

# KNOW YOUR RIGHTS: LGBT FAMILY LAW

## RELATIONSHIP RECOGNITION AND MARRIAGE

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MY SAME-SEX SPOUSE AND I VISITED NEW MEXICO TO GET MARRIED BUT LIVE IN A NON-MARRIAGE RECOGNITION STATE. WE WANT TO SEPARATE, BUT THE STATE WILL NOT ISSUE A DIVORCE BECAUSE IT DOES NOT VIEW OUR MARRIAGE AS VALID. CAN I COME TO NEW MEXICO TO GET DIVORCED?

The term that has been coined for this difficulty is called “wedlocked.” For a New Mexico court to have the jurisdiction to issue a divorce, one member of the couple must reside in New Mexico for at least 6 months.<sup>1</sup>

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I GOT MARRIED TO MY SAME-SEX SPOUSE IN A MARRIAGE-RECOGNITION JURISDICTION BEFORE DECEMBER 2013, BUT LIVE IN NEW MEXICO. SHOULD WE GET MARRIED HERE NOW THAT MARRIAGE EQUALITY IS THE LAW IN NEW MEXICO?

There is no reason to get another marriage license in New Mexico. If you were married in a marriage recognition jurisdiction, within the US or abroad, and your marriage is otherwise valid, it is also valid and recognized in New Mexico.<sup>2</sup> It may complicate things to have multiple marriage licenses.

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I GOT A CIVIL UNION IN ANOTHER STATE SEVERAL YEARS AGO, BUT MY PARTNER AND I HAVE SINCE SEPARATED AND I LIVE IN NEW MEXICO. I WANT TO MARRY MY CURRENT PARTNER. DO I NEED TO DISSOLVE MY CIVIL UNION?

You must dissolve any civil union or marriage before entering into a marriage with another partner.<sup>3</sup> Other state courts have ruled that civil unions from out of state must be dissolved before marrying someone else, and that not doing so constitutes bigamy.<sup>4</sup> This specific issue has not been addressed by the courts in New Mexico, but it would be wise to dissolve the civil union before marrying your partner.

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MY SAME-SEX SPOUSE AND I ARE MARRIED IN NEW MEXICO, BUT PLANNING AN EXTENDED VACATION IN MISSISSIPPI. WILL OUR RELATIONSHIP BE RECOGNIZED THERE?

Probably not. States are not required to recognize a same-sex marriage that was performed in another state. In 2013, the U.S. Supreme Court in *Windsor v U.S.* struck down Section 3 of the federal Defense of Marriage Act (DOMA), meaning that your relationship *is* recognized by the federal government. The court did not, however, rule that all states have to recognize out of state marriages of same-sex couples, and many states still do not

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<sup>1</sup> N.M. Stat. Ann 40-4-5, Dissolution of marriage; jurisdiction; domicile.

<sup>2</sup> Griego v Oliver

<sup>3</sup> N.M. Stat. Ann § 30-10-1

<sup>4</sup> ELIA-WARNKEN vs. ELIA. SJC-11023. April 5, 2012. - July 26, 2012. <http://law.justia.com/cases/massachusetts/supreme-court/2012/sjc-11023.html>

respect these marriages.<sup>5</sup> Thus, it is advisable to travel with a photocopy of your marriage license and your power of attorney for medical decisions.

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#### THE JUDGE IN MY COUNTY HAS STOPPED MARRYING COUPLES ALTOGETHER. IS THAT LEGAL?

Although county clerks are required to issue marriage licenses to eligible same-sex couples, these licenses must be signed by an ordained minister, judge or tribal leader. Judges are not required by state law to officiate weddings, and may refuse. However, if a judge were to marry only straight couples and refuse to solemnize the marriages of same-sex couples, that judge may be violating the New Mexico Human Rights Act.<sup>6</sup>

No religious individual or member of the clergy can be forced to marry same-sex couples and may legally refuse to marry any couple.<sup>7</sup>

### PARENTING

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#### IF MY SAME-SEX SPOUSE GIVES BIRTH TO A CHILD, AM I LEGALLY CONSIDERED THE PARENT WITHOUT COMPLETING A SECOND-PARENT ADOPTION?

