



## **2025 Family Law Guide**

**A Primer for Attorneys representing LGBTQ+ clients with Ohio Family Law  
Issues**

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## EQUALITY OHIO FAMILY LAW GUIDE

### 1. Opening Statement

#### a. Purpose of this Guide

Congratulations on your decision to practice Family Law and more specifically, to represent LGBTQ+ individuals navigating various family law issues. Your representation of these clients matters. The purpose of this guide is to provide you with some basic information and a list of resources to assist you in providing quality representation to clients in the ever-changing area of LGBTQ+ Family Law. We also urge you to encourage your clients to consider resolving their Family Law conflicts by agreement, wherever possible, using mediation, Collaborative Divorce, and Dissolution of Marriage to resolve their disputes.

#### b. Changing Landscape of LGBTQ+ Individuals and Family Law

With the newly minted right to marry also comes the ability for LGBTQ+ individuals to end their marriage, if they so desire. A divorce for LGBTQ+ individuals may bring forth special issues for the Court's consideration, especially where there has been a short-term marriage and a long-term relationship, or handling child custody issues. Since there have been very few Court decisions in Ohio regarding family law issues since the June 2015 *Obergefell* ruling,<sup>1</sup> how you frame your argument before the Court matters. Educating the Court is also critical. You do not want to create "bad law" regarding LGBTQ+ issues.

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<sup>1</sup> *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

c. Lack of Legislation Modifying the ORC since *Obergefell*

The Ohio Republican-dominated legislature has chosen not to modify the Ohio Revised Code since the *Obergefell* decision to reflect the right to marry and the subsequent right to divorce. Nowhere is this more apparent than the area of Artificial Insemination by Donor (AID). Ohio Revised Code Sections 3111.88 to 3111.96 provide that with non-spousal AID, husbands have the right to be recognized as fathers if the specific provisions of the code are followed. This means that even though the husband is a genetic stranger to a child born by AID, his rights to the child born during the marriage are protected.

Before *Obergefell*, Ohio courts routinely denied lesbian couples equal treatment to opposite-sex couples in terms of recognizing the non-birth mother like the “husband” according to Section 3111.88-3111.96. *Hobbs v. Mullen (In re Mullen)*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302 and *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241. *In re Mullen* held that a non-married lesbian before *Obergefell* had no parental rights even though the birth mother entered into a co-parenting agreement with her when the child was born. 129 Ohio St.3d 417. In *In re Bonfield*, the Ohio Supreme Court analyzed Ohio Revised Code Section 3111.95(A), holding that same-sex couples are not covered under the statutory definition of a parent. The three ways to be recognized as a legal parent are as follows: (1) by natural parenthood, (2) by adoption, or (3) “by other legal means in the Revised Code that confer or impose rights, privileges, and duties upon certain individuals.” 97 Ohio St.3d 387.

In 2024, the First District Court of Appeals decided *In re L.E.S.*, 2024-Ohio-165, 233 N.E.3d 1259, 2 (1st Dist.), which holds that an unmarried partner can also be recognized as a legal parent under Ohio law *if* it is established that the couple would have been married if it were not for Ohio's ban on same-sex marriage before *Obergefell*. This issue has not been taken up by the Ohio Supreme Court.

Without legislative or Ohio Supreme Court clarity, some courts follow *Obergefell* in holding that same-sex spouses should be treated the same as opposite-sex couples, and therefore, same-sex married couples using AID are treated the same as opposite-sex married couples using AID; other Courts do not.<sup>2</sup> As a result, it is recommended that LGBTQ+ married couples take extra legal steps to protect their families in the event of a divorce, such as parentage proceedings and step-parent adoptions (for children born through AID before the marriage).

## **2. Background**

### **a. *Obergefell* and the Right to Marry**

Same-sex marriage was legalized in Ohio as of June 2015 with the Supreme Court ruling in *Obergefell v. Hodges*.<sup>3</sup> This ruling requires all U.S. states to issue marriage licenses to same-sex couples and to recognize marriage licenses issued in another state. This landmark decision granted the fundamental right to marry under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

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<sup>2</sup> *Obergefell v. Hodges*, 576 U.S. 644; *Pavan v. Smith*, 582 U.S. 563, 567, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017).

