der that recognizes the existence of an alternate payee's right to receive **all,** or a portion of, a plan participant's benefits

It is only private sector plans subject to ERISA that require a QDRO. Although ERISA covers most employer retirement

JV: What information must a domestic relations order contain to qualify as a

• Details about any loans against the

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Establishing Parentage *Post Obergefell* for Same- Sex Couples

By Christine M. Hanisco

Following the US Supreme Court's decision in *Obergefell v. Hodges* (2015), many have questioned whether second-parent adoptions remain necessary. Sadly, the answer is yes.

Despite the 2010 New Hampshire law and subsequent US Supreme Court decisions that legalized same-sex marriage, discrimination persists, and a frequently raised question by same-sex parents is how to best protect their children and preserve their family unit.

To have a child, same-sex couples must rely on either adoption or assisted reproductive technology (ART) using donor sperm or eggs, and where necessary a gestational carrier. Same-sex couples were first allowed to adopt as a couple in New Hampshire in 1999. In other states, the prohibition persisted until as recently as 2016.

Many same-sex couples have looked to the courts to protect their children and family unit by requesting a second-parent adoption. In a second-parent adoption, the non-genetic parent files a petition for adoption of the child with the consent of his or her spouse, in accordance with NH RSA 170-B:4, IV. This provision was intended for stepparents to obtain a judicial order declaring them legal parents. Many would agree that a parent should not have to adopt his or her own child, but without this additional step, the non-genetic parent in a same-sex relationship may not be recognized as the child's parent throughout this country and throughout the world.

Following the US Supreme Court's decision in *Obagefell v. Hodges* (2015), however, many have questioned whether second-parent adoptions remain necessary, as a child conceived or born during the marriage is presumed to be the legitimate child of the couple. See RSA 522:5, 168-B:2, V; see also *Bodwell v. Brooks* (1996)(d iscussing marital presumption).

Sadly, the answer is yes. First, a presumption can be rebutted, and the non-genetic parent is never going to be able to establish paternity or maternity through the testing authorized in RSA 522:1. Second, the naming of the non-genetic parent on the child's birth certificate does not establish him or her as a legal parent. The birth certificate is merely administrative evidence recording the child's birth and does not confer any parental rights.

The reality is that a heterosexual couple's parentage is unlikely to be questioned by a medical provider, insurance company, school, government agency or foreign government. So even if a heterosexual couple relies on ART and donor gametes to conceive a child, it is unlikely that anyone will question how the child was conceived. Same-sex couple do not have that same experience. They may find themselves denied access to employment-based benefits, insurance, decision-making in healthcare, and more.

However, if the non-genetic parent is able to establish his or her parentage through a second-parent adoption, that adoption decree must be given full faith and credit across the United States under article IV, section 1 of the Constitution. This is why second-parent adoption is an attractive legal solution for couples looking to protect their families. See also *VL v. EL,* 136 S. Ct. 1017 (2016) (holding adoption order must be given full faith and credit with no public policy exception).

Further, the marital presumption is based solely on the relationship between the couple, and with same-sex couples necessarily only applies to lesbians, as a gay man will need to rely on a gestational carrier (often referred to as a surrogate).

Gay men, both married and unmarried, may avail themselves of RSA 168-B:12, I, to establish their legal parentage through either a pre-birth or post-birth petition, even if their surrogate lives in or gives birth in a different state. However, although the resulting order should be given full faith and credit throughout the United States, there have been efforts to challenge the validity of such orders. Unlike adoptions, states do not have to give **full** faith and credit, if such an order violates their own public policies.

Lesbian couples, who do not need to use a surrogate, remain at a legal disadvantage. Among those who are married, some choose to live with the risk that comes with the marital presumption, while others prefer to fully establish their rights. However, only those who are married are able to petition for a second-parent adoption, as RSA 170-B:4, IV requires that petitioner and child's parent be married.

The problem, *post-Obergefell,* is that not all judges are granting the petitions due to the marital presumption, because adoption is intended to create a new legal relationship where one did not previously exist. This leaves the couple caught between what should be enough (child was born of the marriage) and the reality of the discrimination still faced by same-sex couples. Ultimately, this does nothing to protect the children.

Potential Alternative

An alternative, which to the best of this author's knowledge has not been attempted, may be for lesbian couples to petition the court for a parentage order pursuant to RSA I 68-B:2, II which states that a "person is the parent of a child conceived via assisted reproduction if the person... consents to the performance of assisted reproduction..." and

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plan;

- A copy of the decree of divorce; and
- Written QDRO procedures for the plan.

