

Legal Issues in Same Sex Divorces

October 5, 2015

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After searching for love and the expensive wedding, you now find yourself in the same position as approximately half of all married adults in America: in need of legal representation for your divorce. With the quickly changing political climate in the country regarding same sex marriages you now need to navigate the laws of same sex divorce, and this blog will address some of the issues you may face including: parentage; child custody, and child support.

While the legal recognition of your same sex marriage should not be an issue in Massachusetts that does not mean you may not face some unique issues with your divorce proceedings. During divorce proceedings you will need to resolve the issues relating to the division of your marital assets, alimony, child custody, and child support.

The issues of parentage, child custody, and child support have the possibility of becoming the most troublesome aspect of your divorce. In general, the rules that govern heterosexual marriage regarding child custody and child support will apply so long as both parents are the legal parents. So long as both parents have a legal relationship with the child, custody, support, and parenting plans will be treated the same as heterosexual divorce.

Where there are potential serious issues are when both parents have not established a legal relationship with the child. In Massachusetts, children born via assisted reproduction within a legal spousal relationship are the legal children of the couple. This presumption is still there even when only one of the spouses has a biological relationship to the child. However, if the child was born using assisted reproduction before the legal marriage occurred the subsequent marriage of the parties does not legitimize the child. For example, if you and your spouse lived in a state that didn't perform or recognize same sex marriage, but you had a child using assisted reproduction where only one parent has a biological connection to the child, then even though you later married, the non biological parent does not automatically establish a legal relationship with the child.

If this is the case in your marriage it is very important that you establish a legal relationship with the child through a formal court action. This will not only eliminate the potential rights of a known sperm donor or gestational surrogate, but will also create a legal relationship for you with the child that will allow you the same rights to child custody, parenting time, and support in your divorce proceedings. This is also a very important step to take because some divorces have the potential to become hostile, and sometimes biological parents will try and leverage their biological relationship against the non biological parent.

While the Supreme Court recognized the legal rights of same sex couples to marry, given the political climate of some states, there will likely be issues relating to same sex adoptions and divorces. Given this it is important to establish that legal relationship with the child. If you do not

establish a legal relationship with the child then you will be faced with the obstacle of proving your status as a “de facto parent.” Massachusetts allows for non-legal parents to establish parental rights through complaints in equity by showing that a continued relationship with the “de facto parent” is in the best interest of the child. A de facto parent is someone who has no biological relationship with the child, but has actively participated in the child’s life as a parent by shaping the child’s daily routine, addresses developmental needs, provides for the educational and medical needs, and serves a moral guide to the child.

If you are currently in a same sex relationship or marriage it is important to protect yourself against the uncertainty of what another state may say about your marriage and your children. If you are currently a parent to a child born of assisted reproduction prior to your marriage and you are not the biological parent then it is highly suggested that you protect both you and your child by initiating a formal court action.

At Cohen Cleary, P.C., we can represent you regarding prenuptial agreements, divorce, child custody, child support and any legal actions necessary to ensure that both you and your children’s interests are protected. We have extensive experience in successfully representing individuals in divorce proceedings and any subsequent issue that may arise from your divorce such as nonpayment of child support, modifications of custody agreements, and complaints for contempt.

If you or someone you know is in a same sex marriage and is considering a divorce or other family law issue, then take the steps you need to protect yourself and your children by contacting our office for a confidential case evaluation.