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KNOW YOUR RIGHTS:

PROTECTING LGBTQ FAMILIES IN WISCONSIN AFTER *PAVAN V. SMITH*

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Madison, Wisconsin
(as of October 5, 2018)

The Four Cases to Know

As an LGBTQ parent, there are four cases you should know about, in order to understand your rights in Wisconsin and throughout the United States (and to understand the rest of this article). In chronological order, they are as follows:

Wolf v. Walker is the federal appellate decision that brought marriage equality to Wisconsin on the beautiful summer evening of Friday, June 6, 2014. The lawsuit was filed and litigated by the ACLU. The decision, and therefore marriage equality in Wisconsin, became final on October 6, 2014.

Less than one year later, on June 26, 2015, the U.S. Supreme Court announced its decision in *Obergefell v. Hodges* and brought marriage equality to the entire United States. This case was litigated by GLAD and other non-profits. The decision was final and binding throughout the United States the day it was issued.

Together, these two marriage equality cases required the following:

1. Same-sex couples must be allowed to marry in Wisconsin and every other state.
2. Out-of-state marriages must be recognized in Wisconsin and every other state.
3. The rights/benefits and responsibilities of marriage must be applied equally to same- and different-sex couples.
4. All of this must happen right now, not later after additional policy debate, litigation, or legislation.

While #1 and #2 above were implemented somewhat smoothly across the country, Wisconsin and a few other states refused to fully implement and abide by #3 and #4 above. They did not seem to understand that being allowed to marry meant nothing, if you did not also receive the rights and responsibilities of marriage. Lawsuits followed, including the following two in Wisconsin.

Torres v. Seemeyer is the federal district court decision from the fall of 2016 that requires the State of Wisconsin and all of its agencies to ungender and apply Wisconsin's artificial insemination statute

equally to same- and different-sex couples. The Court ordered Wisconsin Vital Records to issue two-parent birth certificates for children born to married same-sex couples, if the couples comply with the artificial insemination statute. The lawsuit was filed as a federal class action by Lambda Legal in May 2015, after Vital Records refused to issue the correct birth certificates despite the clear mandates in *Wolf* and *Obergefell*. The Wisconsin Attorney General opposed equal application of the law. The decision became final on September 14, 2016. (Even though this is a lower court decision, it stands as the law of the land in Wisconsin because it was never appealed by the Wisconsin Attorney General.) Vital Records has been complying with this decision and issuing two-parent birth certificates, although for whatever reason and without any authority, they list lesbian parents as "Mother/Father" instead of "Parent/Parent."

Pavan v. Smith is the U.S. Supreme Court decision, issued on June 26, 2017, that held Arkansas' marital presumption of paternity and artificial insemination statutes must be applied equally to same-sex and different-sex married couples. The Court in an unusually short (five-page) decision, and without oral argument or the regular briefing schedule, summarily reversed the Arkansas Supreme Court. The Arkansas Supreme Court had allowed Arkansas Vital Records to refuse to apply the marital presumption of paternity and artificial insemination statutes to married same-sex couples and to refuse them two-parent birth certificates. The U.S. Supreme Court said that it already decided this issue in *Obergefell*. It said, citing its own *Obergefell* decision, that the Constitution entitles same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples," including "the constellation of benefits that the States have linked to marriage." A bit exasperated, the U.S. Supreme Court said: in *Obergefell* we even "expressly identified 'birth and death certificates.' That was no accident: several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates." The U.S. Supreme Court closed the door on this issue in *Pavan* and brought parentage equality to the entire country.

These four cases have dramatically changed Wisconsin law as applied to married same-sex couples. Gone are the days of settling for guardianships or having to terminate the parental rights of one parent in order to have both parents adopt their own child. Below is a summary of the protections now available to same-sex couples and their children in Wisconsin.

But first, many couples rightly ask …

Do We Still Need a Court Order Regarding Our Parental Rights?

Yes, you still need a court order regarding your parental rights and the rights of your child to his or her two parents (via parentage or adoption, discussed below), even if you are married and even if you are both on the birth certificate (as "Mother/Father" or as "Parent/Parent"). The reason is a concept called "portability of judgment."