<sup>3</sup> *Obergefell v. Hodges*, 576 U.S. 644.

b. Rights prior

Before the ruling in *Obergefell*, Ohio had passed the Defense of Marriage Act (DOMA) that amended the Ohio Revised Code to state that marriages of same-sex couples would not be recognized in Ohio, even if entered into legally in another state.<sup>4</sup> DOMA further stated that no statutory benefits afforded to married couples would be extended to same-sex couples.<sup>5</sup> That same year, 62 percent of voters voted in favor of “State Issue 1,” which amended the Ohio Constitution to define marriage as between a man and a woman.<sup>6</sup>

c. Common Law Marriage

Before *Obergefell* in 2015, Ohio did not recognize common law marriages of same-sex couples. Common law marriage comes with the same rights, benefits, and responsibilities of licensed marriage, such as access to Social Security survivor benefits or access to pensions and other assets. Common law marriage also allows spouses to take advantage of divorce laws, giving them access to alimony determinations and division of marital property through equitable distribution (which will be discussed later). Ohio Revised Code Section 3105.12 banned common law marriage in Ohio. This ban took effect as of October 10, 1991. There are exceptions for those marriages that were valid before 1991 or originated in states where common law marriage is still legal.<sup>7</sup> Although it has not been specifically

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<sup>4</sup> Ohio Rev. Code § 3101.01(B)(1)-(2).

<sup>5</sup> Ohio Rev. Code § 3101.01 (B)(3).

<sup>6</sup> <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/>

<sup>7</sup> Ohio Rev. Code § 3105.12(B)(1)-(3).

acknowledged in any Ohio courts to date, it stands to reason that same-sex common law marriages meeting those exceptions must be recognized since *Obergefell*.

### **3. Children and Parentage**

#### **a. Artificial Insemination by Donor**

Ohio Revised Code Sections 3111.88 – 3111.96 set out the requirements of Artificial Insemination by Donor (“AID”). This ensures that if an LGBTQ+ individual or couple follows the very specific Ohio Revised Code sections, the sperm donor would not have any rights or responsibilities to a child born as the result of donor insemination. The donor would have no right of parenting time with the child and no responsibility to pay child support.

The time to safeguard a potential recipient of donor sperm is prior to the actual insemination. This is especially critical because any failure to exactly follow the statutory requirements could result in a donor being able to assert parental rights and responsibilities to the child. This may even apply to married lesbians using AID because the Ohio Legislature has not amended Ohio Revised Code Section 3111.95 which states that a “husband” is considered the natural father of the child born using AID. Ideally, the code would be amended to include a “married spouse” being considered a natural parent to a child born by AID. Currently there is no appellate case law on this specific issue. Trial judges are free to interpret Ohio Revised Code Section 3111.95 as they choose.



b. Surrogacy

Surrogacy is legal in Ohio. Currently there are no laws in Ohio prohibiting the use of surrogacy contracts. However, enforceability of surrogacy contracts varies by the judge hearing the case as well as the specifics of the contract itself.

In *S.N. v. M.B.*, 2010-Ohio-2479, 188 Ohio App. 3d 324, 935 N.E.2d 463, a surrogate and an unmarried intended mother executed an agreement setting forth that the surrogate would carry embryos created through in vitro fertilization using an anonymous donor's eggs and an anonymous donor's sperm to term. According to the contract, any children born to the surrogate as a result of the agreement would be the intended mother's children. Following the birth of a child, the surrogate refused to proceed under the terms of the surrogacy agreement. As a result, the intended mother filed the parentage action. The court held that summary judgment was properly granted to the intended mother. This case from the Tenth District Court of Appeals (Franklin County), was not further appealed.

c. *Obergefell* Effect (or lack thereof)

Same-sex couples have the right to a civil marriage "on the same terms and conditions as opposite-sex couples, *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015). "Terms and conditions" can mean different things to different judges. Because same-sex marriage is relatively recent in Ohio, interpretation of the law has not made its way through appellate courts or to the Supreme Court of Ohio. In *Pavin v. Smith*, 137 S. St. 2022 (2017), the U.S. Supreme Court affirmed the *Obergefell* premise of equal treatment for same-sex and opposite sex married couples by invalidating the State of Arkansas attempt to treat birth certificates for children

conceived by AID differently for married opposite-sex couples than married same-sex couples. “Because that differential treatment infringes *Obergefell*’s commitment to provide same-sex couples the constellation of benefits that States have linked to marriage, we reverse the state court’s judgment.” However, the phrases “terms and conditions” and “constellation of benefits” can currently be viewed differently by Ohio judges.

