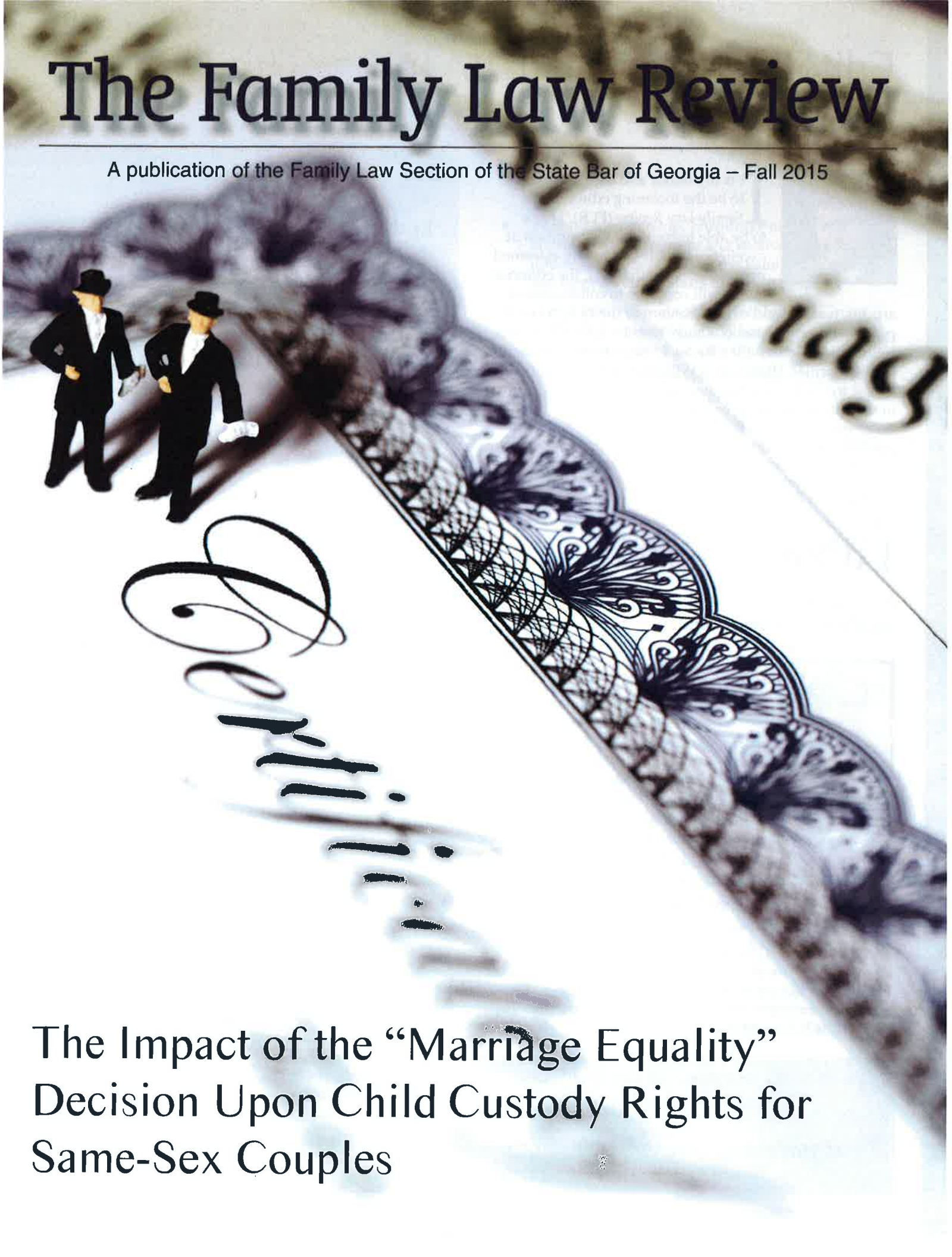
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Fall 2015



The Impact of the "Marriage Equality" Decision Upon Child Custody Rights for Same-Sex Couples

The Impact of the "Marriage Equality" Decision Upon Child Custody Rights for Same-Sex Couples

by Georgia K. Lord

The recent Supreme Court "Marriage Equality" decision in *Obergefell v. Hodges*[1] promises to transform the way in which Georgia's courts evaluate custody rights regarding children of same-sex relationships. There are many open questions regarding the reach of the holding in the case. This means that, for now, there is tremendous uncertainty regarding the extent to which many individuals who are or were in same-sex couples have standing to seek custody of the children born or adopted into those relationships.