Your family needs to be able to travel outside of Wisconsin and know that your joint legal parentage will be respected and recognized. You cannot have that assurance with just a birth certificate. A birth certificate is a self-reported record, is only indicia of parentage not proof, and is not entitled to Full Faith and Credit under the U.S. Constitution. You need a court order to receive Full Faith and Credit.

This is a bitter pill, since different-sex couples are not advised to do the same, but the legal consensus on this issue is wide. *See* National Center for Lesbian Rights, Legal Recognition of LGBT Families, available at http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (advising that "[r]egardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always

encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate"); National Center for Lesbian Rights, Protecting Your Family After Marriage Equality, available at http://www.nclrights.org/wp-content/uploads/2015/01/Protecting-Your-Family-After-Marriage-Equality.pdf (advising that "[a]ll non-biological parents still need an adoption or parentage judgment from a court recognizing that they are a legal parent, *even if you are married and even if you are listed as a parent on the birth certificate*. Being on the birth certificate does not necessarily make you a parent under the law"); Gay & Lesbian Advocates & Defenders (GLAD), Marriage Tips and Traps, available at http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf (advising married same-sex couples in Massachusetts that the presumptions of parentage will apply to children born during the course of the marriage but that couples should still "go[] through the legal process of [obtaining a court order for] any child born during the marriage"); Lambda Legal, Civil Unions for Same-Sex Couples in New Jersey, available at http://data.lambdalegal.org/pdf/772/pdf (advising that, even if both civil union spouses are presumed to be legal parents under state law, that "it is vital that [the couple] consult an attorney and pursue securing your child's legal status with both parents through a [court order]").

We feel even more strongly about this recommendation since the U.S. Supreme Court decided the same-sex adoption case of *V.L. v. E.L.* on March 7, 2016. The issue presented in that case was whether Alabama had to recognize a Georgia adoption by a non-biological parent in a lesbian artificial insemination case. The Court answered yes, that Full Faith and Credit applies to the adoption, and that the adoption and resulting equal parental rights must be recognized by Alabama, even if the state disagrees that same-sex couples should be allowed to be equal legal parents and even if the adoption order is inconsistent with the public policies of the state. The short and sweet and unanimous decision in *V.L. v. E.L.* speaks to the strength of this holding.

We also recommend obtaining a court order not just for geographic portability, but also for portability in time. If a couple rests on a birth certificate, and the legislature changes the law of parentage in the future, ambiguity would result. Only a court order will freeze time and clearly survive changes in the law.

In addition, if the non-biological parent's rights are ever challenged in court (by the biological parent, by family members, or by a third-party providers of services or benefits like a health insurance company or pension administrator), a court order will provide much stronger protection than just a birth certificate, contract, and/or pattern of conduct.

The remainder of this article goes through the different ways to secure and protect the rights of your child to his or her two legal parents.

Parentage

The marital presumption of paternity/parentage is a statute that says a husband is the legal parent of a child born to his wife during their marriage, automatically by operation of law at the child's birth. Wis. Stat. § 891.41(1)(a) provides the following:

> Presumption of paternity based on marriage of the parties. (1) A man is presumed to be the natural father of a child if any of the following applies: (a) He and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.

This is how a husband becomes a legal parent and appears on the birth certificate by simply signing a form at the hospital. Nearly every state has such a statute. Wisconsin's version of this statute also has a subsequent intermarriage provision, meaning that if a couple has a child during their non-marital relationship and then they subsequently intermarry, the husband is presumed to be the child's legal parent as if the child was born during the marriage. Wis. Stat. § 891.41(1)(b) provides the following:

> Presumption of paternity based on marriage of the parties. (1) A man is presumed to be the natural father of a child if any of the following applies: (b) He and the child's natural mother were married to each other after the child was born but he and the child's natural mother had a relationship with one another during the period of time within which the child was conceived and no other man has been adjudicated to be the father or presumed to be the father of the child under par. (a).

