

Mediating for Extraordinary Families

By: Natalie F. Baird-King, Esq. & Sarah E. Kay, Esq.
King Kay Solutions, LLC

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1. Family Law Cases involving Special Needs Children

I. DEFINITIONS AND QUALIFICATIONS

A. Terminology

Is it OK to call a person or child with a disability *disabled*?

This question has been discussed extensively within the disability community. Is it preferable to use *person-first language* (saying “person with a disability” or “person with autism” or “person with deafness”) or *identity-first language* (“disabled person” or “autistic person” or “deaf person”)? Each person with whom you speak will have an individual preference. However, the consensus is to use *identity-first language* because the disability is often a vital part of who they are.¹

B. Definition of Disabilities/Special Needs Within Education

*"If we're going to talk, then let's talk. Forget what is polite or proper and delve right into what is sincere and honest. Lead me down the labyrinth of your true, spectacular self. I am not interested in pleasantries. If you want a conversation, then let's get lost."*²

Under the Individuals with Disabilities Act³, first passed in 1975 under the name *Education for All Handicapped Children Act*, a special needs child will have a diagnosis in one of 13 categories:

1. Autism
2. Deaf-blindness

¹ Brittany Wong, *It's Perfectly OK to Call a Disabled Person 'Disabled,' and Here's Why*, HUFFINGTON POST, https://www.huffpost.com/entry/what-to-call-disabled-person_1_5d02c521e4b0304a120c7549 (last updated Sept. 16, 2021).

² Attributed to Beau Taplin, REAL TALK.

³ *About IDEA*, U.S. DEPARTMENT OF EDUCATION, <https://sites.ed.gov/idea/about-idea/> (last visited Jul. 26, 2022).

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3. Deafness
4. Emotional disturbance
5. Hearing impairment
6. Intellectual disability
7. Multiple disabilities
8. Orthopedic impairment
9. Other health impairment [commonly used for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder]
10. Specific learning disability
11. Speech or language disability
12. Traumatic brain injury
13. Visual impairment.

For a child to qualify as “special needs” under the IDEA to receive services, the diagnosis above must have an adverse effect on the child’s performance in school or life.

C. Resources

Some resources to help you learn more (definitely *not* an exhaustive list):

1. American Academy of Child & Adolescent Psychiatry (AACAP): This organization's website provides a wealth of informational and educational resources on a variety of childhood and adolescent conditions. Website: <https://www.aacap.org/>
2. American Council of the Blind (ACB): This organization is comprised of persons who are blind or visually impaired who seek equality and independence. Website: <https://www.acb.org/>
3. American Foundation for the Blind (AFB): This organization provides resources to persons with vision loss and their families. Website: <https://www.afb.org/>
4. American Psychiatric Association: This organization and website promote awareness, education, and resources about and for persons with mental illness. Website: <https://www.psychiatry.org/>
5. Anxiety and Depression Association of America (ADAA): This organization exists to prevent, treat, and cure anxiety, depression, and related disorders through education and research. Website: <https://www.adaa.org/>
6. Center for Autism and Related Disabilities (CARD): There are various CARD chapters throughout Florida. This free community-based program exists to optimize

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the potential of persons with autism and related disabilities. CARD University of Miami and Nova Southeastern University Website: <https://www.umcard.org/home/> and CARD University of South Florida Website: <http://card-usf.fmhi.usf.edu/index.html>