Under the *Obergefell* decision, the state must recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. The decision also requires Georgia to issue same-sex marriage licenses on the same basis that it would issue licenses authorizing marriages by spouses of different sexes. Georgia's Attorney General and Council of Municipal Court Judges have announced that Georgia's officials will comply with these holdings. *Obergefell* remedies the prior gaping inequity that existed regarding the treatment of same-sex couples,[2] but it leaves many questions in its wake.

Up until the issuance of the decision on June 26, Georgia law refused to recognize the fact that some families include two parents of the same sex. In the pre-*Obergefell* legal landscape, custody litigation between LGBTQ individuals often hinged upon whether an individual who had functioned as a parent would be recognized as such under the prevailing rules of law without regard to either the realities of the situation or the best interest of the child. A partner who lacked any legal standing was deemed a stranger to the child in the eyes of the law, and any claim they made for custody was subject to dismissal on that basis.

Some of the situations which will arise are:

- One partner is the biological parent and the other partner is the adoptive parent through a second parent adoption or step-parent adoption.
- The partners had a marriage ceremony and license in a state that recognized same-sex unions, lived in Georgia, and had a child while they were living in Georgia. They did not go through an adoption process.
- One partner is the biological parent and the other has not adopted the child but has been informally recognized as a co-parent from the time of the child's birth. The partners were not married in a state that legally recognized their relationship, although they may have had a non-licensed ceremony.
- The partners had a non-licensed ceremony in Georgia and lived in Georgia at the time they had a child. They entered into a parenting agreement. They separated before the Obergefell decision.
- One partner provided the egg used to create the child and the other partner carried and gave birth to the child.
- An egg donor provided eggs used to create fraternal twins for male spouses, with one partner providing the sperm that fertilized one of the eggs, and the other partner providing the sperm that fertilized the other egg.
- Partners had a state-sanctioned marriage when one was a man and one was a woman, but now have a same-sex relationship because one has transitioned to a different sex.

Numerous Georgia statutes addressing an individual's standing to seek custody are based upon many outdated assumptions: e.g., that a child can only have one biological mother, that a child cannot have two legal mothers or two legal fathers simultaneously, and that a marriage consists of a man and a woman. The result is unclear whether and how particular statutory language will apply to same-sex relationships. None of us know what governing principles will emerge from this blend of old and new rules. The best we can do is examine the existing lines of authority that appear to be the most relevant, and leave it to future litigation to determine what results emerge when these arguments are made. Some of the existing rules **appear** to be:

1. In *Bates v. Bates*, 317 Ga. App. 339, 341-42, 730 S.E.2d 482, 484-85 (2012), the Supreme Court of Georgia discussed the concept of second parent adoption by a same sex partner but declined to reach the question of whether the law permits such adoptions. The case concerned a biological mother who participated in a second parent adoption of her child by her partner at the time. After the relationship ended, the biological mother asked the court that had entered the adoption to set it aside. Her motion was denied as untimely. She attempted to bring a discretionary appeal from this denial but was unsuccessful. The adoptive parent brought a custody action, which was dismissed on the basis that Georgia law did not permit second parent adoption. The Court reversed, finding that *res judicata* barred the biological mother from contesting the validity of the adoption. The Court commented

in dicta that, "The idea that Georgia law permits a "second parent" adoption is a doubtful one, ... and the arguments that Nicole presses about the validity of a decree that purports to recognize such an adoption might well have some merit," *citing Wheeler v. Wheeler*, 281 Ga. 838, 840, 642 S.E.2d 103 (2007) (Carley, J., dissenting from denial of cert.), and O.C.G.A. § 19–3–3.1(a) (prohibiting marriages between persons of the same sex). The Court also noted a potential defense of judicial estoppel, saying:

> *In the original proceedings on the petition for adoption, [the biological mother] not only affirmatively invoked the jurisdiction of the Fulton County court, but her own lawyer prepared the decree that she now contends is void. To some of us, it seems that the present attack upon the validity of that decree amounts to an attempt to play the courts for fools, and that is the sort of thing that judges ought not tolerate. Nevertheless, because res judicata is sufficient to dispose of this appeal, we do not reach the question of judicial estoppel.*

317 Ga. App. at 344 n. 5.

The decision in *Bates v. Bates*, 317 Ga. App. at 342-44 & n. 2, also relied upon the facts that the Fulton Superior County had determined that a second parent adoption "was one authorized by the statutes," and that "the Fulton County court was competent ... to consider whether it properly had jurisdiction when it entered the adoption decree." The decision further acknowledged that Georgia law expressly prohibited any recognition of a same sex marriage, but noted that the "second parent's" standing to seek custody did not arise from the relationship between the women but instead from the adoption decree that had been entered. *Bates*, 317 Ga. App. at n. 2, *citing Ga. Const., Art. I, Sec. IV, Par. I(b)*. The Court explained:

> *The parental right to seek custody that Tina asserts in her custody petition is a right that arises, if at all, by virtue of the Fulton County adoption decree, not as an incident of her relationship with Nicole, a relationship with no legal significance. No doubt, Tina and Nicole may have been motivated to petition for adoption as a result of their relationship with one another, but such a motivation does not strip the courts of jurisdiction. After all, the existence of a relationship between two persons of the same sex might motivate them to do a lot of things—to open joint accounts, to acquire and own property jointly, and to contract with one another—and no one would seriously contend that the Constitution strips the courts of jurisdiction to decide disputes about such things just because the parties to those disputes once were involved in a same-sex relationship.*

Presumably, the *Obergefell* decision will mean that legally married same-sex couples who live in Georgia will be able to use the standard step-parent adoption procedure, rather than attempting the second parent type of adoption that some Georgia judges have refused to grant.

2. If one partner is the biological parent and the other is an adoptive parent via step-parent adoption, the adoptive parent stands on the same footing and has the same rights and obligations as a biological parent. Custody is determined by the best interest of the child rule. *Hastings v. Hastings*, 291 Ga. 782, 784, 732 S.E.2d 272, 274 (2012); *see also Ivey v. Ivey*, 264 Ga. 435, 445 S.E.2d 258 (1994), *cited in Ga. Divorce, Alimony, & Child Custody* § 25:1, n. 10. Under this precedent, it appears that if a same-sex partner adopts a child through a step-parent or second parent adoption, that parent stands on equal legal footing with the biological parent.
3. A child's biological mother is the only recognized parent of the child, unless: a) the mother is married at the time the child is born (or within the usual period of gestation); b) she thereafter marries the reputed father of the child and the reputed father acknowledges the child as his; c) the biological father legitimates the child; or d) there is a voluntary acknowledgement of paternity under the process set out in O.C.G.A. § 19–7–22(g)(2). *See Ga. Divorce, Alimony, & Child Custody* § § 11:64 & 25:6; O.C.G.A. § 19-7-25; *Ernst v. Snow*, 305 Ga. App. 194, 699 S.E.2d 401 (2010); *Edwards v. Cason*, 237 Ga. 116, 226 S.E.2d 910 (1976); *see also Ray v. Hann*, 323 Ga. App. 45, 46, 746 S.E.2d 600, 602 (2013). Unless one of these listed circumstances apply, the father has no custodial rights over the child (but may nonetheless be required to assist in supporting the child). The process of voluntarily acknowledging paternity pursuant to O.C.G.A. § 19–7–22(g)(2) gives very limited rights to the father (such as the right to object to the adoption of the child); it does not, standing alone, give the father any right to custody or parenting time.[3]

   In addition, under O.C.G.A. § 19–7–20, "All children born in wedlock or within the usual period of gestation thereafter are legitimate." Does this section, when considered in conjunction with O.C.G.A. § 19-7-25(a), set out above, mean that a child born to a woman who is legally married at the time of birth or conception is also the child of the birth mother's spouse, whether that spouse is male or female? A "best guess" is that a child born to a woman who is in a legally recognized marriage with another woman will also be deemed

to be the child of the birth mother's spouse, and, with regard to custody, both spouses will have the same rights and obligations as the birth mother. Custody will be determined by the best interest of the child rule.