As mentioned above, there is also a statute in Wisconsin that says a husband is the legal parent of a child conceived by his wife during the marriage, if the child is conceived with donor sperm via physician-supervised artificial insemination and the husband consents in writing to the insemination. Many states have some version of this statute, too. Wis. Stat. § 891.40 provides the following:

> Artificial insemination. (1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of the child shall be the natural father of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and shall file the husband's consent with the department of health and family services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03(7)(bm). However, the physician's failure to file the consent form does not affect the legal status of father and child. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.
>
> (2) The donor of semen provided to a licensed physician for the use of artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.

It has been our firm's position since *Wolf* in 2014, and certainly since *Obergefell* in 2015, that these statutes must be ungendered and applied equally to married same-sex couples, just like other benefits of marriage such as filing joint income tax returns. The courts in *Torres* and *Pavan* have made clear that our firm's interpretation is correct and is required by marriage equality. In fact, it is not a matter of interpretation anymore. There is no more room for debate. Parentage equality is here, and we have four federal cases to cite (the four cases discussed above).

Through one or both of these statutes, the non-biological parent should be declared in a court order – or really, confirmed – to be the legal parent of their spouse's biological child. Since *Wolf* in 2014, our firm has fought hard to obtain such court orders throughout Wisconsin, and not just in supposedly liberal counties. The process has become quite smooth and celebratory in some counties, such as Dane. In addition, Wisconsin Vital Records has been respecting our parentage orders and promptly revising the

birth certificates to list both parents as "Parent/Parent," instead of the passive-aggressive moniker of "Mother/Father."

Parentage is not a step-parent adoption, although it achieves the same end: equal legal parentage cemented in a court order. Faced with the reality that they must secure a court order as recommended, many couples prefer this option to a step-parent adoption, because (1) the non-biological parent is not a "step-parent," and (2) parentage does not require the involvement of an adoption agency or the invasion of privacy of a home study/step-parent screening.

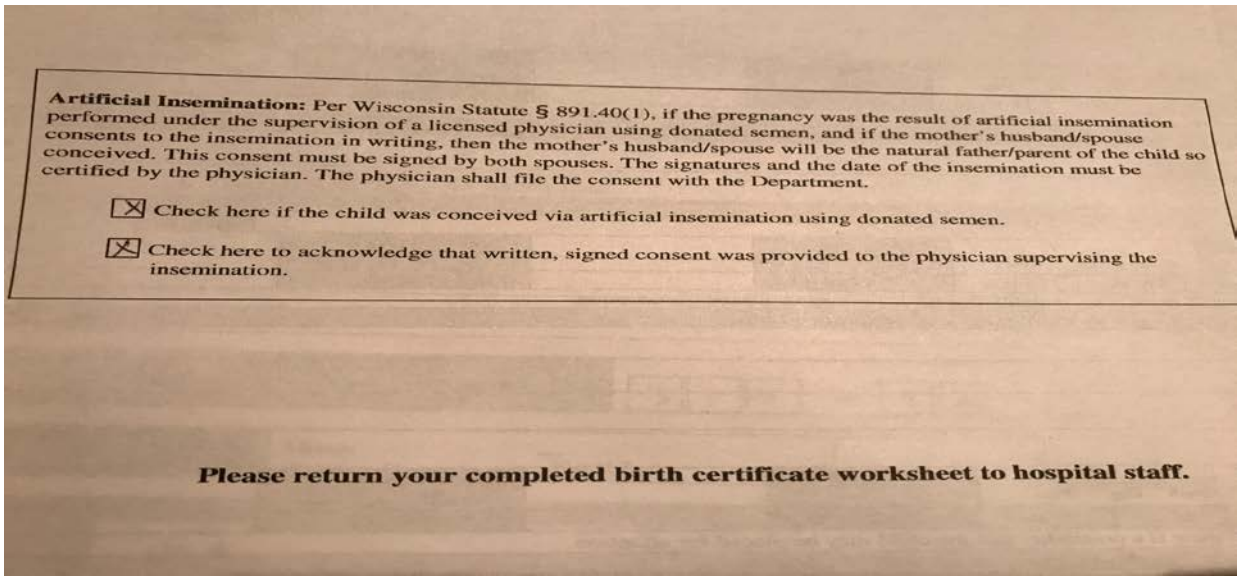
After *Torres* and *Pavan*, it is clear that a married same-sex couple who complies with the artificial insemination statute is entitled to a parentage order and a two-parent birth certificate. The non-biological parent should be confirmed to be a parent in the order, and the sperm donor should be confirmed to have no parental rights or responsibilities. The following is a checklist on how to comply with the artificial insemination statute:

