
Coates' Canons Blog: Same-Sex Marriage And Adoptions of a Minor by a Stepparent

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Over the course of the last two weeks, North Carolina federal district court judges in both the western district and the middle district rendered decisions declaring North Carolina's laws prohibiting same-sex marriage unconstitutional. See General Synod of the United Church of Christ, et. al. v. Drew Resinger, Register of Deeds for Buncombe County, et. al., Case No. 3:14-cv-00213-MOC-DLH; Fisher-Borne, et. al. v. Smith, et. al, Case No. 1:14CV299. These decisions were based on *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), in which the Fourth Circuit Court of Appeals declared unconstitutional a Virginia law and a Virginia constitutional amendment prohibiting same-sex marriages and making same-sex marriages invalid, as well as the U.S. Supreme Court's denial of certiorari of the same case. As a result of these decisions, any prohibition on same-sex marriage — including North Carolina Const. art. XIV, Section 6, G.S. 51-1, and G.S. 51-1.2 — is invalid statewide. Same-sex marriage is now legal in North Carolina.

We are still in the process of analyzing the impact of these decisions on other areas of the law outside the marriage context. One immediate area of concern is adoptions. Under current NC law, there are three ways by which an adoption may take place:

- Direct placement adoption, which contemplates a complete substitution of families where biological parents sever their rights in favor of adoptive parent or parents;
- Agency placement adoption, in which an agency acquires legal and physical custody of a minor for purposes of adoption by means of relinquishment or termination of parental rights; and
- Stepparent adoption, whereby an individual who is the spouse of a parent of a child but who is not a legal parent adopts the child.

See *Boseman v. Jarrell*, 364 N.C. 537, 543 (2010).

This summary addresses stepparent adoptions only. The recent decisions extend the right to adopt to married same-sex couples in North Carolina where one parent is the legal parent of the child. Prior to the recent same-sex marriage decisions, a same-sex couple could not marry, and therefore, the partner in the relationship who was not the child's legal parent could not seek to adopt the child as a stepparent. A "stepparent" is defined as "an individual who is the spouse of a parent of a child, but who is not a legal parent of the child." **G.S. 48-1-101(18)**. If a same-sex couple lawfully marries under the laws of North Carolina or any other state and one partner in the marriage is the legal parent of a minor child, then pursuant to the G.S. Chapter 48 definition of stepparent, the same-sex spouse is the child's stepparent. Under **G.S. 48-4-101**, a stepparent may file a petition to adopt a stepchild child if:

- (1) The parent who is the spouse has legal and physical custody of the child, and the child has resided primarily with this parent and the stepparent during the six months immediately preceding the filing of the petition;
- (2) The spouse is deceased or incompetent but, before dying or being adjudicated incompetent, had legal and physical custody of the child, and the child has resided primarily with the stepparent during the six months immediately preceding the filing of the petition; or
- (3) The court, upon a finding of cause, permits a stepparent who does not meet the requirements of (1) or (2) above to file a petition.

The petition is signed and verified by the stepparent and filed as a special proceeding before the clerk of superior court.

The process for the adoption by a same-sex stepparent is the same as for any other stepparent adoption. After the filing of the petition, a hearing or disposition of the adoption petition is not held until at least 90 days have elapsed; however, this requirement may be waived by the clerk for cause. See **G.S. 48-2-603(a)(1)**. In determining whether to waive this requirement for cause, the clerk may likely consider whether: (i) time is needed for notice to be given and/or consent obtained, (ii) an agency report to the court is required, and (iii) additional time is needed to ensure that the adoption will work and is in the child's best interest. See Jane Thompson, North Carolina Clerk of Superior Court Procedures Manual, Appendix XIII, Page 110.96.

The clerk may dispose of the petition without a formal hearing if the petition to adopt a minor stepchild is not contested. See **G.S. 48-2-601(a)**. At the hearing or disposition, the clerk must grant the petition if the clerk finds by a preponderance of the evidence that:

1. The adoption is in the child's best interests;
2. 90 days have passed since filing the petition, unless this requirement was waived by the clerk for cause;
3. The child has been in the physical custody of the stepparent for at least 90 days, unless this requirement is waived by the clerk for cause;
4. Notice of the filing of the petition has been served on any person entitled to notice;
5. All the consents, waivers, or judicial orders terminating parental rights have been filed with the clerk and the time for revocation has expired;
6. Any required report to the court has been filed and considered by the clerk;
7. The requirements of the Interstate Compact on the Placement of Children have been met, if applicable;
8. Any motion to dismiss the proceeding has been denied;
9. The stepparent is a suitable parent;
10. The clerk has reviewed any accounting and affidavit of fees and addressed any unacceptable fees pursuant to Article 10 of Chapter 48; and
11. There has been substantial compliance with Chapter 48.

