationship, parental in nature;
• that you have undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life.


If you are able to show to a court that you meet these criteria, the court will consider you in an equal position to the existing legal parent in the court’s decision-making process. In other words, you will not automatically receive custody and visitation, but you will be considered equal to the other legal parent as the court decides what parental rights would be in the best interests of the child.

Keep in mind, however, filing a de facto parentage action with the court will be time-consuming and costly. Also, you must be able to prove all of the above criteria before the court will even consider what role you should play in the child’s life. Courts have also limited the availability of the de facto parent doctrine in some cases; consulting a qualified family law attorney is strongly advised before seeking de facto parent status.

Of course, the issue of whether or not you qualify as a de facto parent or whether parentage is challenged is likely to come up only if you and your partner break up, and your ex-partner refuses to allow you to continue to see the child and to act like a parent. Thus, if your partner agrees to your equal parental status, second-parent adoption is the best option for preserving your parenting rights because it does not rely on the unpredictable litigation that establishing parentage in other ways requires.

Are there any other things we can do to protect my partner’s rights to function as a parent?

As discussed earlier, we strongly recommend that you take steps to establish that both you and your partner are legal parents of your children. However, if your partner is not a legal parent to your children, there are several different things that you can do to attempt to ensure that your partner is able to care for your children as an equal parent, although none of these actions provide the same protection as establishing your partner as a legal parent. Some of these include:
Designate your partner as your choice to be your children’s legal guardian. You can name your partner as the person you would like to be your child’s guardian if you die or are incapacitated. You can do this in several ways. You can identify your partner as your choice to be the child’s guardian in your will. You can also identify your partner as your choice to be the child’s guardian in a separate “Nomination of Guardian” document. This is a good idea because, unlike your will, the “Nomination of Guardian” document will be valid any time you are incapacitated, while your will is only valid after your death. You may need an attorney to draft this document for you. In either case, you should make sure that your partner has a copy of each document in which you have named him or her to be your child’s guardian.

Fill out paperwork stating that you want your partner treated like a legal parent. Provide a letter or fill out a form provided by your child’s school stating that your partner is authorized to make emergency and non-emergency medical decisions for your child, to come to school to visit your child (for assemblies, recitals, etc.) and to pick up your child from school.

You should also provide your child’s doctor and other health care professionals with a letter or form stating that your partner is authorized to make emergency and non-emergency medical decisions for your child. You can use the one-page form in the publication “A Kinship Caregiver’s Guide to Consenting to Health Care” as a guide (this publication is available at www.washingtonlawhelp.org), but your letter or form should also state that your partner is permitted to visit your child at the hospital and should be treated as an equal family member for hospital visitation purposes and need not be limited to 6 months.

Draft a shared parenting agreement. You can and should work with your partner to develop a written shared parenting agreement between you. Once you have signed the agreement, honor it.

**What should we include in a shared parenting agreement?**

The two of you should write up a parenting agreement that is agreeable to both of you. The time to do this is while your relationship is solid and intact. Although these agreements are not generally enforceable by a court, they can serve as strong evidence of you and your partner’s intentions with regard to parenting your child. There is no particular form for such an agreement, but a useful agreement should address several topics:

- **Define the intended parenting relationship.** Your parenting agreement should spell out the nature of your relationship. For example, you should say that even though only one of you is the legal parent, you both consider yourselves to be equal parents to the child.
• Name the non-legal parent as the person who will become the child’s legal guardian if the legal parent is incapacitated or dies. The legal parent should also prepare a will that names the non-legal parent as the appointed legal guardian. While this designation will not be binding on a court, courts usually follow these designations unless there is a compelling reason not to.

• Address what happens if you and your partner (the legal parent) separate or break up. You should state that you both agree that both parents will remain involved in the care and upbringing of the child and that both of you will have continuing access to the child. In particular, you should clearly state your agreement regarding custody and visitation following a break up. State in the agreement who will have primary custody of the child, when and for how long will the non-custodial parent be able to have visitation with the child, etc. For example, you may decide to share custody equally, with the child moving back and forth between your homes every week or month, or you may decide that the child will live with one of you during the week but stay with the other parent a few weekends a month.