1. The child must be conceived during the marriage;
2. The sperm donor can be known or anonymous. The statute does not require that it be anonymous donor sperm from a sperm bank;
3. The non-biological parent/spouse must consent in writing to the insemination;
4. The insemination must occur under the "supervision" of a physician, which does not necessarily mean the insemination must be *performed* by a physician; and
5. The physician must certify the date of the insemination, that the insemination took place under their supervision, and that the signatures of the spouses appear on the certification.

If a married same-sex couple does not satisfy all of these requirements, prior to *Pavan* the couple would have to complete a so-called step-parent adoption. After *Pavan*, however, it now appears that the couple should be able to rely on the marital presumption of parentage as a kind of safety net, to confirm the parental rights of the non-biological parent. Step-parent adoption should not be necessary anymore under these types of facts.

Completing Your Child's Birth Certificate Form After the Birth

During the *Torres* lawsuit in 2016, Vital Records updated their "Birth Certificate Worksheet" to include a section about artificial insemination. The birth certificate worksheet is what birth mothers fill out after they give birth in order to name their child and obtain a birth certificate for their child. The form still uses the word "husband" instead of "spouse." In general, the birth mother's spouse should be listed in the "husband" section, even if the spouse is a woman. The new(ish) section on artificial insemination reads as follows:



Artificial Insemination: Per Wisconsin Statute § 891.40(1), if the pregnancy was the result of artificial insemination performed under the supervision of a licensed physician using donated semen, and if the mother's husband/spouse consents to the insemination in writing, then the mother's husband/spouse will be the natural father/parent of the child so conceived. This consent must be signed by both spouses. The signatures and the date of the insemination must be certified by the physician. The physician shall file the consent with the Department.

☒ Check here if the child was conceived via artificial insemination using donated semen.

☒ Check here to acknowledge that written, signed consent was provided to the physician supervising the insemination.

Please return your completed birth certificate worksheet to hospital staff.

If a couple has satisfied these facts and completes this section of the form, Vital Records will issue a "Mother/Father" birth certificate, listing the non-biological parent as "Father." The birth certificate can be changed to "Parent/Parent" after a parentage order is obtained, or after a so-called "step-parent" adoption is completed as discussed immediately below.

As discussed above, no matter whether the birth certificate reads "Mother/Father" or "Parent/Parent," a same-sex couple should not rest their family's security on the birth certificate alone. They should obtain a court order confirming equal legal parentage via parentage (above) or so-called "step-parent" adoption (below). See the section above entitled "Do We Still Need a Court Order Regarding Our Parental Rights?" for more about this point.

Step-Parent Adoption

Step-parent adoption has been available to married same-sex couples in Wisconsin since the *Wolf* decision in 2014. Even judges in the most conservative of counties have recognized that they must grant these adoptions now under *Wolf* and *Obergefell*. Our firm has been finalizing such adoptions all over the state since 2014, without much push-back. For the most part, it is a smooth process across the state.

However, choosing to obtain a court order via step-parent adoption is a hard decision to make for lesbian couples who have conceived their child together. The non-biological parent is not a "step-parent." They are not raising a child from a previous relationship. This is their child, from their marriage. Sometimes the non-biological parent is even on the birth certificate already as "Father."

But so-called "step-parent" adoption is a means to an end. Some attorneys explain this by using the new term "confirmatory adoption," meaning the adoption is simply confirming the rights the adopting parent should already have through the parentage laws described above. Some couples decide to endure the adoption process in order to get a traditional, well-recognized adoption order, versus a parentage order which is a newer concept. Or, couples decide on step-parent adoption because they live in a conservative or problematic county, and they do not wish to endure the legal process or attorney fees it might take to convince the court of the rightness of parentage. Step-parent adoption is definitely the path of least resistance.