See **G.S. 48-2-603**.

The question of consent (item 5 above) where a same-sex stepparent is the petitioner may pose some questions regarding the role of the biological parent who is not the spouse of the stepparent in that adoption. A stepparent adoption of a child requires *both* parents of the child to consent, although the content and the nature of the consents differ for each of these parents. See **G.S. 48-4-103**. For the parent whose same-sex spouse is the petitioner, the consent does not include a transfer of physical and legal custody to the stepparent or a recognition that upon the finalization of the adoption, the consenting parent's and the child's legal relationship is severed. That parent-child relationship remains intact after the adoption is finalized. See **G.S. 48-4-103(a)(2)**. In contrast, the parent who is not married to the stepparent petitioner must (i) consent to the transfer of any rights of legal and physical custody of the child to both the other parent and stepparent, (ii) consent to the adoption of the child by the stepparent, and (iii) recognize that the adoption will terminate the parent-child relationship and extinguish any prior court orders of custody and visitation. See **G.S. 48-4-103(b)**.

Consent is not required from a parent who is not petitioner's spouse if that parent:

- is deceased,
- had his or her parental rights terminated by court order,
- executed a relinquishment of his or her rights to an agency for the adoption of the child,
- received notice of the adoption proceeding as required by G.S. 48-2-401 and failed to respond within 30 days after service of the notice, or
- was convicted of first or second degree rape or rape of a child and the child's conception was a result of that rape .

G.S. 48-3-603(a)(1), (4), (6), (7), (9).

Additional exceptions apply specifically to fathers. The consent of a father is not required if he:

- was judicially determined to not be the father, or if another man was judicially determined to be the father,
- was not married to the mother at the time of the child's birth, and he executed a notarized statement denying paternity or disclaiming any interest in the minor,

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- after conception, received a prebirth notice as provided for in G.S. 48-2-206 and failed to notify the court within 15 days of receiving the notice of his belief that his consent is required, or if he did timely respond, the court after hearing determined his consent is not required,
 - did not prior to the filing of the adoption petition or a prebirth consent hearing (whichever occurs earlier)
 - legitimate the child, or
 - acknowledge paternity and
 - was obligated to support the child by either a written agreement or court order, or
 - during pregnancy and afterwards, provided reasonable and consistent payments to support the mother, child, or both and has regularly visited or communicated or attempted to do so with the mother, child, or both, or
 - prior to the filing of the adoption petition, did not take the child into his home and openly hold the child out as his own.

G.S. 48-3-603(a)(2), (5), (8); 48-3-601(2)b.3, 4., 5.

Unless one of these provisions applies, both parents must consent to the stepparent adoption involving a same-sex marriage. However, in some same-sex couples, there may have been a sperm or egg donor or a gestational carrier, as well as conception by artificial insemination. This poses additional questions regarding notice and consent, which are not specifically addressed by North Carolina law. **G.S. 48-2-402(b)** allows for service by publication upon an unknown parent if notice of the adoption is required to be provided to that parent. Although North Carolina law addresses a child's parentage when conceived through artificial insemination, it is specific to a nonhusband donor and by law considers the child a naturally conceived legitimate child of the husband and wife, and therefore, does not apply to same-sex marriages. **G.S. 49A-1**. A judicial determination may need to be made regarding a sperm or egg donor's or gestational carrier's right to notice in the case of a stepparent adoption; however, the law is unclear on what factors must be considered in making that determination. Despite this uncertainty regarding notice, it is clear is that a same-sex spouse is eligible as a stepparent to adopt his or her spouse's child under G.S. Chapter 48.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-1-101.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-4-101.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-2-603.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-2-601.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-4-103.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-3-603.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-3-601.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_48/GS_48-2-402.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_49A/GS_49A-1.html