7. Childhood Arthritis and Rheumatology Research Alliance (CARRA): This organization conducts research to prevent, treat, and cure childhood arthritis and other rheumatic diseases. It also partners with children and their families, so research addresses the most important questions to those impacted by the conditions. Website: <https://carragroup.org/>.
8. Consortium for Citizens with Disabilities: This coalition of national organizations advocates for “federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.” Website: <http://www.c-c-d.org/>
9. Foundation Fighting Blindness: This organization funds research to find cures for blinding retinal diseases. It has a wealth of research and information about various conditions that cause blindness or vision impairment. Website: <https://www.fightingblindness.org/>
10. Margaret A. “Peggy” Graham, *The Many Meanings of “Special Needs”*, 42 ABA FAM. ADVOCATE 6 (Winter 2020).
11. Guide Dogs for the Blind: This organization seeks to create partnerships between blind and visually impaired people, dogs, and communities. Website: <https://www.guidedogs.com/>
12. Hearing Loss Association of America (HLAA): This organization was established and continues to be run by people with hearing loss to educate and provide resources for persons with this disability. Website: <https://www.hearingloss.org/>
13. Learning Disabilities Association of America (LDA): LDA supports and educates persons with learning disabilities and advocates for their success. Website: <https://ldaamerica.org/>
14. National Federation of the Blind: This organization is among the oldest and largest national organizations of blind persons in the United States and exists to provide information and support to blind persons and build a community full of opportunities for them. Website: <https://nfb.org/>
15. National Institute of Arthritis and Musculoskeletal and Skin Diseases: This organization supports research into the causes, treatment, and prevention of arthritis and musculoskeletal and skin diseases. Website: <https://www.niams.nih.gov/>

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16. National Institute of Mental Health (NIMH): This federal agency provides research and education on mental disorders. Website: <https://www.nimh.nih.gov/index.shtml>
17. Next for Autism: Advancing Futures for Adults with Autism (AFAA): This organization strives to design and launch innovative programs to enhance the future of autistic persons. Website: <https://www.nextforautism.org/>
18. Pacer Center: A center providing information and training for families of children and youth who have any disability. Website: <https://www.pacer.org/>
19. Philip Schipani, *Special Needs: Definitions and Qualifications*. In *Special Needs Children and Family Law*, THE FLORIDA BAR CONTINUING LEGAL EDUCATION COMMITTEE AND THE FAMILY LAW SECTION (Oct. 11, 2019).
20. Spina Bifida Association: This organization devotes itself to research, advocating, and education about spina bifida, offering a wealth of resources to persons with the birth defect. Website: <https://www.spinabifidaassociation.org/>
21. The ARC: This nationwide organization promotes and protects persons with intellectual and developmental disabilities so they can enjoy full participation within their communities. This website offers links to other relevant organizations and websites and including ones that address advocacy, employment, and initiatives. Website: <https://thearc.org/>
22. U.S. Department of Health and Human Services: Parenting a Child with a Disability: this website includes an extensive Q&A on resources for families with children. Website: <https://www.hhs.gov/answers/programs-for-families-and-children/index.html>

II. EDUCATIONAL CONSIDERATIONS

A. Background

Schools play a significant role in people's lives from birth through early adulthood and, for many, well into the adult years. For disabled persons, school is an even more critical component. It is not simply a source of grades but also an environment to learn essential life skills such as social skills, emotional regulation, problem-solving, executive functioning, vocational skills, self-care, and transitional services.

B. Two Critical Laws

There are two critical laws that both assist and protect disabled children in educational environments: Section 504 of the Rehabilitation Act of 1973,⁴ as amended (Section 504) and the Individuals with Disabilities Education Act (IDEA).⁵ A disabled child may have accommodations under Section 504 (often called a “504 Plan”) or special services under an individualized education plan (IEP), or both.⁶ Of the two, the IEP is more comprehensive. Therefore, not all children qualifying for a 504 Plan qualify for an IEP; however, the reverse is likely true.

1. Section 504 of the Rehabilitation Act of 1973, as Amended: This was among the first civil rights laws of the United States.⁷ It prohibited programs receiving federal funds from discriminating against a qualified person based on a disability. This includes public schools as they receive federal funding. The definition of “qualified” under this law is limited.⁸ For educational settings, the definition is even more limited.⁹ The 504 makes reasonable accommodations, so the disability does not prevent the child from accessing school. A simple example: a child with a severe perfume allergy could have a 504 Plan permitting him time for shots or clinic appointments, an emergency healthcare plan, training for the school health consultant on proper monitoring and dispensing of medication, use of air purifiers, education for necessary persons like physical education teachers, and adequate precautions minimizing child's risk of exposure to perfumes during the school day. A 504 Plan is not as focused on the child's academic process but, instead, the child's ability to access the school.
2. Individuals with Disabilities Education Act (IDEA): Congress passed a landmark legislation in 1975 titled the “Education for All Handicapped Children Act” which required all schools receiving federal funding to provide “free and appropriate public education” (FAPE) to all disabled children, evaluate them, and create educational plans for them to emulate for them as close to the educational experiences of their non-