In New Mexico, any child born within the context of a marriage is presumed to be the child of that couple.<sup>8</sup> In *Chaterjee v. King*, the New Mexico Supreme Court ruled that presumptions of parentage apply to women as they do to men, such that children born to married, same-sex couples are presumed to be children of the marriage.<sup>9</sup> This means that if you are legally married to your spouse before birth, you should be considered a legal parent. The Bureau of Vital Records should list both you and your spouse on the birth certificate.

Remember that a presumption can be rebutted, or set aside. As a result, there is concern that some states that do not recognize your marriage might refuse to recognize parentage based upon the marital relationship. As a result, best practices remain to obtain a second parent adoption for the non-legal or non-biological parent, so that the relationship between the parent and child is premised upon a Court Order, rather than a presumption due to the marriage.

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#### MY SAME-SEX SPOUSE GAVE BIRTH TO OUR CHILD, AND MY NAME IS ON THE CHILD'S BIRTH CERTIFICATE. WE ARE PLANNING TO MOVE TO A NON-MARRIAGE RECOGNITION STATE NEXT YEAR. WILL I BE RECOGNIZED AS MY CHILD'S LEGAL PARENT?

Parental recognition in non-marriage states varies depending on the state. However, it is likely that a birth certificate alone may not be sufficient for you to have legal rights in another state. We recommend that any non-biological parent complete a second-parent adoption, especially if you plan on traveling or living in a non-marriage state.

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<sup>5</sup> *United States v. Windsor*, 570 U.S. 12 (2013) (Docket No. 12-307),

<sup>6</sup> N.M. Stat. Ann § 40-1-2, Marriages solemnized; ordained clergy or civil magistrates may solemnize.

<sup>7</sup> *Griego v Oliver*.

<sup>8</sup> NM Stat § 40-11A-204 (2013) Uniform Parentage Act

<sup>9</sup> *Chaterjee v King*, 2012-NMSC- 019, Supreme Court of New Mexico, June 1, 2012

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## CAN AN ADOPTION AGENCY REFUSE TO HELP GAY PARENT(S) ADOPT?

Any New Mexico foster care or adoption agency that receives state or federal funding cannot discriminate on the basis of sexual orientation.<sup>10</sup> These agencies make placement determinations on the basis of the “best interest of the child”. In 1988, the New Mexico Court of Appeals determined that “sexual orientation of a proposed custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment.”<sup>11</sup> Thus, most agencies cannot refuse to place a child with a gay or lesbian individual or couple simply due to their sexual orientation. Agencies that are affiliated with religious organizations and do not receive state or federal funding can follow their religious tenants with regard to family formation.

## TRANSGENDER FAMILY LAW

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### CAN A TRANSGENDER PARENT ADOPT A CHILD?

Any New Mexico foster care or adoption agency that receives state or federal funding cannot discriminate on the basis of gender identity.<sup>12</sup> These agencies make placement determinations on the basis of the “best interest of the child”. We don’t believe that gender identity is a sufficient basis for refusing to place a child with a parent, but the New Mexico appellate courts have not addressed this issue.

Transgender individuals in other states have reported difficulties adopting when an individual case worker, adoption agency, or judge had an anti-trans bias, or did not fully understand gender identity. Having an attorney and medical and/or psychological experts who are willing to testify has proven helpful.

If you believe you have been denied an opportunity to adopt due to your gender identity, please contact the ACLU of New Mexico.

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### MY EX-SPOUSE IS TRYING TO TERMINATE MY CUSTODY/VISITATION RIGHTS ON THE BASIS OF MY GENDER IDENTITY. WHAT RIGHTS DO I HAVE?

