

# For LGBTQ+ Persons, the Path to Parenthood Presents Unique Challenges



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Advancements in assisted reproductive technologies and major legal and societal shifts have significantly expanded family building options available to members of the LGBTQ+ communities. However, persons in these communities still face unique and complex challenges as they navigate the path to parenthood.

## Primary takeaways:

### PROSPECTIVE LGBTQ+ PARENTS SHOULD CONSIDER:

- » Taking care in selecting supportive and non-discriminatory medical, legal, and financial providers.
- » Assuming and planning for higher costs associated with family building.
- » Carefully considering and documenting guardian appointments for minor children, especially if based on one's "family of choice" and "bulletproof" estate plans to more effectively repel challenges.
- » Encouraging federal, state, and local policy makers to address gaps in legislation protecting members of the LGBTQ+ communities.





# The experience of one is not the experience of all

Recent studies have shown dramatic differences in expectations around family building between LGBTQ+ millennials and their elder counterparts.<sup>1</sup> While older generations were more likely to first marry different-sex partners and have children via intercourse, younger LGBTQ+ persons view alternative paths to parenthood as more achievable than ever before.<sup>2</sup> Members of the LGBTQ+ communities must still contend with complex medical, legal and financial barriers along the path to parenthood that differ from those faced by cisgender, heterosexual couples.

The issues faced by LGBTQ+ persons in pursuing parenthood are far too numerous and nuanced to be covered in detail here. From determining the method and covering the costs of family expansion, to navigating the myriad of federal, state and local laws impacting LGBTQ+ parental rights, the

challenges faced by each prospective parent will vary widely. Sixty-three percent of LGBTQ+ millennials who are interested in building a family expect to use assisted reproductive technology, foster care, or adoption to become parents.<sup>3</sup> These specific paths to parenthood present notable challenges to the LGBTQ+ communities.

## WHY THIS MATTERS:

Because of the dramatic difference in the way certain laws treat LGBTQ+ persons, it is important to recognize and plan for the multitude of challenges these persons face in building their families.

<sup>1</sup> Neyra, O. (2021). Reproductive Ethics and Family: An Argument to Cover Access to ART for the LGBTQ Community. *Voices in Bioethics*, 7. <https://doi.org/10.52214/vib.v7i.8559>

<sup>2</sup> Family Equality (2019) LGBTQ Family Building Survey. <https://www.familyequality.org/fbs> (August 2023)

<sup>3</sup> Id.

# Assisted Reproductive Technology: Patchwork Policies serve as Barriers to Access and Parental Recognition

Assisted reproductive technology refers to treatments and procedures that aim to achieve pregnancy, all of which rely on varying degrees of medical assistance.<sup>4</sup> For members of the LGBTQ+ communities, this can be a notable barrier. Despite existing protections, LGBTQ+ persons face continued and widespread health care discrimination with 56 percent of LGBTQ+ patients reporting experiencing discrimination in healthcare settings.<sup>5</sup> To alleviate this barrier, special consideration should be paid to selecting supportive providers with experience caring for LGBTQ+ communities.

Members of the LGBTQ+ communities may also need to plan for increased costs associated with assisted reproductive technology as insurance policies commonly require a medical diagnosis of “infertility” before extending coverage.<sup>6</sup> A medical diagnosis of infertility often requires a minimum period of unprotected sex without the occurrence of pregnancy.<sup>7</sup> Insurance carriers have widely used the medical definition of infertility as a basis for denying coverage to same-sex couples by classifying them as “socially infertile” as opposed to “medically infertile.”<sup>8</sup>



Insurance carriers who ultimately extend fertility coverage to same-sex couples often require them to cover costs out of pocket for a minimum period before coverage applies. This minimum window typically corresponds to the time period required for proof of infertility in opposite-sex couples.<sup>9</sup> For some forms of assisted reproductive technology, including surrogacy, coverage may only be available on a supplemental basis while Medicaid generally does not cover surrogacy costs at all.<sup>10</sup> This can leave less affluent LGBTQ+ persons with few, if any, options available to build a family through biological means.

<sup>4</sup> <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/art>

<sup>5</sup> <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/>

<sup>6</sup> Neyra, O. (2021). Reproductive Ethics and Family: An Argument to Cover Access to ART for the LGBTQ Community. *Voices in Bioethics*, 7. <https://doi.org/10.52214/vib.v7i.8559>

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.





For those who use assisted reproductive technology, parental recognition – the process of having both intended parents listed on a child’s birth certificate – can also present challenges. State laws addressing parentage have largely failed to keep pace with broadening ways in which families are formed, and although the Supreme Court ruled in 2017 that married same-sex couple have the right to both be listed on their child’s birth certificate, the rights of unmarried same-sex parents remain unclear.<sup>11</sup> Thirty-four states lack clear and direct laws addressing recognition for non-gestational, unmarried parents.<sup>12</sup>

Parental recognition processes can be complicated and costly, but are necessary to afford children the legal protections extended through parentage.<sup>13</sup>

#### RECOMMENDED ACTIONS:

- » Actively seek out healthcare providers who have experience providing reproductive care to LGBTQ+ communities and policies protecting LGBTQ+ patients.
- » Carefully review insurance policies to understand scope of coverage. Build increased reproductive health care costs into goals-based planning assumptions.
- » Connect with LGBTQ+ community organizations and advocacy groups as many offer resources and support to prospective parents.
- » Consult an attorney who has experience representing LGBTQ+ families in parental recognition matters.