d. Marital Presumption

By definition, the marital presumption in Ohio means that a child born during the marriage is a child of the marriage, Ohio Revised Code Section 3111.03. This presumption can be rebutted by genetic testing. “Terms and Conditions” and “Constellation of Benefits” under *Obergefell* and *Pavin* are not always recognized by trial judges in same-sex divorces. The establishment of parentage under Ohio Revised Code Sections 2151.232, 3111.25 or 3111.821 is final and enforceable and therefore cannot be rebutted. By establishing parentage in a same-sex marriage with children, the biological parent would not be able to rebut the marital presumption in the event of divorce.

e. Parentage

Parentage legally establishes the existence of a parent-child relationship. It creates rights and responsibilities of the parent to the child. In a same-sex marriage, parentage actions would legally confirm that both parents are legally recognized as parents of a child born through AID during their marriage.

Because no same-sex married couples can accurately predict whether their marriage will be long-lasting or end in divorce, if they plan on having children

during the marriage, parentage should be established for each child born through AID. Currently this is the only way to level the playing field of a nasty divorce by negating any rebuttal to the marital presumption.

Parentage is established by filing a Petition to Establish Parentage in either Juvenile Court or Domestic Relations Court in the county where the family resides. Some courts require the petition to be filed in Domestic Relations Court because the petitioners are a married couple. Other courts require the filing to be initiated in Juvenile Court because the parties are not seeking a divorce. Either way, parentage will establish a legal relationship between the non-biological parent and the parties' child born through AID. This is clearly in the child's best interest because it promotes family stability. Note that having both names on a child's birth certificate as parent one and parent two does not establish parentage. Same-sex couples need a court order that specifically establishes parentage.

Forms necessary to establish parentage are available through Cuyahoga County Juvenile Court or Equality Ohio. They can be adapted for any county parentage filing. Until the Ohio Legislature or Ohio Appellate and Supreme Courts address the disparity between same-sex and opposite-sex marital couples using AID to have children, establishing parentage is the best option to protect the children born to same-sex marriage couples using AID.

f. Birth Certificates

When a child is born to a same-sex married couple, both parties are listed as parents on the child's birth certificate. The Ohio Department of Health began issuing

birth certificates for children born to same-sex married couples following the *Obergefell* decision in 2015.

#### **4. Divorce, Dissolution of Marriage, Collaborative Divorce, Mediation**

##### **a. Definitions**

**Divorce** – Divorce in Ohio is governed by Ohio Revised Code Section 3105 to terminate a marriage. Divorce is an adversarial proceeding which requires grounds or reasons for the divorce.

**Dissolution of Marriage** – Dissolution of Marriage is Ohio's no-fault divorce pursuant to Ohio Revised Code Section 3105.63. Grounds for the divorce are not heard by the Court. Instead, parties enter into a Separation Agreement resolving all issues between the parties. The Agreement is filed with the Court and adopted into the Judgment Entry ending the marriage.

**Collaborative Divorce** – Collaborative Divorce is a non-adversarial form of divorce governed by Ohio Revised Code Section 3105.42-45. It is a form of Alternative Dispute Resolution (ADR). Each party is represented by an attorney trained in the collaborative divorce process. The parties and attorneys have four-way meetings to discuss and resolve all the issues of the parties' divorce. After resolving the issues, a Separation Agreement is drafted and filed with the Court. The parties proceed with a no-fault divorce. The upside of this process is that the parties participate in resolving their conflicts leading to greater cooperation in the future, especially if they are raising children together. The downside is that if they are

unable to reach an agreement, the Collaborative Attorneys cannot represent the parties in a contested divorce.