What exactly is step-parent adoption? Step-parent adoption is the adoption of a child by the spouse of the legal parent. The legal parent's rights are not terminated during this type of adoption. Instead, the "step-parent" comes onto the rights of the legal parent and the couple begins to share parental rights of the child. A couple must be married to complete a step-parent adoption. A step-parent screening is required in Wisconsin before a step-parent adoption can be finalized. The screening is completed by an adoption agency and involves completing questionnaires, background checks, a medical exam, and a home visit. It is not a full home study, but it is not insignificant. A screening should not be required in a parentage matter, on the other hand (and in our firm's experience, it is not). Without any problems, birth certificates are being revised by Wisconsin Vital Records to list both parents pursuant to step-parent adoption orders (as "Parent/Parent").

This is a common strategy for lesbian couples who conceived their child together using donor sperm. It is also appropriate in cases in which a couple has been forced to choose only one of them to adopt their adoptive child, and in true step-parent cases, *i.e.*, when raising a child from a previous relationship.

Second-Parent Adoption

Second-parent adoption is a step-parent adoption for a couple who is not married. This type of adoption is not yet available in Wisconsin and would likely require a new law before it could become available in Wisconsin. Right now, in Wisconsin, to adopt your partner's biological or adoptive child, you must be married. The same is true for different-sex couples.

Joint Adoption

Joint adoption of a child by a same-sex couple has also been possible in Wisconsin since *Wolf*. This type of adoption is different from a step-parent adoption. A joint adoption refers to a couple adopting a child together from foster care or in a private adoption agency placement. Both parents adopt at the same time, from the outset. Wisconsin Vital Records has been recognizing these types of adoption orders and revising birth certificates appropriately, to list both adoptive parents thereon as "Parent/Parent."

This is a common strategy for gay male couples adopting through a private agency, and any couple adopting from foster care. Same-sex couples, if married, should no longer be made to "choose" which one of them will adopt their child from an agency or foster care. However, same-sex couples still face tremendous difficulty and outright discrimination in intercountry adoption. None of the decisions discussed in this article are binding outside the United States.

Guardianship

Guardianship remains an option to protect an LGBTQ family in Wisconsin, although its appropriateness is questionable now that equal legal parentage can be achieved. A guardianship is a court order that establishes a legal relationship between a child and an adult, and may be used to give a non-legal parent the right to make day-to-day decisions about the child. A guardian can make educational and medical decisions for the child, and often, depending on the terms of the policy, can enroll the child on the guardian's health insurance plan. A guardianship does not, however, make the guardian a legal parent, and it can be terminated by the legal parent at any time so long as the legal parent is fit.

A guardianship can be useful for a couple that, for some reason, cannot marry. Marriage is not required for a guardianship. However, it is infinitely inferior to parentage or adoption. It should be used sparingly these days.

Co-Parenting and Co-Maternity Agreements

For many years, a Co-Parenting Agreement was the foundation of an LGBTQ-specific life and estate plan involving children. It is a contract between the parents that states their intentions and commitment to co-parent, stipulates to fact (*e.g.*, "we conceived the child together"), outlines their plan regarding parentage, custody, placement, and support of the child, and often binds the parties to alternative dispute resolution within a set of standards devised by GLAD and NCLR. The contract is useful in parentage, adoption, and guardianship proceedings as an exhibit, as well as upon dissolution of the relationship, death, or incapacity. It is also referenced throughout the couple's life and estate plan to strengthen provisions such as nominations of guardian.

Ideally, these agreements are signed prior to the child's conception or birth, but they can also be signed after the birth. Co-Parenting Agreements are particularly important in co-maternity pregnancies (one's egg, the other's uterus). They can also act as a safety net, in the event a parentage or adoption order is not being recognized and respected. Except in co-maternity cases or cases in which the couple is not married, the necessity of a Co-Parenting Agreement is diminishing, as marriage and parentage equality gain momentum and become a new norm.