4. The statutory language may be more problematic for male spouses: O.C.G.A. § 19-7-22 provides that a "father of a child born out of wedlock" can petition to legitimate the child. This appears to limit legitimation actions to men who are the biological father of the child but are unmarried.

   In addition, only a biological father, and not a step-parent, may bring a legitimation action. *See Phillips v. Phillips*, 316 Ga. App. 829, 730 S.E.2d 548 (2012), *quoting Veal v. Veal*, 281 Ga. 128, 636 S.E.2d 527 (2006) (Opinion noted there is no clear process by which a non-biological father can seek custody or even visitation of a child to whom he has bonded, encouraged legislature to provide a remedy); *In re C.L.*, 284 Ga. App. 674, 676-680, 644 S.E.2d 530, 532-34 (2007) (Grant of legitimation to biological father displaced original legal father, causing him to lose status to seek custody, because, "[t]he statutes do not contemplate a child having two legal fathers;" Andrews, P.J., in dissent, argued that the original legal father had standing because he should be considered a "parent" within the meaning of O.C.G.A. § 19–7–1(b.1)); *Davis v. LaBrec*, 274 Ga. 5, 549 S.E.2d 76 (2001), *aff'g* 243 Ga. App. 307, 534 S.E.2d 84 (2000) (Best interest rule applied to custody contest between legal father and biological father); *see also Ga. Divorce, Alimony, & Child Custody* § § 25:6 & 25:17.

5. Under O.C.G.A. § 19-7-21, "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."[4] Does this provide another statutory vehicle by which same-sex couples can each be recognized as a parent of the child? Will identification of each spouse on the birth certificate (and perhaps the agreements signed at the time of the assisted reproduction procedure) be sufficient to establish the parent-child relationship, or will an adoption or parentage petition still be required (particularly when neither spouse gave birth to the child)? *See generally* O.C.G.A. Title 19 Chapter 8 Article 2 (relinquishment of embryo to intended parents via adoption or parentage petition). Presumably bringing a petition would be the safer route, but some couples may not be able or willing to pay the financial costs associated with such a petition – and some couples may simply assume that the *Obergefell* decision took care of this problem. Another "best guess" is that a man who is in a legally recognized marriage with the biological father of a child born during the marriage will have standing to seek custody of his spouse's child. It is unclear whether one or both of these men will be required to initiate a legal proceeding to establish their right to custody and it is very uncertain what type of legal proceeding would be appropriate.

6. Just how does Georgia law define the term "parent"? The portion of the Georgia Code which contains several general rules governing the parent / child relationship (i.e., Title 19, Chapter 7) fails to explicitly define the term "parent". The absence of a definition was noted in *Bailey v. Kunz*, 307 Ga. App. 710, 712, 706 S.E.2d 98, 100 (2011), *aff'd*, 290 Ga. 361 (2012).

   The opinion in *Bailey*, 307 Ga. App. at 712, also pointed out that Georgia's Adoption Code defines the word "parent" "for the purposes of the adoption statute." Review of O.C.G.A. § 19-8-1 reveals that, within the context of the Adoption Code, "'Parent' means either the legal father or the legal mother of the child." "Legal father" means a male who has legally adopted a child; was married to the biological mother of that child at the time the child was conceived or was born, unless such paternity has been disproven; married the legal mother of the child after the child was born and recognized the child as his own, unless such paternity has been disproven; or has legitimated the child and has not had his parental rights terminated. "Legal mother" is defined as "the female who is the biological or adoptive mother of the child and who has not surrendered or had terminated her rights to the child." O.C.G.A. § 19-8-1 at § § (6) – (8). The code defines, "biological father" as, "the male who impregnated the biological mother resulting in the birth of the child." O.C.G.A § 19-8-1(6). It is unclear whether these definitions would have any application outside of cases arising out of adoption. If they do, the gender-specific language may be problematic. The Juvenile Code also uses the same definition for "biological father." O.C.G.A. § 15-11-2 (6). Neither section defines the term "biological mother."