**Mediation** – Mediation in divorce cases involves a trained family law mediator who assists the parties in resolving their conflicts. Governed by Ohio Revised Code Section 3109.052, this is a form of ADR. Mediation can occur before, during or even after the parties' divorce. The mediator is a neutral third party who listens to the parties, hears their issues, assists them in hearing the other party in the conflict and helps them to reach a satisfactory resolution of the issues. Any agreements reached are written into a Mediation Agreement which is presented to the Court. The downside of this process is that mediators cannot represent parties in a dissolution of marriage or contested divorce. The upside is that mediators can assist parties in resolving part or all of their conflicts.

b. *Obergefell* Effect

Even before the *Obergefell* decision, Ohio Courts were granting divorces and dissolutions of marriage for same-sex couples. Since the decision, no new laws have been passed by the Ohio Legislature to reflect who can marry in Ohio. Ohio Revised Code Section 3101.02 still states: A marriage may only be entered into by one man and one woman." *Obergefell's* impact on divorce in Ohio has not been addressed. As a result, each court and each judge hearing contested cases may choose to treat same-sex couples the same as opposite sex couples in divorce, or they may not, despite the *Obergefell* decision. Few cases have reached appellate courts involving same-sex couples divorcing. However, after the *Obergefell* decision, the Ohio Supreme Court ordered on June 26, 2015, that all domestic relations court forms be

gender-neutral effective March 15, 2016. This order extends to all family law matters including Juvenile and Probate Court forms as well.

c. Lack of Case Law

While lack of case law regarding LGBTQ+ divorces could mean a wide disparity in how these cases are being handled at the trial level, it also poses an opportunity to frame issues for trial judges and trial magistrates that can educate them regarding LGBTQ+ issues in divorce and create “good law” in the process. It is, therefore, critical for practitioners to share information including pleadings, briefs, and basic arguments to promote successful divorce litigation for LGBTQ+ divorce clients. Equality Ohio’s Family Law Clinic can assist in this process.

d. Property Issues

Division of property in a divorce is governed by Ohio Revised Code Section 3105.171 and case law. Property is to be divided equitably, but not necessarily equally. The trial court decides which property, owned by the parties, is considered marital and which is separate assets belonging to an individual party. Among the ten factors to be considered are the length of the marriage, assets and liabilities of the parties, retirement benefits, financial misconduct, plus “any other factor that the court expressly finds to be relevant and equitable.” Ohio Revised Code Section 3105.171(F)(10). The use of creative arguments for a short-term marriage following a long-term relationship can extend the duration of the marriage to a period beginning when parties began to live together in a committed relationship. An argument can be made that the parties were prohibited from marrying in Ohio, which is why the parties were not married sooner. *In re L.E.S.*, 2024-Ohio-165, 233

N.E.3d 1259, 2 (1st Dist.). Similarly, one could argue that out-of-state or out-of-country marriages should be recognized in Ohio because they had to be entered into outside of Ohio, which would not allow their marriage before *Obergefell*. These arguments can also be used pursuant to the “any other relevant and equitable” section of Ohio Revised Code Section 3105.171(F)(10) and have a substantial impact on the Court’s decision on dividing the assets and debts of the marriage. Arguments can be made to also consider each party’s contribution to the assets or debts as well as the financial disparity between the parties. Remember that the allocation of assets and debts must be equitable, but not necessarily equal.

e. Spousal Support

Spousal Support in Ohio is governed by Ohio Revised Code Section 3105.18 and case law. There are fourteen factors for the court to consider when awarding spousal support. Like division of property, duration of the marriage and the catch all provision of “any other factor that the Court expressly finds to be relevant and equitable” are among the fourteen factors, 3105.18(C)(1)(n). The same creative arguments used in dividing assets and debts can also be used to argue on behalf of a longer duration of spousal support to be awarded where there has been a short-term marriage and a long-term relationship.

f. Custody in Domestic Relations Court

Child custody in Ohio is governed by Ohio Revised Code Section 3109.04. Custody determinations for married couples are heard in Domestic Relations Court. Custody determinations for unmarried couples are heard in Juvenile Court.

When allocating parental rights and responsibilities, the domestic relations court can order shared parenting, where both parents make decisions together in the best interest of the child, or the court can order that parental rights and responsibilities be allocated to one of the parents, who would be designated residential parent and legal custodian of the child. When shared parenting is ordered, a special document is created called a Shared Parenting Plan. The Shared Parenting Plan sets out in writing how the parents will make decisions for the education, health, and wellbeing of the child. Sample Plans can be found on the Supreme Court of Ohio website as well as local county domestic relations court websites.

Parenting Time Plans for a non-custodial parent include a schedule of parenting time as well as various rights and responsibilities of the non-custodial parent. Sample Parenting Time Plans can also be found on the Supreme Court of Ohio website as well as local county Domestic Relations Court websites.