⁴ 29 U.S.C. § 794 (a) (2020). Title II of the Americans with Disabilities Act of 1990, 28 CFR Part 35 (2020), extends the protections of Section 504 to *all* services, activities, and programs by state and local governments, irrespective of if they receive federal financial assistance. *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEPT JUST. CIV. RTS. DIVISION, https://www.ada.gov/ada_title_II.htm (last visited Aug. 6, 2021). Only Section 504 will be discussed in these materials.

⁵ 33 U.S.C. §§ 1400-1482 (2020).

⁶ However, if a child is entitled to both, the IEP typically includes all accommodations as it is the more comprehensive document.

⁷ Nora McGreevy, SMITHSONIAN MAGAZINE, <https://www.smithsonianmag.com/history/history-30-years-since-signing-americans-disabilities-act-180975409/> (July 24, 2020).

⁸ 45 C.F.R. § 84 (2020).

⁹ 45 C.F.R. § 84 (l) & (j) (2020).

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disabled peers as is possible.¹⁰ This landmark legislation has since evolved and is currently known, as reauthorized in 2004, as IDEA.¹¹ Unlike Section 504, the IDEA is focused on qualified disabled children's education and learning. Instead of ensuring the children from birth through 21 years can access the *school*, IDEA ensures the children can access the *curriculum* and *learning* within the school. Schools are not to wait for caregivers and parents to notify them, they have an affirmative duty through "Child Find" to actively seek and evaluate children who may qualify for services under the IDEA.¹² Once an IEP is in place, the team of professionals and parents meet to discuss the child's progress and any adjustments needed to the plan to ensure the child is making "progress appropriate in light of the child's circumstances."¹³ Each state must adopt its own status and administrative codes implementing the requirements of Section 504, Title II of the ADA, and IDEA. While each state can be unique, its laws cannot contradict the federal mandates and must be at or above the federal minimum requirements.

C. Resources

Some resources to help you learn more (definitely *not* an exhaustive list)

1. *A Guide to the Individualized Education Program*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/parents/needs/spced/iepguide/index.html>, (last updated Aug. 30, 2019).
2. Alison Allman, *Special Needs and Educational Considerations*. In *Special Needs Children and Family Law*, THE FLORIDA BAR CONTINUING LEGAL EDUCATION COMMITTEE AND THE FAMILY LAW SECTION (Oct. 11, 2019).
3. Council for Exceptional Children: This is among the largest international professional organization focused on improving the success of children with disabilities and/or talents and gifts. It offers professional development and resources. Website: <https://exceptionalchildren.org/>
4. Council of Parent Attorneys and Advocates (COPAA): This is an independent and non-profit organization of attorneys, advocates, parents, and related professionals whose mission is to protect "the legal and civil rights of and secure excellence in education on behalf of tens of thousands of students with disabilities and their

¹⁰ Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 PL 94-142: Its History, Origins, and Concepts*, 161 J. EDUC. 5 (Summer 1979).

¹¹ 20 U.S.C. § 1400, 1482 (2020).

¹² Pamela Wright & Pete Wright, *The Child Find Mandate: What Does It Mean to You?*, WRIGHTSLAW, <https://www.wrightslaw.com/info/child.find.mandate.htm> (last updated Jan. 8, 2019).

¹³ *Endrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 137 S. Ct. 988 (2017).

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families each year at the national, state and local levels.” Website:
<https://www.copaa.org/>