Then, follow these steps:

1. Prepare the draft order for approval by the interested parties.
2. Submit the proposed order to the plan administrator for preapproval.
3. Circulate the preapproved order for signature.
4. File the executed order with the court for approval_
5. File the certified court order with the plan and request the issuance of a final determination letter to ensure that the order is qualified and interpreted correctly. Follow up to confirm that the alternate payee has received any benefit election forms and that the participant has reviewed and considered changing beneficiary designations for any remaining benefit.

JV: **What types of provisions should I make sure are in my QDRO?**
JG: Provide precise instructions for the calculation of the assigned benefit. With respect to a defined benefit plan clearly establish: the coverture formula and whether the benefit will be paid over the life of the alternate payee (separate interest) or the life of the participant (shared interest). With respect to a defined contribution plan, establish: the effective date of the assignment; whether investment gains/losses are to be applied; the effect of any loans taken by the participant; and whether any future contributions should be included in the division_

Survivor Benefit Protection. Include survivor benefit provisions to secure the alternate payee's benefit in the event of the death of the participant, either before or after retirement.

Assign Value-Added Benefits. Benefits ancillary to the assigned benefit may represent a valuable portion of the benefit. Specify whether any portion of cost-of-living adjustments or early retirement incentives are to be assigned.

Taxation. A plan may have "after-tax" and "pre-tax" accounts. Provide that the alternate payee's share should be allocated on a pro rata basis among all plan accounts to avoid an inequitable distribution of tax burden.

JV: How can an attorney ensure that the appropriate QDRO is in place to protect a client's share of the retirement plan?
JG: You should work with an attorney experienced in QDRO preparation and the plan administrator to ensure that you accurately identify the type of plan being divided. Requirements and considerations vary based on the nature of the plan, so start by getting the summary plan description and written QDRO procedures. Be cautious about using a plan's model QDRO. These models exist for the administrative convenience of the plan and may need to be modified to protect your client's interests.

.TV: What should be in the Final Decree about the contents of the QDRO and the process of getting the QDRO approved?
JG: To avoid oversight and issues caused by delay, the best practice is to draft the QDRO concurrently with the divorce and incorporate the QDRO by reference in the decree. If the plan administrator has not received and approved a QDRO, there is no obligation to pay the alternate payee. Should the participant die, quit or retire before the QDRO is filed, the alternate payee's benefit is jeopardized. To the extent that the QDRO is not incorporated into the decree, the separation agreement should include comprehensive and definitive provisions for the division of retirement benefits.

JV: What are tips and tricks for navigating the complicated QDRO process?
JG: In addition to exercising diligence and care, prepare your clients for the complexity, expense and length of time it takes to divide retirement plans. Retirement assets are often among the most valuable assets divided in a divorce. Nevertheless, separation agreement provisions are often vague enough to leave essential features open to interpretation and disagreement. By discussing the process for division and agreeing on the details during the divorce process, there is far less likelihood that there will be further litigation.

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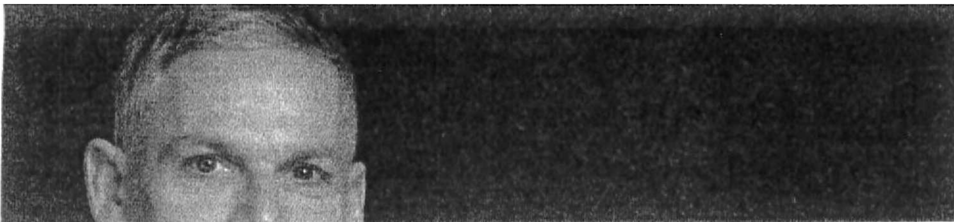
RSA I 68-B:3, which states that "If, under the provisions of this chapter, a parent-child relationship is created between two persons, the child shall be considered for all purposes of law, the legitimate child of the parent."

The probate division of the NH Circuit Court has exclusive jurisdiction over all actions under chapter 168-B, and its equity powers should allow for an order adjudicating the non-genetic parent as a legitimate parent pursuant to the chapter. See RSA 168-B:22; 547:3-b.

This alternative would also be available to unmarried couples who seek to have a child through ART and cannot pursue second-parent adoption. The result would be a judgment that recognizes the non-genetic parent as a legal parent and may be given full faith and credit in other states.

Even if on a day-to-day basis, the relationship between a child and non-genetic parent is recognized, having a legal adjudication of the relationship while the family unit is harmonious can prevent emotional and potentially lengthy and disruptive legal disputes in the future. Ultimately, the best interest of the child is protected by confirming the parent-child relationship through second-parent adoption.

Christine Hanisco is an associate at The Stein Law Firm in Concord, NH She is licensed in New Hampshire and Massachusetts and her practice focuses on third-party family building through adoption and assisted reproductive technology.



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