
GUARDIANSHIP AND PARENTAL RIGHTS IN SAME SEX PARTNERSHIPS: A COMPARATIVE PERSPECTIVE

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ABSTRACT

This article examines the issues of guardianship and parental rights arising within same-sex partnerships - a problem that continues despite the attainment of marriage equality in many parts of the world³. While it is undeniably true that legal recognition of same-sex marriage has altered both the social and legislative landscapes, significant obstacles remain for LGBTQ+ families, particularly with regard to the acknowledgment of non-biological parents, adoption, surrogacy, and the legal mechanisms of guardianship⁴. Major jurisdictions included within this comparative study include the United States, United Kingdom, Australia, India, South Africa, and divergent European and Middle Eastern states to highlight the deficits of marriage reforms in overcoming the intersection of cultural, religious, and legal discrimination⁵. International human rights instruments and related advocacy efforts are assessed for varied strengths and weaknesses⁶. The article concludes with pragmatic recommendations for reforming the law and policy, calling for a shift away from marriage-centric equality toward an expansive, inclusive family law policy-one better aimed at securing the rights and best interests of children and parents in same-sex relationships⁷.

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³ NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (Beacon Press 2008).

⁴ Courtney G. Joslin, Protecting Children: Adoption, Assisted Reproduction, and the Non-Biological Parent, 32 *BYU J. Pub. L.* 138 (2018).

⁵ Douglas NeJaime, Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination, 100 *Cal. L. Rev.* 1169 (2012).

⁶ Human Rights Council, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/47/27 (2021).

⁷ Sonia Katyal, The Numerus Clausus of Sex, 84 *UGent L. Rev.* 1 (2017).

Introduction

While the legalization of same-sex marriage represents a turning point in the struggle for the recognition of LGBTQ+ rights in many countries,⁸ for many, the pursuit of true equality remains unfinished-not least in those areas where civil status does not ipso facto confer on same-sex couples the full panoply of parental and guardianship rights⁹. Marriage equality, however important both symbolically and legally, often leaves unaddressed those aspects related to parenting, guardianship, and recognition of diverse family structures¹⁰. In most states, issues of non-biological parental status, access to adoption and to assisted reproductive technologies, and the right to make critical decisions about the welfare of a child remain sites of both legal contestation and social exclusion¹¹.

This article intends to discuss the development and lingering deficiencies in guardianship and parental rights for same-sex families worldwide. This paper identifies the gap that exists between formal marital recognition and substantive family rights, presents current challenges from various legal systems, and reflects upon how international human rights regimes are established to protect family diversity.¹² To this end, the central argument of this article is that actual equality in same-sex families will require reforms beyond mere marriage recognition toward fully inclusive and standardized models of parental rights and guardianship capable of keeping pace with complex realities facing today's families¹³.

Historical and Legal Context

Same-sex marriage is relatively modern, both legally and socially, with wide ramifications in respect of family law. The 2015 decision by the U.S. Supreme Court in *Obergefell v. Hodges* forced all states to recognize same-sex marriages, setting a global precedent¹⁴. Similar decisions followed across Europe, such as those from the European Court of Human Rights in confirming nondiscrimination in respect of family life, most notably in the case of *Schalk and Kopf v. Austria*¹⁵, along with legislative changes, for instance in countries like the

⁸ CARLOS A. BALL, *THE RIGHT TO BE PARENTS* (N.Y.U. Press 2012).

⁹ Catherine J. Archibald, Is Full Marriage Equality Enough?, 16 Geo. J. Gender & L. 1 (2017).

¹⁰ SUSAN GOLOMBOK, *MODERN FAMILIES* (2d ed., Cambridge Univ. Press 2020).

¹¹ Julie Shapiro, The Legal Status of Non-Biological Parents, 48 Fam. L.Q. 1 (2018).

¹² International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia Report* (2023).

¹³ ELIZABETH BRAKE, *MINIMIZING MARRIAGE* (Oxford Univ. Press 2012).

¹⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁵ *Schalk & Kopf v. Austria*, 53 Eur. H.R. Rep. 20 (2010).