5. Center for Appropriate Dispute Resolution in Special Education (CADRE): This National Center on Dispute Resolution in Special Education is focused on "encouraging the use of mediation, facilitation, and other collaborative processes as strategies for resolving disagreements between parents and schools about children's educational programs and support services. It is funded by the Office of Special Education Programs at the U.S. Department of Education." Website: <https://www.cadeworks.org/>
6. KPS4Parents, Inc.: This is a non-profit lay advocacy organization that advocates for the educational and career success of disabled children. They offer advocacy services for families and consulting and paralegal services for educators, specialists, and attorneys. Website: <https://kps4parents.org/>
7. JENNIFER LAVIANO, YOUR SPECIAL EDUCATION RIGHTS: WHAT YOUR SCHOOL DISTRICT ISN'T TELLING YOU (Skyhorse, 2017).
8. William B. Reichhardt, *Legal Considerations when Advocating for Children with Special Education Needs*, 21 J. VA. TRIAL L. ASS'N. 5 (2010).
9. U.S. Department of Education IDEA: This is a website dedicated to providing information about IDEA, reports, and resources from the U.S. Department of Education. Website: <https://sites.ed.gov/idea/>
10. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: ALL ABOUT IEPs, (Harbor House Law Press, Inc. 2010).
11. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW (2d ed., Harbor House Law Press, Inc. 2007).

2. Family Law Cases with LGBTQIAA Litigants

A. Who is a member of the LGBTQIAA community defined:

1. Lesbians: Describe a female-identified attracted to other female-identified people.

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2. Gay: A single individual who does not identify as being “straight” and men who are attracted to other men
3. Bisexual: A person who is attracted to people of their gender and other genders
4. Transgender: People whose gender identity or expressions differs from the sex they were assigned at birth
5. Queer/Questioning: Queer is a term used to define sexual preference, orientation and habits which are not exclusively heterosexual or monogamous. Non heterosexual person who are questioning their place in the queer community.
6. Intersex: People who are born with reproductive or sexual anatomy that does not fit the definition of male or female.
7. Asexual/Ally: Asexual people are those who are not sexually attracted to others. Ally is someone who confronts heterosexism, homophobia, biphobia, transphobia, heterosexual, and gender-straight in themselves and others.

B. Relevant Areas of Law:

1. Cohabitation agreements:
 - i. Cohabitation agreements are agreements of people who reside together and choose not to get married. They have also been referred to as “domestic partnership agreements”. Prior to the same sex marriage being legalized in the State of Florida, many couples in the LGBTQIAA community entered into these types of agreements. Most provisions in cohabitation agreements provide for legal obligations in the absence of statutory rights. They are different from prenuptial which are created to limit or eliminate statutory rights in the event the parties are no longer are married. It is important to specify the terms of the agreement as it relates assets, debts, children, and support obligations. In Florida, the Courts do not offer the registration of domestic partnerships like other states may.

Cohabitation agreements are generally upheld by the Court just like any other contracts between couple such as prenuptial agreements. However, the consideration of such a contract cannot solely be the sexual relationship between the cohabitants. In *St. Joe Corp. v McIver*, 875 So. 2d 375 (Fla. 2004), the Court stated, “Florida law recognizes

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that unmarried cohabitants may agree to enter into an enforceable contract that establishes rights and responsibilities towards each other ‘as long as it is clear there is a valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations.’” (citing *Armao v McKenney*, 218 So. 3d 481, 485 (Fla. 4th DCA 2017)). Florida Courts have also consistently enforced contracts between same sex couples. See *Posik v Layton*, 695 So. 2d 759 (Fla. 5th CA 1997) the court upheld contract of life partnership agreement to support the other partner); *Dietrich v Winters*, 789 So. 2d 864 (Fla. 4th DCA 2001) the Court upheld life partnership agreement related to real estate; *Forrest v Ron*, 821 So. 2d 1163 (Fla. 3d DCA 2002) the Court upheld agreement between partners where “bridge-the-gap” money to be paid.

2. *Real Estate matters:*

If a couple is married, they are afforded the same rights as any other couple who is married regardless of their sex or gender. For married couples, any real estate which is purchased during the marriage is considered marital property and each party owns the property as joint tenants by the entirety. Only married couples can own real estate as joint tenants by the entirety. Both parties are named on the deed if they are married. Neither party can transfer their interest without the consent of the other party. Either party can request a partition if filing a Dissolution of Marriage action to request the Court order the sale of the property.

If same sex couples are not married, real property can be held as joint tenants or tenants in common. Joint tenancy is where two people own the property with rights of survivorship where if one party predeceases the other, their ownership in the property can pass to the other owner. This also ensures that probate can be avoided. Tenancy in common is where two or more people can own property and there is an undivided interest in the property. Each owner has the right to lease, sell, or convey their interest in the property to his or her heirs. Family members of a partner that dies may have the option to come in and sell their share of the real property. The best protection if the parties are not married is to make sure each partner has a Last Will and Testament established.