<sup>11</sup> [https://www.supremecourt.gov/opinions/16pdf/16-992\\_868c.pdf](https://www.supremecourt.gov/opinions/16pdf/16-992_868c.pdf)

<sup>12</sup> Movement Advancement Project. "Equality Maps: Other Parental Recognition Laws." [https://www.lgbtmap.org/equality-maps/other\\_parenting\\_laws](https://www.lgbtmap.org/equality-maps/other_parenting_laws). Accessed August 2023

<sup>13</sup> Movement Advancement Project. June 2023 "Relationships at Risk: Why We Need to Update State Parentage Laws to Protect Children and Families." <https://www.mapresearch.org/2023-parentage-report>.

# Adoption and Fostering: State-Sanctioned Discrimination is Alive and Well

Private and public adoption are both common methods for family building, even more so for LGBTQ+ individuals. Same-sex couples are seven times more likely to be raising an adopted or foster child than their different-sex counterparts.<sup>14</sup> Even so, inequities still exist in the access to both private and public adoptions thanks, in part, to the lack of comprehensive federal nondiscrimination laws protecting LGBTQ+ persons. Non-discrimination laws for LGBTQ+ persons are instead left largely to the states, with fewer than half having adopted state-level protections.<sup>15</sup> Twenty-three states have enacted religious exemption laws to permit the use of religious beliefs as a defense to discrimination against LGBTQ+ persons.<sup>16</sup> In thirteen states, these religious exemption laws have been interpreted to permit social service agencies to refuse to place children with LGBTQ+ families if doing so conflicts with their religious beliefs.<sup>17</sup> This state-sanctioned discrimination can present a barrier to access public adoptions for many LGBTQ+ families which may force them to pursue more expensive alternatives such as private adoption.<sup>18</sup>



## RECOMMENDED ACTIONS:

- » Connect with LGBTQ+ community organizations and advocacy groups as many offer resources and support to prospective parents.
- » Consult an attorney who has experience representing LGBTQ+ families in adoption matters.
- » Build adoption costs into goals based planning assumptions.

<sup>14</sup> <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/>

<sup>15</sup> <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/>

<sup>16</sup> [https://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](https://www.lgbtmap.org/equality-maps/religious_exemption_laws)

<sup>17</sup> Id.

<sup>18</sup> Family Equality (2019) Building LGBTQ+ Families: The Price of Parenthood. <https://www.familyequality.org/price-of-parenthood> (August 2023)

# It Takes a Village to Raise a Child: Memorialize your Plan to Ensure Continuation of Care

As my colleague and friend, Joseph Hahn, pointed out in his recent publication on Retirement and Estate Planning Challenges for LGBTQ+ adults, the movement we have seen towards equality under federal and some state laws does not change privately held biases or social stigma that persists in many communities.<sup>19</sup> Unfortunately, it is still common for families to stigmatize LGBTQ+ children leading to fractured family relationships with LGBTQ+ youth experiencing homelessness at over twice the rate of peers.<sup>20</sup> In light of these fractured family relationships, LGBTQ+ individuals often create “family of choice,” a network of friends and supportive family members who provide social and familial support.<sup>21</sup>



## IMPACT ON PLANNING:

Most state laws don't recognize “families of choice.” This means that LGBTQ+ persons may need to carefully plan for the continuum of care for their children in their estate planning documents and take additional steps to “bulletproof” these documents from the attacks of estranged or unsupportive family members who default laws may favor as guardians, conservators, etc. Careful attention should also be given to the definition of “children” in estate planning documents to ensure that the definition covers all intended parties, regardless of biological relation.

<sup>19</sup> <https://www.jpmorgan.com/content/dam/jpm/wealth-management/documents/lgbtq-planning.pdf>

<sup>20</sup> <https://www.chapinhall.org/research/lgbtq-young-adults-experience-homelessness-at-more-than-twice-the-rate-of-peers/>

<sup>21</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8363185/>





## RECOMMENDED ACTIONS:

- » Communicate with “family of choice” members about roles and responsibilities. Inform service providers (daycares, schools, clubs, etc.) about your expectations regarding these roles.
- » Create and routinely revisit estate planning documents, even if legally married and state default laws are currently LGBTQ+ friendly. Pay particular attention to the definition of “children” and the designation of guardians for minor children. Laws can be changed or invalidated by courts with little notice, or you could move.
- » Execute HIPAA waivers on behalf of minor children so that health care providers can legally communicate with “family of choice” members.
- » Consider writing a letter to unsupportive family members expressly informing them of your designations of guardians for minor children and keep a copy of those letters with your estate planning documents.





# Plan for today, promote change for tomorrow

If you are considering expanding your family in the short term, it is never too soon to assemble a team of medical, legal, and financial professionals to help guide you through the process. A J.P. Morgan advisor can help you begin these conversations.

Longer term, encourage federal, state, and local policy makers to address gaps in legislation protecting members of the LGBTQ+ communities.

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