

A BRIEF SUMMARY OF FAMILY LAW AS IT AFFECTS LGBT (LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED) PERSONS IN FLORIDA

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First, this is a summary of some frequently covered areas in family law as they affect LGBT persons in this state. It is not a comprehensive explanation of family law. Further, the law can change at any time. For specific situations, you should consult an attorney.

1. ADOPTION

A Third District Court of Appeal ruled in 2010 that Florida Statute section 63.042(3), which indicates that no person may adopt if that person is a homosexual, was unconstitutional based on equal protection grounds. Florida Dept. of Children and Families v. In Re: Matter of Adoption of X.X.G. and N.R.G., Case No. 3D08-3044 (Fla. 3d DCA, 2010).

It is this writer's opinion that the decision applies statewide as the Attorney General declined to appeal that ruling, and there were no previous decisions based upon the same grounds. There is caselaw on this situation. Therefore, gays and lesbians should be able to adopt statewide in Florida. As for your specific situation, it is always best to consult with an attorney before using any type of adoption such as second parent adoption or assisted reproductive technology ("ART") to enlarge your family. Due to the patchwork of regulations and statutes, what should be simple situations are not always so easy to resolve legally. Also, if you are relocating from another state to Florida, it is a good idea to have certified copies of judgments of adoption for any children of the relationship before you move to Florida.

2. "PALIMONY", DOMESTIC PARTNERSHIP AGREEMENTS, AND CO-PARENTING AGREEMENTS

The courts in this state have upheld at least one agreement between two lesbians that had a property agreement. Posik v. Layton, 695 So. 2d 759 (Fla. 5th DCA 1997). It is important to note the court indicated that the agreement must be

in writing and must not involve sexual services. This case indicates quite clearly why it is best to have written agreements regarding property among couples. These are called domestic partnership agreements, and they spell out what rights and property each person has if the relationship ends. They might also be important in determining a person's estate if one of the parties dies. There is no "palimony" per se in Florida though.

A co-parenting agreement is an agreement determining visitation and custody of a child if the parties end their relationship. They can be prepared prior to the birth of a child or after birth. They are usually used for cases of artificial insemination. We believe the parties should be able to contract regarding these matters, but at least one appellate court in this state has issued an opinion that held that even with a co-parenting agreement, the rights are unenforceable. Therefore, you do enter into them with some risk that they may not be enforceable. However, there is some moral force if someone violates a written agreement. Also, there is the possibility that they may be enforced by courts in the future.

3. MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS

While many states have enacted marriages, civil unions, or domestic partnership registries for gays and lesbians, it is very unlikely that will happen soon in Florida due to the regressive political climate.

If you do choose to avail yourself of a marriage, civil union, or domestic partnership in another state, be aware that you most likely will not be able to take full advantage of any benefits of that in this state at this time with any public institution. Private institutions though may uphold or honor such marriages or unions for certain benefits. Those are also sometimes taxable to you, though. It does appear that the Defense of Marriage Act ("DOMA"), the federal law that says marriages between persons of the same sex are unenforceable for federal purposes, is slowly but surely being declared unconstitutional, so it is not unreasonable that marriages entered into in other states might someday be enforceable in Florida and/or for federal purposes.

If you do enter into a marriage in another state, please be aware that there may be residency requirements if you ever want a divorce. Almost no one goes into a marriage thinking there will be a divorce, but you should check in advance about residency requirements for a divorce. Civil unions and domestic partnerships from other states will almost certainly not be recognized in Florida.

If you have entered into a marriage in another state, there may be limited remedies if you and your spouse split up through an annulment in Florida. For that, you really should contact an attorney. Some localities in Florida have domestic partnership benefits and registries. Keep in mind those are only valid in those particular jurisdictions, and for specific purposes.

There is a lack of caselaw regarding transgendered persons in Florida and marriage. The leading case is Kantaras v. Kantaras. 884 So. 2d 155 (Fla. 2d DCA 2004). In that case, a dissolution was granted by a trial court of someone who was married and then later underwent change of gender. The court also gave the gender-transitioning parent the majority of time sharing for the two children of the marriage. Unfortunately, the appellate case did indicate the parties should be viewed as the gender they were born with in regards to marriage. However, the court specifically indicated that the holding that the marriage was void ab initio (annulled essentially) does not take into consideration the best interests of the children involved in the case, and that they were not determining the legal status of the children or the best interests of the children. They sent the case back to the trial court for further findings. Clearly this is an area where the law is evolving in Florida, so many situations will require prior legal advice.