3. *Surrogacy, Adoption, and Establishment of Parental Rights:*

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In June 2015, the Supreme Court of Florida held that the ban of same sex marriages is unconstitutional. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Married couples, regardless of sex or gender, are afforded the same rights. *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906 (2012) held that a child born of a same sex marriage is a legitimate child of both people.

- a. Surrogacy: Pursuant to *Fla. Stat.* 742.13(2), the commissioning couple must be legally married. The surrogate must be over 18 years of age. Although *Fla. Stat.* 742.13(3) defines “commissioning couple” as an intended mother and intended father, Court’s must interpret this provision gender neutral pursuant to *Obergefell v. Hodges*. Furthermore, *Fla. Stat.* 63.213 (1)(b) allows single parents and unmarried couples to contract with a surrogate. Contracts should reflect the legal provisions pursuant to *Fla. Stat.* 63 and 742.
- b. Adoption: Who may adopt?
In re: Gill, helped pathed the way to same sex adoption. In 2015, the Florida Supreme Court recognized same sex marriages and therefore, have the LGBT individuals the right to adopt.

Fla. Stat. 63.042 states:

(1) The following persons may adopt:

- (a) legally married spouses jointly;
 - (b) An unmarried adult
 - (c) Two unmarried adults jointly; or
 - (d) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:
 - (i) The other spouse is a parent of the person to be adopted and consents to the adoption; or
 - (ii) The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child.
- (3) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.

Some Options for LGBT couples to adopt:

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1. Lesbian couples may adopt where one parent one parent is the biological parent and the child was conceived through donor sperm.
2. Gay couples may adopt where a surrogate mother has given birth to a child conceived with one of the men's sperm.
3. Both lesbian and gay couples may adopt where one parent previously adopted a child as a single parent.
4. Both lesbian or gay couples may adopt where one partner has a biological child from a previous relationship and the other parent of the child is willing to terminate his or her parental rights.

Step-parent adoption versus second parent adoption:

A step-parent adoption is an option for same sex couples who are legal married and the non-biological spouse may adopt. A second parent adoption is an option for LGBTQIAA couples who are unmarried or available to a co-parent of a legal parent. The second parent adoption process is more costly and it requires a home study and is generally a more complex process. A step-parent adoption is more expedient and only requires one hearing. It does not require a home study and because of the expediency of the process is less expensive.

- c. **Establishment of Parental Rights:** Out of state marriages should be upheld pursuant to the Full Faith and Credit Clause. The court ruled that Florida's public policy demands that the court consider the children born to the marriage of a same sex couple. *Brandon-Thomas v. Brandon-Thomas*, 163 So.3d 644, 648 (Fla. 2nd DCA 2015). The Court has jurisdiction to establish the biological mother's maternity pursuant to sec. 86.011 as the right to parent is a fundamental right. In *B.B.S., v. Rodriguez-Murguia*, 191 So.3d 528. Also, children have the right to establish Maternity through petition for declaration of maternity.

In *T.M.H. v. D.M.T.*, 79 So.3d 787 (Fla. 5th DCA 2012), a biological mother (egg donor) and a birth mother sought relief from the Court as to the parental rights of the parties' child. In this case, a certified question was submitted to the Florida Supreme Court to determine whether Fla. Stat. 742.14 deprives parental rights to a lesbian woman who provided a donor egg to her lesbian partner so both women could have a child to raise together as and who parented the child together for several years after birth. The Supreme Court answered the certified questions and stated that it is not the biological relationship per se, but rather 'the assumption of the parental responsibilities which is of constitutional significance.'" See *D.M.T. v.*

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T.M.H., 129 So.3d 320 (Fla. 2013), citing *Matter of Adoption of Doe*, 543 So.2d 741, 748 (Fla. 1989).