   These definitions from the Adoption Code and the Juvenile Code also do not appear to fit comfortably into situations involving commonly used assisted reproduction technologies. For example, if one woman provided the egg used to create a child and another woman carried and gave birth to the child, it is unclear whether the egg donor, the birth mother, or both, would be "biological mothers" of the child. If artificial insemination or another assisted reproduction process was used, hopefully the respective rights of all parties involved were spelled out in an agreement executed at the time the procedure was performed. The rights and procedures set out in O.C.G.A. Title 19 Chapter 8 Article 2 provide a path that can be used to effectuate these contract rights in certain situations.

   As to the parents who have transitioned to a different sex or gender, or who have come out with a different sexual orientation, "best guess" is that they would retain the same parental and custodial rights they possessed before such transition. In the event that parents who have transitioned to a different sex go back to court, however, the statutory language restricting certain actions to those of a specified sex may limit their options.

7. Does it matter whether the couple ended their relationship before the *Obergefell* decision? We find ourselves in a situation in which many couples have made commitments to each other, parented together, and then parted without any means of establishing legal recognition for their family relationships. Prior to 1997, Georgia law provided a means by which its courts could treat a couple's relationship like a marriage whether or not the participants had obtained a license or had a ceremony: common-law marriages were given legal recognition. Current Georgia law provides that valid common-law marriages entered into prior to Jan. 1, 1997, shall continue to be recognized but abolishes common-law marriages entered into after Jan. 1, 1997. O.C.G.A. § 19-3-1.1. Does this prevent a court from treating an unlicensed relationship between same-sex partners like a marriage? Would recognition of a common-law or "virtual" marriage for same-sex couples during this period of transition constitute an equal protection violation?

   It appears likely that in situations in which partners have not had a licensed marriage, and the non-biological parent has not adopted the child, the partner who is neither the biological parent nor an adoptive parent will lack legal standing to seek custody. A "best guess" is that neither the fact that they may have had a non-licensed ceremony, nor the fact that the non-biological parent may have been informally recognized as a co-parent from the time of the child's birth, will be sufficient under current Georgia law to support standing to pursue custody.

   Virtual adoption is an equitable remedy utilized in probate situations when the conduct of the parties creates an implied adoption without a court order. *Morgan v. Howard*, 285 Ga. 512, 512, 678 S.E.2d 882, 883 (2009). The remedy can only be used after the parent's death, however: "Despite its name, virtual adoption does not result in a legal adoption or the creation of a legal parent-child relationship." *Sanders v. Riley*, 296 Ga. 693, 698, 770 S.E.2d 643 (2015).

8. To what extent will a parenting agreement executed by partners who were not legally married be enforceable? *See generally Lathem v. Hestley*, 270 Ga. 849, 850, 514 S.E.2d 440 (1999)(Petition against former domestic partner for property not subject to dismissal; Court reasoned that claim was not based upon alleged status as domestic partners, but instead upon implied constructive trust); *See also Brown v. Gadson*, 288 Ga. App. 323, 324, 654 S.E.2d 179 (2007)(Rejected argument that agreement executed at time of artificial insemination was void as against public policy; Court relied, in part, on fact that agreement was executed in Florida and was authorized by Florida law).

   Provisions in parenting agreements **may** be enforceable on contract grounds. *See, generally, Taylor v. Taylor*, 280 Ga. 88, 623 S.E.2d 477 (2005) (Trial court has authority to disregard any agreement between the parties in making award of custody, since the welfare of the child is the controlling factor in the court's determination of custody); *Turman v. Boleman*, 235 Ga. App. 243, 510 S.E.2d 532 (1998) (Settlement provision imposing particular condition upon mother's visitation rights violated express public policy, and was therefore unenforceable).