Like with adoption, courts are to base custody or visitation decisions on the best interest of the child. New Mexico law presumes that joint custody is in the better interest of the child. For the court to terminate joint custody, there must be a “substantial and material change in the circumstances affecting the welfare of the child...such that joint custody is no longer in the best interests of the child.”<sup>13</sup>

Some parents have argued that the gender identity or transition of the other parent would negatively affect the child’s welfare. Though we are not aware of this happening in New Mexico, similar arguments in other state and

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<sup>10</sup> N.M. Stat. Ann 8.26.5 Child Placement Agency Licensing Standards [http://cyfd.org/docs/child\\_placement\\_ag\\_lic\\_stand.pdf](http://cyfd.org/docs/child_placement_ag_lic_stand.pdf)

<sup>11</sup> re Jacinta M., 1988-NMCA-100, ¶ 12, 107 N.M. 769 pg 3-4 <http://www.nmcompcomm.us/nmcases/NMCA/1988/1988-NMCA-100.pdf>

<sup>12</sup> N.M. Stat. Ann § 8.26.5 Child Placement Agency Licensing Standards [http://cyfd.org/docs/child\\_placement\\_ag\\_lic\\_stand.pdf](http://cyfd.org/docs/child_placement_ag_lic_stand.pdf)

<sup>13</sup> N.M. Stat. Ann § 40-4-9.1. Joint custody; standards for determination; parenting plan

appellate courts have resulted in divergent rulings regarding the impact on children of being raised by a transgender parent.<sup>14 15</sup>

It is important to note that decisions made by the court on custody and visitation depend heavily on specific circumstances. Like all aspects of law related to transgender people, this area is evolving, but having experts and good lawyers are important. The ACLU put out a list of recommendations for transgender parents, which you can access here: [https://www.aclu.org/files/assets/aclu-tg\\_parenting\\_guide.pdf](https://www.aclu.org/files/assets/aclu-tg_parenting_guide.pdf)

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## DO FOSTER CARE AND ADOPTION AGENCIES PLACE LGBT CHILDREN WITH FAMILIES THAT ARE NOT SUPPORTIVE?

As previously mentioned, these placements are made with the best interest of the child in mind. CYFD notes that the agency has a responsibility to “educate prospective and current foster or adoptive families on how to create a safe and supportive home environment for youth in foster care regardless of their sexual orientation, gender identity or gender expression.”<sup>16</sup>

## CONTACTS FOR LEGAL ASSISTANCE & REPRESENTATION

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### ACLU OF NEW MEXICO

P.O. Box 566  
Albuquerque, NM 87103  
(505)266-5915  
[info@aclu-nm.org](mailto:info@aclu-nm.org)

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### TRANSGENDER RESOURCE CENTER OF NEW MEXICO

120 Morningside Dr. NE  
Albuquerque, NM 87014  
(505)200-9086  
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### EQUALITY NEW MEXICO

625 Silver Avenue SW, Suite 310  
Albuquerque, NM 87102  
(505)224-2766  
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<sup>14</sup> Christian v. Randall, 516 P.2d 132 (Colo. Ct. App. 1973) (Colorado appeals court ruled that in favor of a transgender parent, determining that there was no evidence that living with a transgender parent would harm the child’s physical safety or emotional development)

<sup>15</sup> “Magnuson v. Magnuson, 170 P.3d 65, 66 (Wash. Ct. App. 2007) (2007 Washington state appellate court ruled against giving the transgender parent primary custody because the “impact of gender reassignment surgery on the child is unknown”)

<sup>16</sup> New Mexico Administrative Code, 8.26.5.18 AGENCY POLICIES AND PROCEDURES, 5/29/09; A, 8/15/11(see page 8)  
[http://cyfd.org/docs/child\\_placement\\_ag\\_lic\\_stand.pdf](http://cyfd.org/docs/child_placement_ag_lic_stand.pdf)