In *Russell v. Pasik*, 2015 WL 5947198 (Fla. 2d DCA 2015), same sex relationship of two women started a family. Pasik purchased donor sperm and the intent was that the sperm would be used for both women to get pregnant. Four children were born of the relationship, two children by each Mother. Both Mothers raised the children. A custody lawsuit was filed where Russell refused Pasik to have access to the children. That Court ultimately decided that despite the law and the Court's sympathy for the situation, Pasik did not have standing to seek timesharing for the children who Russell bore.

Same sex couples who have children should understand that parental rights are seeded with the parent who has the child. Same sex parents have the same rights as heterosexual parents that are married. Same sex parents that are not married do not have the same rights pursuant to the Paternity statute as of today.

C. Cultivating an understanding of the uniqueness of LGBTQIAA

All members of the LGBTQIAA are human beings. They have faced long discrimination and have been denied human rights. The rate of suicide among youth is five times higher than those that are heterosexual. Understanding that the journey of those persons in these communities have been heart wrenching in many respects. Understanding their community and educating ourselves as mediators allows us to provide empathy for them as human beings and the legal issues they may encounter in family law cases.

D. LGBTQIA community definitions:

1. Lesbians: Describe a female-identified attracted to other female-identified people.
2. Gay: A single individual who does not identify as being "straight" and men who are attracted to other men
3. Bisexual: A person who is attracted to people of their gender and other genders

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4. *Transgender*: People whose gender identity or expressions differs from the sex they were assigned at birth
5. *Queer/Questioning*: Queer is a term used to define sexual preference, orientation, and habits that are not exclusively heterosexual or monogamous. A non-heterosexual person who is questioning their place in the queer community.
6. *Intersex*: People born with reproductive or sexual anatomy that does not fit the definition of male or female.
7. *Asexual/Ally*: Asexual people are those who are not sexually attracted to others. Ally is someone who confronts heterosexism, homophobia, biphobia, transphobia, heterosexism, and gender-straight in themselves and others.

E. Considerations:

All members of the LGBTQIA are human beings. They have faced long discrimination and have been denied human rights. The rate of suicide among youth is five times higher than those that are heterosexual. Understanding that the journey of those persons in these communities has been heart-wrenching in many respects. Understanding their community and educating ourselves as mediators allows us to provide empathy for them as human beings and the legal issues they may encounter in family law cases.

F. Relevant Areas of Law:

4. *Cohabitation agreements*:
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Courts generally uphold Cohabitation agreements like any other contracts between couples, such as prenuptial agreements. However, the consideration of such a contract cannot solely be the sexual relationship between the cohabitants. The court, in *St. Joe Corp. v McIver*, 875 So. 2d 375 (Fla. 2004), stated, "Florida law recognizes that unmarried cohabitants may agree to enter into an enforceable contract that establishes rights and responsibilities towards each other 'as long as it is clear there is a valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations.'" (citing *Armao v McKenney*, 218 So. 3d 481, 485 (Fla. 4th DCA 2017)). Florida Courts have also consistently enforced contracts between same-sex couples. See e.g. *Posik v Layton*, 695 So. 2d 759 (Fla. 5th CA 1997)(upholding the contract of the life partnership agreement to support the other partner); *Dietrich v Winters*, 789 So. 2d 864 (Fla. 4th DCA 2001)(upholding the life partnership agreement related to real estate); *Forrest v Ron*, 821 So. 2d 1163 (Fla. 3d DCA 2002)(upholding the agreement between partners where "bridge-the-gap" money to be paid).

5. *Real Estate Considerations:*

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If same-sex couples are not married, real property can be held as joint tenants or tenants in common. Joint tenancy is where two people own the property with rights of survivorship where if one party predeceases the other, their ownership in the property can pass to the other owner. This also avoids probate. Tenancy in common is where two or more people can own property, and there is an undivided interest in the property. Each owner has the right to lease, sell, or convey their interest in the property to his or her heirs. Family members of a partner that dies may have the option to come in and sell their share of the real property. The best protection if the parties are not married is to ensure each partner has a Last Will and Testament established.

