

## The Expanding Nature of Legal Recognition of Families

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When many people picture a family, they conjure images of a “traditional” family— a monogamous marital relationship between a man and a woman, who give birth to a child to whom both parents have a biological connection. For many years, however, families have not been so narrowly defined in practice. Divorce, blended step-families, adoption, LGBT families, all have contributed to the rich tapestry of different family configurations in this country.

There is no longer one kind of family unit, and society has recognized over time that many, through either desire or necessity, will order their relationships in ways that do not fit into a two-parent paradigm. Forming a family can occur in a number of different ways that were almost impossible to consider only 30 years ago. The New Jersey courts and legislature have been at the forefront in many ways of providing an expansive view of the legal recognition of different family formations.

With New Jersey’s recent passage of gestational surrogacy legislation, the state has taken another step toward recognizing that the way people choose to create and raise their families can be as unique as children themselves. However, with each unique family structure comes unique legal obstacles and considerations.

There are two primary ways that the law recognizes family formations: interpersonal relationship status and parental status. These categories encompass the myriad of different rights and responsibilities, any of which may be interrelated; however, in many ways, laws that recognize the expanding nature of these two types of statuses have developed independently and concurrently over time.

## Interpersonal Relationship Status

Interpersonal relationship status refers to the legal recognition of relationships among non-biologically related individuals, usually of a romantic or sexual nature, for example, a dating relationship, marriage, or civil union. A number of landmark decisions in the last decade have gained a great deal of attention in expanding the availability of legally recognized interpersonal relationships, specifically the availability of the status of marriage to same-sex partners.

New Jersey has been at the forefront of providing legal recognition to same-sex couples, though for many years such recognition was available only as a separate status; first domestic partnerships, and later civil unions. Although civil unions were intended to provide the same state rights to same-sex couples as opposite-sex married couples, federal benefits were not available to same-sex couples in civil unions.

In 2013, the Supreme Court, in *United States v. Windsor*, struck down a section of the federal Defense of Marriage Act (DOMA) which defined marriage as between one man and one woman. The *Windsor* ruling resulted in numerous federal benefits for same-sex couples who were legally married in a jurisdiction that performed same-sex marriages. However, in the *Windsor* case, the Supreme Court declined to address whether states could define marriage as between one man and one woman.

The *Windsor* decision was also clear that the federal benefits afforded to married couples were not considered available to same-sex couples who entered into a civil union. The U.S. Supreme Court had confirmed that civil unions for same-sex couples were separate and inherently unequal to the status of marriage.

In October 2013, the New Jersey Superior Court, citing the *Windsor* decision, ruled that same-sex couples have the right to marry in New Jersey.

In June 2017, the U.S. Supreme Court issued its historic ruling in *Obergefell v. Hodges*, which holds that the Federal Constitution guarantees same-sex couples the right to marry throughout the

country. As a result of this decision, same-sex couples who choose to marry can gain all the financial and legal rights and responsibilities of opposite-sex married couples, regardless of which state they call home.

Legal recognition of interpersonal relationships has not only grown in the context of same-sex marriage, but also in the area of domestic violence. Abuse can occur in any type of relationship, and the New Jersey courts and legislature have taken an increasingly expansive view of what constitutes a victim under New Jersey's Prevention of Domestic Violence Act.

The Domestic Violence Act, N.J.S.A. 2C:25-19(d), defines a victim as "any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member." The act additionally defines a victim as someone who has a child in common or anticipates having a child in common with the perpetrator, or someone with whom the victim has had a dating relationship.

These categories are purposefully very broad in order to provide the utmost protection to victims of domestic violence. Under these definitions, a victim can seek protections from abuse by their spouse or unmarried sexual partner, but also a former boyfriend that the victim hasn't spoken to in many years, or an in-law who may have lived with a victim for a short period of time in the past. Courts have even expanded these definitions to include parties who engaged in a single sexual encounter. The expanding recognition of these non-traditional interpersonal relationships in the domestic violence realm achieves the important legislative intent to combat the scourge of domestic violence in our society.

## Parental Status

Parental status refers simply to the legal recognition of the relationship between a parent and child which the law confers and imposes rights and obligations. There are three main ways in which New Jersey recognizes parental status: biological relationships, marital relationships and intentional relationships.