Sperm Donation Agreement

A state-specific Sperm Donation Agreement is essential for couples who use known sperm donors to build their families. This is a contract between the sperm donor and the intended parents that makes clear that the intended parents, not the donor, will have exclusive rights to and responsibilities for the child. This contract also provides protections for the donor, for example by releasing him from liability for child support and waiving claims by the child against his estate at his death. This contract should be in place before the sperm is exchanged, much less used. In addition, when a known sperm donor is used, it is recommended that any parental rights he may have be terminated as part of any parentage or adoption proceeding. And it is strongly recommended that the couple offer to pay for an attorney for the sperm donor during the contract negotiations and any court proceedings.

In this way, using a known sperm donor adds two steps to the above-described court proceedings: (1) getting a Sperm Donation Agreement in place; and (2) filing a petition to terminate any parental rights the sperm donor may have. Unless a couple has a strong reason for wanting to use known donor sperm (*e.g.*, it is a close friend or brother), they should consider using anonymous donor sperm from a sperm bank. It is a myth that using known donor sperm will save money. The money you do not pay to a sperm bank will likely go to a lawyer instead for a Sperm Donation Agreement and a termination of parental rights proceeding.

In all cases involving known donor sperm, it is imperative that the couple comply with Wisconsin's artificial insemination statute discussed above. Otherwise, the case could be viewed as a paternity case in the future. Most importantly, the couple should be sure to perform the insemination under the supervision of a physician. Many physicians and clinics are willing to work with fresh, known donor sperm. Our firm can provide referrals upon request.

Other ART Contracts

When an individual or couple decides to use donated genetic material other than sperm (for example, donated eggs or embryos) or decides to build their family through surrogacy, professionally drafted, state-specific contracts are a must. It is now a best practice for both sides of these contracts to be represented by independent attorneys. In fact, some fertility clinics and attorneys even require such representation. Our firm has drafted hundreds of such contracts. The attorneys in our assisted reproduction practice are all fellows in the Academy of Adoption and Assisted Reproduction Attorneys ("AAAA"), the leading organization in this area of law, and are involved in its leadership and development of its ethical rules and best practices.

Life and Estate Planning

Life and estate planning is recommended for every family and every individual, even if you do not have children or many assets. Life planning documents address illness and incapacitation. Estate planning documents address death and assets. All of these documents protect you, your partner or spouse, your children, and your family as a unit. If you fail to make these decisions, the legal system will make them for you. A typical life and estate plan for our families includes: a Will, a Minor Support Trust, various deeds, beneficiary designation forms, a Nomination of Guardian for Minor Child, a Parental Power of Attorney, Powers of Attorney for Health Care and Finances, a Living Will, health care facility visitation authorizations, HIPAA releases, and if necessary, a Revocable Living Trust. There are also new marriage-based tax planning devices available to same-sex couples after *Wolf* and *Obergefell* and the 2013 case of *United States v. Windsor* (which struck down the federal Defense of Marriage Act, "DOMA"). Our firm helps couples navigate these new benefits of marriage within their estate plan, and can even help prepare your tax returns and amend past returns if advisable.

Over the years, our firm has developed LGBTQ-specific versions of these documents that are recommended even post-marriage and parentage equality. Redundancy and safety nets are key in an LGBTQ-specific life and estate plan, as is properly coordinating the documents with whatever court order or contracts a family may choose to do with regard to their child.

Marital Property Agreements and Divorce

After *Wolf*, same-sex couples now have the protections contained in Wisconsin's divorce law and marital property regime. Within that regime is the right to alter those laws in a Marital Property Agreement (usually called pre- or post-nuptial agreements). These contracts address how income and assets will be classified during the marriage, how expenses will be paid, joint ownership of a home or other property, and support rights to maintenance/alimony and property division upon divorce. Pre-nuptial agreements are recommended for all couples, no matter sex or sexual orientation, and especially when the spouses come to the marriage with premarital assets or when there is a stay-at-home parent/primary breadwinner division of labor.

Evaluating Your Options

Deciding how to proceed involves evaluating a variety of factors, including your family's needs and wishes, your county of residence, and the state of the law. The first step towards making a plan is to meet with an attorney experienced in LGBTQ law. We practice statewide and offer a flat fee initial consultation unlimited in time (in person, by telephone, or by Skype or FaceTime) to explain these legal

options in more detail and to help you develop an individualized strategy to protect your family. **To set up an initial consultation, please call our office at (608) 821-8200.**

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