6. *Surrogacy, Adoption, and Establishment of Parental Rights:*

In June 2015, the Supreme Court of Florida held that the ban on same-sex marriages was unconstitutional. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Married couples, regardless of sex or gender, are afforded the same rights. *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906 (2012) held that a child born of a same-sex marriage is a legitimate child of both people.

d. Surrogacy: Under *Fla. Stat.* 742.13(2), the commissioning couple must be legally married. The surrogate must be over 18 years of age. Although *Fla. Stat.* 742.13(3) defines a "commissioning couple" as an intended mother and intended father, courts must interpret this provision as gender-neutral under *Obergefell v. Hodges*. Furthermore, *Fla. Stat.* 63.213 (1)(b) allows single parents and unmarried couples to contract with a surrogate. Contracts should reflect the legal provisions under *Fla. Stat.* 63 and 742.

e. Adoption: Who may adopt?

In re: Gill helped pathed the way to same-sex adoption. In 2015, the Florida Supreme Court recognized same-sex marriages and, therefore, gave the LGBT individuals the right to adopt.

Fla. Stat. 63.042 states:

(1) The following persons may adopt:

(a) legally married spouses jointly;

(b) An unmarried adult

(c) Two unmarried adults jointly; or

(d) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:

(i) The other spouse is a parent of the person to be adopted and consents to the adoption; or

(ii) The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child.(3) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or

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handicap renders such person incapable of serving as an effective parent.

Some Options for LGBT couples to adopt:

5. Lesbian couples may adopt where one parent is the biological parent, and the child was conceived through donor sperm.
6. Gay couples may adopt where a surrogate mother has given birth to a child conceived with one of the men's sperm.
7. Both lesbian and gay couples may adopt where one parent previously adopted a child as a single parent.
8. Both lesbian or gay couples may adopt where one partner has a biological child from a previous relationship, and the other parent of the child is willing to terminate his or her parental rights.

Step-parent adoption versus second-parent adoption:

A step-parent adoption is an option for same-sex couples who are legally married, and the non-biological spouse may adopt. A second-parent adoption is an option for LGBTQIA couples who are unmarried or available to a co-parent of a legal parent. The second parent adoption process is more costly, requires a home study, and is generally more complex. Step-parent adoption is more expedient and only requires one hearing. It does not require a home study and, because of the expediency of the process, is less expensive.

- f. Establishment of Parental Rights: Out-of-state marriages should be upheld under the Full Faith and Credit Clause. The court ruled that Florida's public policy demands that the court consider the children born to the marriage of the same sex couple. *Brandon-Thomas v. Brandon-Thomas*, 163 So.3d 644, 648 (Fla. 2nd DCA 2015). The court has jurisdiction to establish the biological mother's maternity according to sec. 86.011 as the right to parent is a fundamental right. In *B.B.S., v. Rodriguez-Murguia*, 191 So.3d 528. Also, children have the right to establish maternity through a petition for declaration of maternity.

In *T.M.H. v. D.M.T.*, 79 So.3d 787 (Fla. 5th DCA 2012), a biological mother (egg donor) and a birth mother sought relief from the court as to the parental rights of the parties' child. In this case, a certified question was submitted to the Florida Supreme Court to determine whether Fla. Stat. 742.14 deprives parental rights to a lesbian who provided a donor egg to her lesbian

partner so both women could have a child to raise and parent together for several years after birth. The Supreme Court answered the certified questions and stated that it is not the biological relationship per se, but rather 'the assumption of the parental responsibilities which is of constitutional significance.'" See *D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. 2013), citing *Matter of Adoption of Doe*, 543 So.2d 741, 748 (Fla. 1989).

In *Russell v. Pasik*, 2015 WL 5947198 (Fla. 2d DCA 2015), the same-sex relationship of two women started a family. Pasik purchased donor sperm, and the intent was that the sperm would be used for both women to get pregnant. Four children were born in the relationship, two children by each mother. Both mothers raised the children. A custody lawsuit was filed where Russell refused Pasik to have access to the children. That court ultimately decided that despite the law and the court's sympathy for the situation, Pasik did not have the standing to seek timesharing for the children whom Russell bore.

Same-sex couples who have children should understand that parental rights are seeded with the parent who has the child. Same-sex parents have the same rights as heterosexual parents that are married. Same-sex parents that are not married do not have the same rights under the Paternity statute as of today.