When divorcing parents cannot agree on custody, domestic relations courts can send the parties to mediation to attempt to resolve the conflict. This is where a mediator will assist the parties in compromising and settling the dispute themselves. The Court can also send the parties to a court forensic clinic for an investigation, evaluation, and recommendation. Smaller domestic relations courts may not offer these services. The court can also order the appointment of a Guardian ad Litem (GAL), who is a specifically trained attorney, to conduct an investigation and write a report and recommendation regarding custody allegations. Ultimately, when the parties cannot agree, the Court determines what is in the best



interests of the minor child. Under ORC 3109.04 (F) the court can consider several factors in their custody determination. None of the factors listed in this section involve the sexual orientation of the parents.

The custody determination can be further complicated in a divorce of a lesbian couple where the biological mother raises the issue of the marital presumption. Trial Courts have been uneven in their application of *Obergefell* in treating same-sex married couples the same as opposite sex married couples. Some have found that husband's rights under Ohio Revised Code 3111.95(A) concerning a child born from donor insemination apply to same-sex married couples under *Obergefell* even though the legislature has not specifically amended the statute. Other Courts have found the rebutting of the marital presumption to be valid, thereby making the non-biological mother a non-parent and legal stranger to the child. Two recent Courts of Appeal cases show how the issue is percolating throughout the state, but the Ohio Supreme Court has yet to weigh in.

In *In re L.E.S.*, 2024-Ohio-165, 233 N.E.3d 1259, 2 (1st Dist.), the First District reiterates what we know from *Obergefell*, that same-sex spouses are entitled to a presumption of parenthood under Ohio Revised Code Section 3111.95(A) when their spouse had a baby through artificial insemination during the marriage. The case goes further and holds that an unmarried partner can also be recognized as a legal parent under Ohio law *if* it is established that the couple would have been married if it were not for Ohio's ban on same-sex marriage before *Obergefell*. This case was decided January 19, 2024 in the First District Court of Appeals in Cincinnati.

On July 12, 2024, the Sixth District (Toledo), in *Wiczynski v. Hutton*, 6th Dist. Lucas No. L-23-1135, 2024-Ohio-2660, considered a similar issue. In this case, after an agreed dissolution of marriage including an agreed parenting plan, one of the child's mothers filed a motion to vacate the court's order because her ex-wife was not a parent of the child born during the marriage under R.C. 3111. The mother opposing the motion to vacate argued that because this is a post-*Obergefell* case, the Equal Protection clause requires that same-sex spouses be treated the same as opposite-sex spouses even though the statute still only technically refers to "men" and "fathers." The Sixth District refused to vacate based on technical arguments and timeliness, not reaching the constitutional issue.

g. Trans Issues in marriage dissolution

There are no reported cases concerning parties transitioning in domestic relations court. The issue should have no impact on the division of property or spousal support. A transitioning parent may face problems in contested custody matters similar to the prejudice lesbians and gays faced in custody determinations years ago. A sympathetic GAL Report, a positive forensic clinic report, or a private custody evaluation can educate a trial court. Otherwise, it will be up to the attorney to do so.

h. Pre-nups and post-nups in marriage dissolution

Prenuptial and Postnuptial Agreements can be used to identify the value and distribution of pre-marital property in the event of a divorce. These can be especially useful in a long-term relationship with a short-term marriage. A lesser

earning partner/spouse's contributions (other than financial) can be recognized in these agreements to make them more equitable.

i. Post-divorce litigation

Property and debt issues of the parties become finalized with the divorce unless a party appeals the court decision. Post-divorce litigation would then focus on undisclosed assets and debts or the failure to abide by the Separation Agreement terms. Custody, child support, and parenting time can be modified following a divorce anytime while the child is still a minor. A parent coming out following a divorce or dissolution could potentially face a custody modification under Ohio Revised Code Section 3109.04(E)(1)(a). Any modification must be "in the best interests of the child" after consideration of several factors listed in Section 3109.04(F)(1), none of which is specific to sexual orientation.

j. Know your court's resources

Larger counties have mediation departments and court forensic clinics that smaller counties may not have. All courts have the ability to appoint a GAL for contested custody cases or custody modification cases. Parties can also request private custody evaluations at their own expense. Knowing your local court's resources can save time and money in contentious divorce cases.