9. Some argue that child custody standing rules should accord less weight to the precise biological and legal relationship between the parties and the children at issue, and more weight to the strength and quality of the relationship between the parties and the children. They argue that individuals who have served as "psychological parents" should have standing to pursue custody. In the 1976 case of *Drummond v. Fulton Cnty. Dep't of Family & Children Servs.*, 237 Ga. 449, 451, 228 S.E.2d 839 (1976), the Georgia Supreme Court rejected such an argument. It remains to be seen whether Georgia's courts or Legislature will revisit this issue in the future.

   Although it is too soon to know how such questions may be addressed in the future, language in the majority opinion in *Obergefell* **may** provide some support for those urging courts, legislators, and other public officials to look past the question of whether the couple entered into a government licensed marriage: the public official may, instead, be guided by the children's interest in having their parents' relationship viewed as legitimate. In describing the reasons for according constitutional protection to the right to marry, the *Obergefell* majority opinion said:

   A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., Pierce v. Society of Sisters, *268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material*

costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples.

135 S. Ct. at 2590.

This language is reminiscent of a prior Georgia line of authority that recognizes a strong public interest in presuming that a child is legitimate and in preventing parties from "delegitimizing" their children. *See, e.g., Williamson v. Williamson*, 302 Ga. App. 115, 117, 690 S.E.2d 257(2010) ("The public policy favoring the presumption of a child's legitimacy is one of the most firmly-established and persuasive precepts known in law."); *Baker v. Baker*, 276 Ga. 778, 779-84, 582 S.E.2d 102 (2003)("[T]his Court has recently held that the 'best interests of the child' standard should be applied when a party seeks to 'delegitimize a legitimate child and to break up an existing legally recognized family unit already in existence.'), *citing Davis v. LaBrec*, 274 Ga. 5, 7, 549 S.E.2d 76 (2001); *cf. Pruitt v. Lindsey*, 261 Ga. 540, 541, 407 S.E.2d 750 (1991)(Smith, J., in dissent, argues eloquently that children born out of wedlock should be protected from stigma).

To the extent that I have suggested answers to these questions, these answers are very uncertain and may change very rapidly, as more decisions are rendered and new states administrative rules are promulgated.[5] Particularly during this period of transition, all the current question marks may mean that it will take longer and be far more expensive to resolve custody disputes through litigation. This may give reasonable people additional incentive to settle – and unreasonable people more ways in which to stretch out the battle! ***FLR***

Georgia Lord's Atlanta practice encompasses family law, public access rights under the Americans with Disabilities Act, and estate planning. Prior to her 2014 return to private practice, she served in the Fulton Superior Family Court for 6 years as Staff Attorney to Judge Bensonetta Tipton Lane.

(Endnotes)

1 135 S. Ct. 2584 (2015).

2 In this paper, the term "couple" is intended to include persons who are currently in a marriage or domestic partnership with each other as well as those who were formerly in one with each other. Similarly, the term "partner" is intended to encompass both individuals who are currently in a domestic partnership, **and** those who were previously in such a relationship but are now estranged.

3 A father may also be awarded parenting time in the course of a paternity action. *See, e.g., Petersen v. Tyson*, 253 Ga. App. 431, 433, 559 S.E.2d 164 (2002).

4 Neither the statute nor the cases interpreting it define "artificial insemination," so it is unclear whether the term would encompass the full range of commonly used assisted reproductive technologies, e.g., egg donation, gamete donation, and in vitro fertilization. *See also Pruitt v. Lindsey*, 261 Ga. 540, 541 n. 2, 407 S.E.2d 750, 753 n. 2 (1991) (Court notes in dicta that in cases of artificial insemination, "biological paternity does not correspond with a duty to support.").

5 One resource to check for emerging developments is the website for Lambda Legal. See http://www.lambdalegal.org/blog/state/georgia.