Netherlands¹⁶, which in 2001 became the first country in the world to change its laws legally, Spain¹⁷, and most recently Taiwan¹⁸, the first Asian jurisdiction to legalize same-sex marriage in 2019. South Africa is uniquely placed since it has established marriage equality at both a constitutional and statutory level through the enactment of the Civil Union Act 2006¹⁹.

However, marriage equality often stops at the door to parental rights. In the United States, Obergefell addressed spouse recognition but left open questions of parental presumption, particularly in the so-called "second-parent" or non-biological caregiver contexts²⁰. European states with marriage equality still reveal inconsistencies on adoption and parental recognition rights, as those identified by the ECtHR jurisprudence in *X and Others v Austria*²¹. In most regions of Asia and Africa, even in states with decriminalization or partnership registration, there is a lack of comprehensive frameworks for the same-sex parental rights witnessed in the case of India post-*Navtej Singh Johar v Union of India*²². Most developing states, especially those in which family and guardianship are dictated by religious personal law, remain well behind in their protection of LGBTQ+ parents, where laws and policies reinforce their legal invisibility²³.

Key Challenges in Guardianship for Same-Sex Partnerships

One of the common challenges often faced is a lack of universal access to second-parent adoption, in which a non-biological parent seeks joint legal recognition without severing the rights of the biological parent²⁴. States vary greatly within the United States in this respect; progressive jurisdictions such as California and New York allow same-sex couples to perform second-parent adoptions²⁵, while other states heavily restrict or even outlaw such arrangements²⁶. The results of this patchwork of legal regimes have been that children have remained vulnerable in situations where a parent not recognized under the law loses access,

¹⁶ Dutch Civil Code (Burgerlijk Wetboek), Book 1, as amended 2001.

¹⁷ Ley 13/2005 de modificación del Código Civil en materia de derecho a contraer matrimonio (Spain).

¹⁸ Taiwan Judicial Yuan Interpretation No 748 (2017).

¹⁹ Civil Union Act 2006 (South Africa).

²⁰ Courtney G Joslin, 'Obergefell and the (New) Inevitability of the Genderless Marital Family' (2016) 129 *Harv L Rev* 394.

²¹ *X and Others v Austria* App no 19010/07 (ECtHR, 19 February 2013).

²² *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

²³ Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (2018).

²⁴ Melanie B Jacobs, 'Why Just Biology Is Not Enough' (2007) 9 *J Gender Race & Justice* 439.

²⁵ Cal Fam Code § 9000; NY Dom Rel Law § 117.

²⁶ Lambda Legal, *Protected and Served?* (2021).

either due to the dissolution of an intimate relationship or the death of the biological parent²⁷.

Yet the same goes for Australia: while the federal reforms went broadly in the direction of equality, there are wide gaps between territories-in Western Australia, for example, non-biological parents may have difficulty gaining legal status²⁸. Practical implementation is very often retarded by cultural and bureaucratic resistance, even though broad recognition in the United Kingdom was eased by the Children and Adoption Act 2002²⁹.

Emergency Decision-Making and Caregiving

Issues with recognition further complicate the status of parents when urgent medical or educational decisions are being made. In most countries, the non-biological parent does not have any legal right to consent for any medical treatment or admission of children in school or deal with any emergency situation because of lack of legal guardianship status³⁰. Particularly in India, vague wordings of the Guardians and Wards Act have excluded LGBTQ+ guardians in cases where local authorities interpret "natural guardianship" in a strictly heteronormative sense³¹.

Intersection with Discrimination, Religion, and Culture

Religious and cultural norms also remain major barriers. In most Muslim-majority countries, for instance, Sharia-based family law grants primacy to biological and heterosexual parentage³²; hence, guardianship by same-sex partners is illegal³³. The South African constitutional model, enshrining equality and dignity, has driven legal reforms in that country forward; resistance in social and religious forms continues to marginalize LGBTQ+ families, nonetheless, especially in rural and traditional settings.

Case studies suggest a common phenomenon of resilience in the face of adversity. For instance, even as the Indian Supreme Court has proved itself willing to entertain challenges to restrictive

²⁷ NeJaime (n 3).

²⁸ Australian Law Reform Commission, *Family Formation and Legal Parentage* Issues Paper No 1 (2019).

²⁹ Adoption and Children Act 2002 (UK).

³⁰ American Academy of Pediatrics, 'Policy Statement: Ensuring Comprehensive Care for LGBT Families' (2013).