**5. Parentage, Co-Parenting, Custody and Shared Custody (Welcome to Juvenile Court)**

a. Definitions

**Parentage** – Parentage legally establishes the parent-child relationship under Ohio Revised Code Section 3111.01. Parentage further creates rights and

responsibilities of the parent to the child. Parentage does not convey any custodial rights to a child.

**Co-Parenting** – A Co-Parenting Agreement is made when two or more individuals, one of whom is the legal custodian, agree to raise a child together. The agreement can be oral, in writing, or by deeds and actions of the parties. An agreement to co-parent does not establish or convey custodial rights to a child.

**Custody** – When an unmarried woman in Ohio gives birth she is automatically the legal custodian of the child under Revised Code Section 3109.042. In Ohio, a child born during the marriage of two parties (same-sex or opposite sex) is presumed to be the child of both parents under Revised Code Section 3111.03. Both parties are recognized as the parents and legal custodians of the child.

**Shared Parenting** – When married parents agree to share parental responsibilities when they are ending their marriage, they enter into a Shared Parenting Plan pursuant to Revised Code Section 3019.04. The Shared Parenting Plan sets out how the parents will communicate with each other and make decisions together for the best interests of the child.

b. *Mullens, Bonfield, and Obergefell*

Toward the end of 2004, Ohio voters passed a Constitutional Amendment prohibiting same sex marriage. Amongst all the gloom and doom, the *Bonfield* decision provided a light and hope for LGBTQ families. Decided by the Ohio Supreme Court, the *Bonfield* case allowed a same-sex unmarried couple to share custody of the children born by donor insemination pursuant to RC 2151.23 (A)(2). The Ohio Supreme Court held that the juvenile court had jurisdiction to hear the

parties' petition and authority to grant shared custody to both parties after a determination that it was in "the best interests of the children." *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, 36. Both parties were in agreement and there was no opposition. *Id.* The Court made it clear that the non-biological partner would be considered a shared legal custodian, not a parent of the children. *Id.* Shared custody has been granted to same-sex unmarried couples by Juvenile Courts across Ohio for over twenty years!

Then came the *Mullen* decision. *In re Mullen* was decided by the Ohio Supreme Court in 2011. *Hobbs v. Mullen (In re Mullen)*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302. While the lesbian couple in this case agreed to have children together via donor insemination and to co-parent the children, there was no written contract between the parties or specific intent by the biological mother to share custody of the children with her partner. *Id.* The Court found no agreement by the parties deeds and actions that Mullen intended to permanently relinquish her sole custody of her child to share custody with Hobbs. *Id.* An agreement to co-parent is not the same as an agreement to share custody. In this case, legal terms and definitions were critical in the absence of a written agreement.

Then came the *Obergefell* decision. The U.S. Supreme Court affirmed equal treatment for same-sex couples as opposite-sex couples in not only the right to marry, but also enjoy the "constellation of benefits that States have linked to marriage." *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015). *Obergefell* is important in custody cases because if Courts fail to recognize and apply its holdings, especially

under Revised Code Section 3111.95 by allowing for the marital presumption to be denied to same-sex married couples, they could possibly apply the *Mullen* holdings.

c. Lack of Case Law

Between 2015 when *Obergefell* was decided and 2024, there were no Ohio custody cases to guide Ohio Courts until *In re L.E.S.*, 2024-Ohio-165, 233 N.E.3d 1259, 2 (1st Dist.) in January of 2024. *In re L.E.S.* was filed as a contested shared custody case. The First District Court of Appeals applied *Obergefell* and held that RC 3111.95(A) should apply not only to husbands' rights to be recognized as parent for children conceived through donor insemination, but same-sex wives as well. This case was remanded to the Juvenile Court to determine whether the parties would have been married at the time the child was born, but for Ohio's ban on same-sex marriage.

d. Companionship

If shared custody cannot be established by agreement like in *Bonfield*, or with written or "competent, credible evidence" establishing a biological mother's intent to "permanently relinquish some custody in favor of shared custody" as in *Mullen*, then companionship provides another option to preserve and main a consistent relationship with a child. A domestic relations court can grant companionship time under Ohio Revised Code Section 3109.051(B)(1) with a specific schedule after determining those rights to be in the best interests of the child. Where the parties were not married, companionship time can be granted by a juvenile court under Ohio Revised Code Section 3109.12.

e. Transgender Issues in Custody

There are no reported cases in Juvenile Court concerning parties transitioning. Just like in Domestic Relations Court, a sympathetic GAL Report, a positive forensic clinic report or a private custody evaluation can educate a trial court. Otherwise it will be up to the attorney to counter prejudice with information regarding the positive relationship between the parent and the child.