• Define each partner’s financial obligations. Also, your shared parenting agreement should spell out the basic ground rules for financial support, including who will be responsible and in what amount for child support, tuition assistance, medical care and insurance. It should also state how the two of you will pay the child’s expenses. You may decide to share all the child’s expenses jointly or divide them in some way other than 50/50; for example, you may agree that one parent is solely responsible for certain defined expenses.

• Provide a mechanism for resolving disputes. You may also want to include a provision in your agreement stating that you agree to attempt to resolve any dispute or disagreement about the shared parenting arrangement through mediation. A mediator is an unrelated third person who can who can work with you and your former partner to help your reach an amicable and mutually acceptable resolution to any disputes regarding the children and their care.

If my partner and I break up and I am not a “legal parent” to our child, how can I get custody and/or visitation of our child?

There are several options for you to consider:

Enter into an agreement with your partner. If you partner agrees to your continuing custody and/or visitation, it may be fairly easy for you to continue your parental relationship with the child. As explained above, if you and your partner drafted a shared parenting plan spelling out the custodial and visitation schedule for your child, financial support arrangements, and any other important parenting issues, you can follow the terms of the plan that you both agreed to. You may also want to establish an agreed parentage order and parenting plan and enter it with the Court. If you were married or in a
registered domestic partnership, you will be required to enter a parenting plan with the
court when you get your dissolution (divorce).

File a court action and attempt to establish yourself as a de facto parent or parent under
the Washington parentage statute. If your partner, the legal parent, refuses to allow you
to continue your relationship with the child, it can be difficult for you to gain custody or
visitation rights. There is, however, a two-step process that may be successful.

Your first step will be to petition the court for status as a parent. Because this may be a
complicated process, we recommend that you consult with a qualified family law
attorney to assist you in preparing the pleadings and other legal paperwork.

If your petition requesting de facto parent or parentage status is granted, you can petition
the court for a “parenting plan.” Permanent parenting plans usually specify all of the
following:

- What the parents will do to attempt to resolve future disputes (before seeking
  additional court intervention);

- Who will be making decisions regarding the children's education, health care, and
  religious upbringing (known as “legal custody”); and

- What the residential schedule for the child will be (known as “physical custody”).

The parenting plan will include a schedule designating which days of the year the child
will reside with you, and which days of the year the child will reside with your ex-
partner, including provisions for holidays, birthdays of family members, vacations, and
other special occasions.

At the same time that the court issues a parenting plan, the court will also usually
establish child support, ordering you or your partner to provide money to the other to pay
for the costs of raising the child. There are several factors that the court will consider
when ordering child support, including where the child is living and the relative financial
means of the parents.

File a non-parental custody petition. Another option which may be available is filing for
nonparental custody. You may also want to consider including this claim in any court
action you file seeking to establish yourself as a de facto parent. However, you should
know that it is not easy to succeed with such a claim. The law presumes that children
belong with their parents and that generally, parents act in the best interests of their
children. Therefore, the law will give custody to a non-parent only if the child isn’t
living with the legal parent, the legal parent is unfit (unable to care for the child because
of drug or alcohol problems, for example), or the non-parent can prove to the court that
the child’s growth and development would be seriously harmed by living with an
otherwise capable parent.
RESOURCES

- **Legal Voice**: Offers free information on a variety of legal topics, including Family Law and Court Procedures & Lawyers.
  www.legalvoice.org/tools/index.html

- **Washington LawHelp**: A website that helps low-income people find solutions to civil legal problems, including Family Law, Seniors, Consumer & Debt, etc.
  www.washingtonlawhelp.org

- **Columbia Legal Services**: Offers the free publication “A Kinship Caregiver’s Guide to Consenting to Health Care” through Washington LawHelp.
  www.washingtonlawhelp.org/resource/a-kinship-caregivers-guide-to-consenting-to-h