4. CUSTODY AND VISITATION

If you are involved in a custody battle with a non-gay person – i.e. coming out in a divorce, be aware that there have been several cases in Florida indicating that sexual orientation alone is not a basis for denying custody or visitation. Jacoby v. Jacoby 763 So. 2d 410 (Fla. 2d DCA 2000). This is one of the few areas that judges in Florida have shown that there should be no bias toward gays and lesbians. There are many factors determining who should be the custodial parent in Florida Statutes section 61.13. If you are involved in a custody battle, please review those and discuss with an attorney if at all possible. Keep in mind that the court is supposed to look at the best interest of the child above all else. However, as individual judges may have a lack of experience with gays and lesbians in certain parts of the state, you should consult a local attorney about your case.

5. ARTIFICIAL INSEMINATION, PATERNITY AND CHILD SUPPORT

There are clinics in Florida where you can get artificially inseminated. Once a child is born from that process, you will only be able to put the woman carrying the child on the birth certificate as the mother. You should know that

you may choose the child's name without regard to the mother's last name, i.e. a hyphenated name of partners. There is no legal father if the sperm was donated, pursuant to Florida Statute section 742.14. Further, you may only pay reasonable compensation directly related to the donation of sperm or eggs in the reproductive process. There has been at least one appellate decision giving both a birth mother and an egg donor mother parental rights, but even that is up for further review.

If a person has a child through any process other than donation, you could be a father liable for child support or a mother facing a father with visitation rights. It would be in everyone's best interest to go through a recognized sperm donor clinic and to prepare a Contract for Donation of Genetic Reproductive Material if a directed donation is wanted. It is almost always better to have an anonymous donation. You may wish to contact attorneys after birth about the possibility of a second parent adoption, and whether that is available in your area at that time.

6. ALIMONY

If you are receiving alimony, there has been a recent change in the law that will reduce or end alimony if you are residing in a "supportive relationship". Fla. Stat. § 61.14. This may also cover situations where someone is residing with a same-sex partner after a marriage. However, there may be a good-faith argument that it does not apply to same-sex couples. Further, the court has to consider a number of factors in the statute. There have been few court cases testing this yet, so please consult an attorney if you have concerns about this.

If you are leaving an opposite-sex marriage, you should consult an attorney about your or your spouse's entitlement to alimony. There are a number of factors that can be used to determine the amount and type of alimony that can be awarded. The length of the marriage is a primary consideration, but there are a number of other considerations including need and ability to pay by either of the spouses.

7. DOMESTIC VIOLENCE

The definition of a "family or household member" for purposes of domestic violence includes gay and lesbian couples. This is if they are presently residing together as if a family or have resided together in the past as if a family. Further, you can get a dating violence injunction if you have been threatened or hurt.

To obtain a domestic violence injunction please call the Domestic Relations section of your local circuit courthouse during business hours or contact law enforcement after hours.

8. NAME CHANGES

Some gay and lesbian couples want to change their last names to the same name or hyphenate names. This is a relatively easy process that can be done at any circuit courthouse, and usually will not require an attorney. You will have to be fingerprinted for this after you have filed your petition, and you will have to wait for the results to come back before a hearing on the name change can be held. The court will want to make sure you are not trying to evade law enforcement or creditors before granting the petition. Once it is granted, follow up with the Bureau of Vital Statistics if you were born in Florida. If you were born outside Florida, follow up with the state that issued your birth certificate to get a corrected birth certificate. You will need a certified copy of your name change order to correct a birth certificate.

9. GENDER CHANGES

If you are seeking to go through a gender change, you should first consult with licensed professionals to make sure you are following all of the appropriate protocols. Once you have had gender reassignment surgery, you can have your birth certificate changed with the appropriate documents in Florida. This is mainly an administrative process, and if you have problems, you can consult an attorney. It is easiest if you have your name legally changed to your proposed new future gender name prior to asking that your birth certificate be changed. If you have questions about other states' procedures for your birth certificate, Lambda Legal has a good updated database for that at www.lambdalegal.org.

10. ALTERNATIVE DISPUTE RESOLUTION

If you have a dispute with a same-sex partner, the courts and the law are not always prepared to deal with our issues in the same way that they are straight married couples. Therefore, you may want to consider mediating your dispute or going through a process called collaborative law, which is very much like a guided mediation. If you would like more information about these, please consult a local attorney.