**6. Adoptions**

Adoption in Ohio is governed by Revised Code Section 3107. Probate courts have exclusive jurisdiction over adoptions in Ohio. Adoptions require a substantial number of forms and other documents to be submitted to the court along with an adoption petition. A list of the required forms and documents should be available on your county probate court website or the Ohio Supreme Court website. In addition to the submission of court forms and additional documents, petitioners will need a criminal background check and a home-study performed by a social worker from the court.

Adoptions are considered joyous occasions. As such, courts often allow family and friends of the petitioners to attend the hearing, creating a party-like atmosphere.

a. Who Can Adopt

- i. Married Couples can adopt a child. Even though RC 3107.03(A) refers to a husband and wife, same-sex married couples can adopt in Ohio.

- ii. Single adults can adopt a child under RC 3107.03(B). Sexual orientation of the prospective adoptive parent is not a barrier to adoption. In *In re Adoption of Charles B.*, 50 OhioSt. 3d 88, 552 N.E. 2d 884 (1990), the Ohio Supreme Court reversed the appellate court finding that, as a matter of law, homosexuals are not eligible to adopt. There are no laws prohibiting gay people from adopting children in Ohio.
- iii. Stepparents can adopt a child under RC 3107.03(C).

b. Stepparent Adoptions versus Parentage Actions

Stepparents who are married to the adoptive child's parent can adopt. If the child has another legal parent, that parent may have to consent to the adoption in order for the case to proceed. A stepparent adoption granted in Ohio should be recognized in all other states under the full faith and credit clause of the US Constitution.

A stepparent adoption is the best way to legally protect a family when a same-sex married couple's children were born through donor insemination before the parties were married. Although somewhat cumbersome, the adoption granted in Ohio will be recognized throughout the United States. While some clients may complain, justifiably, that they should not have to adopt their own child, that is reality in Ohio.

Parentage actions, which are easier to complete in Ohio than stepparent adoptions, might not be recognized in other states. If the same-sex parents are married, then stepparent adoptions are the better legal option. If the same-sex



parents are not married, or if the children were born during the marriage, a parentage action is the only option to protect the family in Ohio. Probate courts in Ohio are not allowing adoptions by married same-sex non-biological parents whose children were born via donor insemination during the marriage. Ohio probate courts already recognize the non-biological parents as parents, even though the marital presumption can be raised in a divorce proceeding, as explained in the divorce section of this guide. Until Ohio Revised Code Sections 3111.88 to 3111.96 are revised to reflect *Obergefell*, same-sex couples will continue to have to go through extra legal hurdles to protect their parental rights.

c. Confirmatory Adoptions

Confirmatory adoptions are not available in Ohio. It is a streamlined process of adoption where the same-sex parents are legally recognized as parents under state law. Second parent adoptions where the same-sex partners are not married and have children together are also not available in Ohio. R.C. § 3107.03.

**7. Legal Documents All Adults Should Have, Especially LGBTQ+ Adults**

Estate planning documents are essential to protect LGBTQ+ relationships from unwanted interference from family members when an LGBTQ+ individual is ill or dies by clearly stating the couple's wishes in writing. The estate planning documents below are recommended to achieve this purpose.

a. Last Will and Testament

A last will and testament is an estate planning document that directs who should be administering the decedent's estate and how the estate assets should be

distributed. In Ohio, wills are governed by Ohio Revised Code Section 2107. There are two types of assets to be considered when planning for end-of-life, non-probate assets and probate assets.

Non-probate assets are assets that pass to named beneficiaries outside of a person's will and are not part of the decedent's probate estate. Examples of non-probate assets are assets where beneficiaries are named, such as life insurance or retirement accounts. They also include joint assets, such as bank accounts, brokerage accounts, and joint ownership of real estate with rights of survivorship. All individuals should take time to make sure their beneficiaries of choice are named on accounts, deeds, and assets. Probate assets are assets that are distributed to beneficiaries in accordance with a person's last will and testament. Both probate and non-probate assets should be considered as part of the estate planning process.