³¹ Guardians and Wards Act 1890 (India).

³² Dawood Ahmed and Yahyaoui Chehraz, 'Islamic Family Law and LGBTQ Rights' (2019) 7 *Oxford J L & Religion* 215.

³³ Amnesty International, 'LGBT Rights in the Middle East and North Africa' (2020).

adoption laws, actual reform is slow³⁴. In Hong Kong, courts have at times granted guardianship to nonbiological same-sex parents; but without recognition of marriages or civil unions, such rulings have very limited scope and are often challenged³⁵.

Parental Rights in Same-Sex Families

Most of the legal frameworks governing ART and surrogacy create glaring disadvantages for same-sex couples. In most jurisdictions, especially where the couples are males, access to IVF and surrogacy is either greatly restricted or completely prohibited. In the Netherlands, probably the country most advanced in terms of surrogacy law, both spouses of a married lesbian couple can be identified at birth as lawful mothers when conception is by donor insemination³⁶. On the other hand, Russia and most Eastern European countries allow surrogacy only for heterosexual couples, while in countries like Poland, the nonbiological parent faces impossible difficulties toward legal recognition³⁷.

Under UK law, the Human Fertilisation and Embryology Act 2008 enables same-sex partners to register as legal parents³⁸, yet international surrogacy arrangements are still legally fraught, particularly for male couples seeking recognition back in the UK³⁹.

Custody in Separations and Inheritance

Parental rights are often most vulnerable when same-sex couples separate. Those legal jurisdictions which prioritize genetic over intentional or de facto parenting create particular vulnerabilities for nonbiological parents who can lose custody and visitation rights. Various countries, including the United States, have privileged the biological parent at times through family courts, using the "best interests of the child" in decisions that undervalue emotional and functional relationships a child develops with a nonbiological caretaker⁴⁰.

Inheritance remains another area of vulnerability. When the law does not presume parental status for both members of a same-sex couple, the children in that situation stand to lose

³⁴ See, e.g., *Shafin Jahan v. Asokan K.M.*, (2018) 16 S.C.C. 368 (India) (discussing autonomy and family rights though not directly on same-sex adoption).

³⁵ See, e.g., *L v. KG*, [2019] HKCFI 998 (Hong Kong).

³⁶ Human Fertilisation Act (Parents and Guardianship) (Netherlands), *Stb.* 2013, nr. 435.

³⁷ See Polish Family and Guardianship Code art. 61⁹ (restricting recognition of non-biological parents)

³⁸ Human Fertilisation and Embryology Act 2008, c. 22 (U.K.).

³⁹ See *Re X & Y* (Foreign Surrogacy), [2009] EWHC 3146 (Fam) (U.K.).

⁴⁰ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (emphasizing parental due-process rights).

inheritance benefits, survivor pensions, or next-of-kin rights upon the death of the non-legal parent⁴¹.

Disparities between Married and Unmarried Couples

Unmarried same-sex couples continue to be marginalized in parental recognition, even under conditions of marriage equality. Most U.S. states use marital presumptions about parental status that disenfranchise unmarried nonbiological parents⁴², while requirements of "stable marital relationships" for joint adoptions in India exclude unmarried couples and same-sex couples, undermining constitutional guarantees of equality⁴³.

International Treaties and Institutions

The CRC provides the base establishing the child's right to a family and nondiscrimination. Progressive interpretations of the CRC emphasize the fact that interests of children are best served in families where legal recognition of all caregiving parents is guaranteed irrespective of sexual orientation⁴⁴. Implementation, however, does vary, with most signatories having entered reservations or interpreting family rights narrowly to exclude same-sex couples⁴⁵.

European institutions have promoted the rights of same-sex families under the European Convention on Human Rights. The European Court of Human Rights established that sexual orientation cannot justify a difference in treatment with respect to questions at stake under family law and adoption, and a number of judgments have been handed down to this effect, such as *E.B. v. France*, 2008⁴⁶ and *X and Others v. Austria*, 2013⁴⁷. Implementation by member states depends upon political will, and some lag behind in their enforcement⁴⁸.