The parental status based upon biology is self-explanatory. This is the most traditional form of establishing a parent-child relationship. In most cases the mother gives birth to a child, and the father acknowledges his genetic link to the child by placing his name on the child's birth certificate. Genetic testing can be used by the courts to resolve disputes and establish biological connections between parents and children.

The parental status based upon the marital relationship derives from the legal presumption that if a child is born to two parties who are married to one another, a parent-child relationship exists between the child and each party to the marriage. This rebuttable presumption has long-standing historical roots in common law. The marital presumption, often a legal fiction, was originally intended to combat the stigma of illegitimacy of the child if the father was considered unknown. This marital presumption is enshrined in the New Jersey Parentage Act, which states that husbands are presumed to be the parent of children born to their wives during their marriage.

While the Parentage Act is gender specific, same-sex couples have been successful in arguing that the presumed parental status should extend to same-sex partners whose spouse gives birth to a child to whom the same-sex partner may not be related.

While parental status based on biology or a marital relationship remains the most prevalent way of forming a parent-child relationship, courts have begun to recognize that the intention of parties and an individual's role in a child's life can also factor into decisions regarding parent-child relationships and family formation. Parental status can also be conferred in a number of ways based upon an intentional relationship, meaning a parent intends to create and/or fulfill the role of a parent to a child.

The most traditional example of intentional parental relationship is adoption. A party stands before the court and requests to be deemed the legal parent of a child. If successful, the adoptive parent is provided all of the same legal rights and responsibilities of a parent as if that parent had given birth to the child themselves.

Another intentional approach of family formation is the use of assisted reproductive technology (ART). ART techniques have been in use for many years and can take many forms, such as

intrauterine insemination, or in-vitro fertilization (where the carrier may or may not be biologically connected to the child).

In recent years, a controversial ART procedure, which is not approved within the United States, has resulted in more than two genetically related parents. In 2016, a baby was born with the DNA from three people—the mother, the father and an egg donor. The procedure removed part of the mother's mitochondrial DNA, which carried a disease that would have resulted in the child having a fatal neurological disorder within a few years of birth. Here, the result is a child with a genetic link to three different people. The courts have not weighed in on whether all three biologically connected adults would be considered parents, or would have any custodial rights or support obligations to the child.

Gestational surrogacy is another means to create an intentional parental relationship. New Jersey's recently passed gestational surrogacy bill provides a legal framework for individuals and couples who wish to form a family but cannot do so through traditional procreative means, for example an infertile couple or a same-sex partnership. The bill allows people in New Jersey to enter into contracts with surrogates to carry a fertilized egg of another person to term. The law provides certain legal protections for the surrogate, the intended parents and the child. In this scenario, the surrogate agrees to give up all parental rights they may have otherwise been able to assert. By recognizing gestational surrogacy as a legitimate means of creating a parental relationship with the child, New Jersey has taken an important step toward recognizing the continuing importance the intention of the parents in family formation.

Intentional relationships can also give rise to legal recognition of families through coparenting or multi-parenting arrangements. Co-parenting refers to when individuals or couples agree to raise a child together with other individuals or couples without the existence of a romantic relationship, such as platonic friends who conceive and/or raise a child together, usually in more than one household. It is akin to the type of arrangement often followed by former spouses who share physical custody of a child, but without the potential hostility of divorce.

In a recent published trial court decision, the New Jersey court wrestled with a coparenting arrangement between a same-sex couple and their female friend with whom they decided to conceive and raise a child. In the case of *D.G. and S.H. v. K.S.*, the parties amicably co-parented for

years and shared parenting time and caretaking responsibilities for the child. Unfortunately, over time their co-parenting arrangement broke down, and the same-sex couple sought a custody determination from the court. The court recognized that the non-biologically related same-sex partner was considered a psychological parent to the child because the parties intended for him to form a parent-child relationship, he took on a significant caretaking function of the child, and most importantly a parent-child bond had formed between him and the child. While he was not considered a legal parent for purposes of the Parentage Act, the court essentially approved the co-parenting arrangement and all three parties were afforded equal custody of the child.

The recognition of various family structures has evolved and expanded over time. The courts have shown an increasing willingness to recognize more varied forms of interpersonal relationships and parent-child relationships. Changes in society necessitated that the law and the courts evolve past the heteronormative concept of a “traditional family” and adapt to the many different ways that people form families. Every family is unique, and experienced, informed advocacy can be all the difference when, and if, a court addresses a family’s individual circumstances.

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