In accordance with Revised Code Section 2107, a person creating a will must be 18-years-old, of sound mind, and voluntarily drafting the will. A written will should be signed by the testator in the presence of two witnesses who are not receiving anything in the will. The will does not need to be notarized.

#### b. Advanced Directives

Advanced Directives are legal documents that state what healthcare a person desires in the event that they are unable to communicate for themselves.

##### i. Health Care Powers of Attorney (POA)

A power of attorney (POA) is the authority a person gives to another person to act on their behalf. A health care POA is a specific POA that concerns the healthcare decisions of an adult. Health care POAs are governed by Ohio Revised

Code Section 1337. The person creating the health care POA, the principal, names a primary and a secondary agent, known as the attorney-in-fact, who can make healthcare decisions for them in the event that they are unable to make such decisions for themselves. This includes the right to speak to whoever is providing healthcare, such as doctors, nurses, or respiratory therapists, wherever healthcare is being provided, such as hospitals, rehabilitation facilities, home health care, urgent care, or doctors' offices. The authority of the named attorney-in-fact also includes the right to request treatment and the right to refuse treatment. Both the principal and the attorney-in-fact must be adults. A HCPOA is a "springing" POA that only springs into action when the principal is unable to make their own health care decisions. At all other times the principal makes their own health care decisions.

## ii. Living Wills

A living will specifies what healthcare a person desires in the event that they are terminally ill and in the last stages of their illness or in an irreversible coma. The living will is a directive to a person's doctor and other health care professionals concerning end of life issues and the type of care or refusal of care that the individual is seeking. This includes the right to refuse extraordinary life preserving treatments such as feeding tubes and IVs or to request comfort care only and hospice. Living wills are governed by Ohio Revised Code Section 2133. Like a HCPOA, primary and secondary individuals are named to consult with doctors and other medical professionals. Both the individual and those named as agents with healthcare decision-making authority must be adults.

c. HIPAA Authorization

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law governed by 45 C.F.R. 160-164 that allows an adult to permit disclosure of their medical records and information to named individuals. Executing a HIPAA authorization allows access to the person's medical records to assist their named individuals in making health care decisions under a health care POA and living will.

d. General Durable Powers of Attorney

General Durable Powers of Attorney concern the financial affairs of the principal (individual). These POAs are governed by Ohio Revised Code Section 1337. Within the POA, the attorney-in-fact (agent named) is granted authority to make financial decisions on behalf of the principal as soon as the document is executed. This creates the possibility of conflict between the principal and the attorney-in fact, especially if the principal is perfectly capable of making their own financial decisions. As such, this document has the potential of being abused and should be avoided unless necessary.

e. Nomination of Guardian for Minor Children

Parents or legal custodians of minor children are able to nominate a guardian for their children/wards in the event of their death. Nominations of guardians for minors are governed by Ohio Revised Code Sections 2111 and 1337.

**8. Legal Resources**

a. National Organizations

Lambda Legal  
Lambdalegal.org  
National Headquarters

120 Wall Street, 19<sup>th</sup> Floor  
New York, NY 10005  
212-809-8585  
Midwest Regional Office – Covering Ohio  
65 E. Wacker Place, Suite 2000  
Chicago, IL 60601  
312-663-4413

National Center for Lesbian Rights  
nclrights.org  
870 Market Street, Suite 370  
San Francisco, CA 94120  
415-392-6257

American Civil Liberties Union  
ACLU.org  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
212-549-2500

National LGBTQ Task Force  
thetaskforce.org  
1050 Connecticut Avenue NW, Suite 65500  
Washington, DC 20036  
202-393-5177

The Transgender Legal Defense and Education Fund  
transgenderlegal.org  
646-845-4205

Sage Advocacy and Services for LGBTQ+ Elders  
sageusa.org  
305 7<sup>th</sup> Avenue, 15<sup>th</sup> Floor  
New York, NY 10001  
212-741-2247

b. State Organizations

Equality Ohio  
Equalityohio.org  
614-224-0400  
Legal Clinic 855-LGBT-LAW

ACLU of Ohio  
Alcuohio.org

4506 Chester Avenue  
Cleveland, OH 44103  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
614-586-1958

TransOhio Inc.  
Transohio.org  
P.O. Box 18272  
Cleveland, OH 44118