NGO Advocacy and Emerging Trends

Groups like ILGA World, Human Rights Watch, and Amnesty International have promoted legislative and judicial reform through detailed documentation of discrimination and pressure

⁴¹ See Naomi Cahn, *Family Classes*, 95 B.U. L. Rev. 2031, 2050–53 (2015).

⁴² Courtney G. Joslin, *Marital Status Discrimination and Parentage*, 88 Geo. Wash. L. Rev. 1107 (2020).

⁴³ Central Adoption Resource Authority Guidelines (India) (excluding unmarried couples).

⁴⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁴⁵ See Office of the U.N. High Commissioner for Human Rights, *General Comment No. 14*, U.N. Doc. CRC/C/GC/14 (2013).

⁴⁶ *E.B. v. France*, 2008-I Eur. Ct. H.R. 227.

⁴⁷ *X & Others v. Austria*, App. No. 19010/07, Eur. Ct. H.R. (Feb. 19, 2013).

⁴⁸ Council of Europe, *Implementation of ECtHR Judgments: Annual Report 2023*.

for harmonized law⁴⁹. Though the Rainbow Map and Index by ILGA does track global legal progress in those arenas, it can also show regressions⁵⁰: several countries threaten existing parental rights with new restrictions, many under conservative governments.

Emerging trends to 2025 continue to reflect a mix of forward momentum-such as: adoption reform in Latin America; expanded access to assisted reproductive technology in Australia; piecemeal recognition in Hong Kong and Singapore-and increased pushback, as reflected in so-called "Project 2025" proposals in the United States that seek to limit LGBTQ+ adoptions and foster care⁵¹.

Policy Reforms

This requires the same acknowledgement of parents' rights, no matter the ties to the other spouse either by marriage or genetics. This calls upon the policymakers to establish statutory presumptions of parenthood for all the children brought up within loving and intentional family structures, underpinned by clear procedures with an objective of identifying de facto parents from birth. Federal or supranational harmonization-like EU-wide directives-minimizes inequalities and issues of mobility that same-sex parents confront⁵².

Anti-discrimination protections must be robust, extending to all areas of family law, including adoption, surrogacy, guardianship, inheritance, and caregiving⁵³. Religious and cultural exemptions that permit discrimination must be eliminated, where this can be done without infringing on genuine religious liberty. Statutes related to emergency authority could be updated to include as legal parents or caregivers those defined by intent and practice, not biology or marriage alone.

Family law should reflect today's diversity in the configurations of kinship. The inclusive models, such as the standard of the "best interests of the child" abstracted from marital or genetic status, provide clear grounds for evaluating all caregiving arrangements on their merits⁵⁴. The increasingly powerful role played by reproductive technologies, genetic editing,

⁴⁹ ILGA World, *State-Sponsored Homophobia Report* (2024).

⁵⁰ ILGA Europe, *Rainbow Map & Index 2024*.

⁵¹ Human Rights Campaign, *Project 2025: Threats to LGBTQ+ Families* (2024).

⁵² Douglas NeJaime, *The Legal Parentage of Intentional Parents*, 125 Yale L.J. 1134 (2016).

⁵³ United Nations Human Rights Council, *Discrimination and Violence Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 (2015).

⁵⁴ See Family Law Act 1975 (Austl.) § 60CC (codifying best-interests standard).

and shifting forms of surrogacy arrangements creates an imperative for frequent revisiting of the law, so that technological developments never increase legal exclusion⁵⁵. Finally, climate change and displacement pose particular risks for LGBTQ+ families through loss of documentation or geopolitical instability; strong international norms are needed for the protection of cross-border families⁵⁶.

Conclusion

LGBTQ+ individuals have strived since long to attain their due dignity in society by marriage equality. Restrictions on parental rights of same sex couples have left the children in such families vulnerable. Steady legal reforms followed by cultural change can truly improve modern family law and ensure equality in a true sense. The future of an all inclusive society therefore, begins with marriage equality leading to equal parental rights for all families irrespective of gender and sexual orientation⁵⁷.

⁵⁵ Hague Conference on Private International Law, *Parentage/Surrogacy Project* (2023).

⁵⁶ UNHCR, *LGBTQ+ Refugees and Families at Risk* (2023).

⁵⁷ Ryan Thoreson, *Beyond Marriage Equality: The Future of LGBTQ+ Family Rights*, 45 Hum. Rts. Q. 125 (2023).

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