3. Family Law Cases Involving Extended Families

1. Comity

Kittel v. Kittel, 194 So. 2d 640 (Fla. 3d DCA 1967) – “Comity” allows courts of one state or jurisdiction to give effect to laws and decisions of another state out of deference and respect, not obligation.

Maclaren v. Maclaren, 616 So. 2d 104 (Fla. 1st DCA 1993) – “Comity” is not an obligation but a form of respect. The trial court did not abuse its discretion in refusing to grant comity to a New Zealand support decree where the New Zealand laws were dramatically different than Florida’s.

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Johnson v. Johnson, 676 So. 2d 458 (Fla. 5th DCA 1996) – “Comity” is proper only where the foreign order was properly entered.

2. Full Faith and Credit

28 U.S.C.A. § 1738B – “Full Faith and Credit for Child Support Orders Act”

Fla. Stat. § 88.011, et seq. – Uniform Interstate Family Support Act.

3. Domestication of Foreign Judgments

Fla. Stat. § 55.501, et seq. – Florida Enforcement of Foreign Judgments Act.

Fla. Stat. § 47.011 – venue in an action to domesticate a foreign decree is governed by the general venue statute which requires the action be filed in the county where the respondent resides.

Fla. Stat. § 61.14(1) – venue for modification of a foreign decree may be in the county where either the petitioning or responding party resides.

4. Grandparent Visitation

Fla. Stat. § 752 – Grandparental Visitation Rights

Sullivan v. Sapp, 866 So. 2d 28 (Fla. 2004) – Fla. Stat. § 61.13(2)(b), which permitted grandparent visitation, is unconstitutional.

Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000) – Fla. Stat. § 61.13(7) which authorized custody for grandparents and gave them rights to intervene in custody disputes, is unconstitutional.

Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) – Fla. Stat. § 752.01, titled “Grandparental Visitation Rights” is unconstitutional.

In re Guardianship of D.A. McW, 460 So. 2d 368 (Fla. 1984) – Florida Supreme Court’s long-standing view that “the natural parent ha[s] a clear preference to custody over all others based upon the status of parenthood.”

Forbes v. Chapin, 917 So. 2d 948 (Fla. 4th DCA 2005) – where a parent once agreed to grandparent visitation, that agreement was not a waiver of the parent’s right to later

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enforce his constitutional right to privacy to raise his child free of government intrusion and to revoke the grandparent's visitation right.

Downs v. Ledoux-Nottingham, 219 So. 3d 244 (Fla. 5th DCA 2017) – The court can award grandparents make-up timesharing with a child anytime it was awarded under a foreign judgment but not followed.

Fazzini v. Davis, 98 So. 3d 98 (Fla. 2d DCA 2012) – the trial court may modify a foreign judgment after domestication to terminate grandparents' visitation rights based on Florida's policy to subordinate grandparent visitation rights to the parents' superior rights to the child.

Strinko v. Strinko, 225 So. 3d 367 (Fla. 3d DCA 2017) – “Full Faith and Credit, rather than comity principles, governs the domestication and enforcement of the judgment of a sister state entered by a court of competent jurisdiction... [D]espite Florida's privacy laws and their effect on grandparent visitation, the properly domesticated judgment of a sister state allowing grandparent visitation is enforceable in Florida, and the trial court has no discretion but to enforce such a properly entered and domesticated judgment.”

5. Temporary or Concurrent Custody by an Extended Family Member

Fla. Stat. § 751 – Temporary Custody of Minor Children by Extended Family Member

J.R.B. v. J.L.B., 85 So. 3d 1167 (Fla. 4th DCA 2012) – The grandparents lacked standing to petition for temporary custody under Chapter 751 where the child was merely visiting the grandparents for the summer under a Minnesota order, even though the grandparents made sufficient allegations of harm to the child. However, the appellate decision did not preclude the parents or Department of Children and Families from initiating a dependency action under Chapter 39, *Florida Statutes*.

IN re: Amendments to the Florida Supreme Court Approved Family Law Forms, 320 So. 3d 54 (Fla. 2021) – the Florida Supreme Court updated family law forms 12.970 (a)-(f) concerning temporary and concurrent custody by extended family.