

**LINDA ROBERSON'S CAPITOL TIMES COLUMN
ARCHIVED COLUMNS – NON-TRADITIONAL FAMILIES**

July 15, 2004

Q: My life partner and I are adopting a child. We understand that Wisconsin law will not currently permit both of us to be designated as legal parents. How can we best protect our daughter's relationship with both of us, when only one can be a "parent" under the law?

A: From your question I assume that you are a gay or lesbian couple struggling with current discriminatory policies that operate to deprive your child of the legal advantages of having two parents. While more than a dozen states now permit two-parent adoptions for families like yours, Wisconsin is not one of those states. However, there are several things that you can do to improve your situation.

First, you need a written agreement specifying that both of you have responsibilities for caring for and financially supporting your daughter and that those responsibilities will continue whether or not you continue to reside in the same household. You should consult an attorney with experience in drafting these joint custody agreements for expert guidance.

Second, the adopting parent should designate the non-adopting parent as his/her agent for making health care and educational decisions for the child. This document should help the non-adopting parent in dealing with third parties about the child's needs.

Third, be sure that you both have wills in place acknowledging the parent-child relationship between your daughter and the non-adopting parent, and designating the non-adopting parent as guardian of the child after the adopting parent's death.

There are other things you can do to demonstrate the existence of a parent-child relationship. The child should bear the non-adopting parent's surname (hyphenated with the adopting parent's surname, if you choose). Keep records – photographs, home movies, the child's drawings of "my family", notes from the child, etc. – showing that the child sees the non-adopting parent as a parent equal in status and affection to the adopting parent. The child should refer to both of you by a name commonly seen in this society as denoting parenthood. It may be "Momma and Mother" or "Daddy and Pop" or using the word for mother or father in another language that has meaning for your family – but the child shouldn't call the adopting parent "mom" or "dad" while referring to the other parent by his or her first name. Keep records to prove that the non-adopting parent has financially supported the child.

Some families in your situation have moved to another state after completing the adoption process here with one parent, and obtained a second-parent adoption. At this point it is not clear whether the out-of-state adoption would be accepted in Wisconsin in

the event of a dispute between the parents.

April 22, 2004

Q: What difference does it make legally if you marry as opposed to entering into a civil union?

A: Marriage provides couples with more than a thousand benefits under federal and state law. Civil unions may provide none of these benefits, or they may make the partners eligible for participation in benefits available under state law, depending on the state and the care and thoroughness with which its civil union statutes were enacted. Partners in civil unions are not eligible for benefits under federal law, and will not be unless or until federal law is revised to provide such eligibility.

State benefits include the right to file a joint state income tax return, automatic inheritance rights, child custody rights, joint adoption, economic rights at divorce, joint bankruptcy proceedings in state court, wrongful death benefits, and a privilege protecting a spouse's right not to testify against the other spouse in state court.

Some important federal benefits are the right to file a joint federal income tax return, Social Security benefits at a spouse's death and at retirement, spousal immigration rights, protection of one spouse's interest in a pension earned by the other spouse, joint bankruptcy proceedings in federal court, and a privilege protecting a spouse's right not to testify against the other spouse in federal court.

Other benefits available to married persons but not mandated to be offered to civil union couples include eligibility for health insurance coverage on one partner's group policy, entitlement to bereavement leave or family leave offered as an employment fringe benefit, and reduced rate or family memberships in health clubs and other organizations.

These are just a few of the many benefits married people enjoy by virtue of their marital status. Check www.actionwisconsin.org for a more comprehensive look at this question.

Similarly, the issue of Wisconsin acknowledgment of a same-gender marriage occurring in another jurisdiction has not been squarely raised and decided. In general, all U.S. states accord "full faith and credit" to the laws of their sister states. Thus, a marriage occurring in, say, Illinois is recognized as a valid marriage in Wisconsin. This deference to other states' rules extends to common law marriage (marriage without a ceremony or license that is assumed after the passage of a required period of time during which the parties live as spouses and hold themselves out as married): even though Wisconsin does not permit common law marriage in this state, our courts recognize common law marriages from Iowa, a state that does permit them. By analogy, Wisconsin courts should accept the marriage of same-gender couples occurring in Massachusetts, just as they would accept the marriage of opposite-gender couples occurring in Massachusetts. If a

Wisconsin court should apply standard full faith and credit analysis to a same-gender marriage in another jurisdiction, however, you can be sure that conservative forces would clamor for immediate enactment of a so-called “Defense of Marriage” statute in Wisconsin that would prohibit recognition of same-gender marriages. Such laws, which have been enacted in many states, dangerously erode the principle of full faith and credit that has permitted citizens in our mobile society to rely on the rights and privileges they enjoy and not worry about losing those rights if they move across a state line. U.S. constitutional law has long protected the right to travel, and the loss of important civil rights as a result of a move may violate that constitutional protection.

Complicating the issue further is the possibility of amendments to the state and federal constitutions that would deprive same-gender couples of the right to marry. Proponents of such amendments apparently concur that, in the absence of a change to the U.S. and or state Constitution, same-gender couples have the right to marry. Such amendments, if passed, would constitute only the second time in the history of our nation that the Constitution has been changed to deny civil rights. (The first time was the passage of the Prohibition amendment, which was subsequently repealed.) They would be the *only* instance in which the Constitution was changed to deny basic human rights to a minority group: even during the unfortunate period of our history in which Black people were not considered “persons” under the law, the federal and state Constitutions did not prohibit interracial marriage.

The law in this area is uncertain and is changing rapidly. One cannot help but wonder how some marriages are protected by failing to acknowledge others. I can tell you that I don’t believe that my 35-year-old heterosexual marriage is affected in any way by yours, and I wish you luck in accomplishing it.

March 11, 2004

Q: I know that gay and lesbian couples are getting married in several states as well as Canada and other countries. My partner and I have been in a committed relationship for fourteen years and would like to marry. Can we do this in Wisconsin? If not, can we do it elsewhere and have it recognized in Wisconsin?

A: Wisconsin law neither specifically prohibits nor explicitly permits marriage between persons of the same gender. The predominant interpretation of our family code, accepted by most if not all license-granting authorities, is that statutory language referring to “husband” and “wife” means that there must be one spouse of each gender. To date, the constitutionality of that interpretation has not been challenged in any reported case. Nonetheless, it is unlikely that Wisconsin authorities will issue marriage licenses to same-gender couples, relying on the wording of the statute and the commonly held interpretation that husbands are male and wives female. This interpretation is currently being challenged in other states, but to date I am not aware of any such litigation in Wisconsin.

July 3, 2003

Q: My partner and I are thinking about moving in together. Are there legal steps we should take to protect both of us?

A: Because you refer to a “partner” I assume this is not a simple roommate situation but rather a long-term personal commitment. Although there was a time, not so long ago, when courts would not enforce agreements between unmarried cohabitants, Wisconsin law (and the law of most other states) now recognizes the right of domestic partners to enter into property and support agreements. These agreements can accomplish any number of results, from establishing ownership interests in property to providing for support rights if the relationship ends to waiving all claims to property or support. In the absence of an agreement, the courts may impose equitable remedies to give relief to a partner who is disadvantaged at the termination of the relationship – so negotiating a fair agreement at the outset can save unpleasant surprises and significant legal fees.

Additionally, domestic partners should pay special attention to their estate planning. Properly drawn wills, beneficiary designations, and powers of attorney will ensure that the partners’ wishes are carried out if one of them becomes disabled or dies.