

## Supreme Court Decisions: DOMA, Prop. 8, and Implications for Children and Families

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## The Supreme Court

- *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013)
  - California's Proposition 8
- *United States v. Windsor*, 133 S. Ct. 2675 (2013)
  - Section 3 of DOMA

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## Proposition 8

CALIFORNIA CONSTITUTION  
ARTICLE 1 DECLARATION OF RIGHTS

SEC. 7.5. Only marriage between a man and a woman is valid or recognized in California.

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*Perry*



- **Proposition 8 proponents have no standing to appeal the district court's judgment.**
- **No resolution regarding:**
  - Equal protection challenge to state marriage laws, including constitutionality of separate non-marital recognition.
  - Level of scrutiny for sexual orientation-based classifications.
  - Fundamental right to marry claim by same-sex couples.

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**Defense of Marriage Act (DOMA)**



- **Section 2: States do not have to recognize same-sex marriages from other states.**
- **Section 3: Federal government cannot recognize marriages of same-sex couples.**

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*Windsor*



- **Section 3 of DOMA is unconstitutional.**
- ***Married* same-sex couples gain federal recognition and receive federal rights and benefits.**

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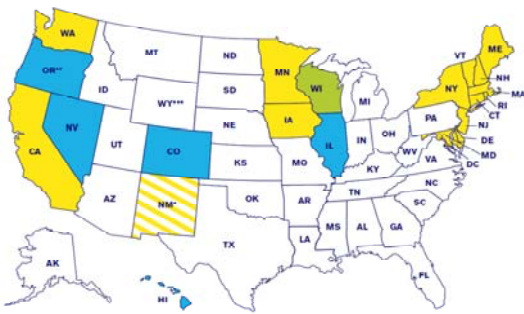
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## Relationship Recognition



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## Marriage Prohibitions



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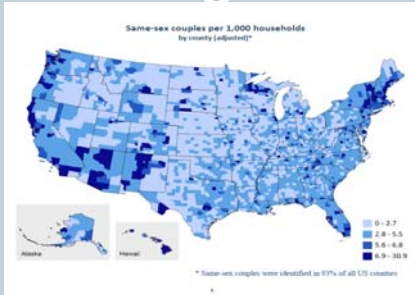
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## Same-Sex Couples



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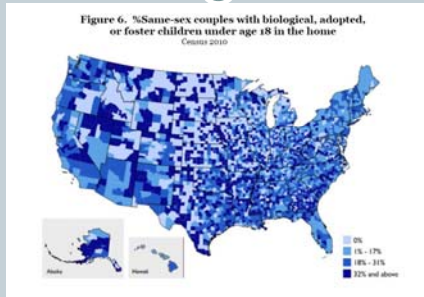
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## Same-Sex Couples with Children



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## Federal Recognition After *Windsor*

- **Place-of-Celebration Rule**
  - Majority approach (see, e.g., IRS, immigration, military benefits)
- **Place-of-Residence Rule**
  - Minority approach (see, e.g., FMLA)
- **No Rights Extended to Non-Marital Relationships**

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## Looming Question

- **Are state laws restricting marriage for same-sex couples unconstitutional?**
  - *Roberts, C.J., dissenting*: "The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States . . . may continue to utilize the traditional definition of marriage."
  - *Scalia, J., dissenting*: "[T]he view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion."
  - *Kennedy, J.*: "The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples."

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## Next Steps

- **Cases challenging state marriage restrictions**
  - Challenges in states without relationship recognition
  - Challenges in states with comprehensive non-marital recognition
    - *Garden State Equality v. Dow* (N.J. 2013) – opens marriage to same-sex couples in N.J.; rules civil unions inadequate.
  - Challenges to lack of interstate recognition
    - *Obergefell v. Kasich* (S.D. Ohio 2013) – recognition of marriage celebrated in Maryland.
    - Distinguish marriage recognition from parental recognition
      - Full Faith and Credit issue – laws vs. judgments (*Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007))

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## Today's Families

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## How family was created historically

- Giving birth made one the mother F. C. 7610
- Being married to the mother made one the father F.C. 7540 and F.C. 7611
- Acknowledging the child as one's own F. C. 7611(d)
- Later, genetic testing added biology as a way to become a parent F.C. 7550 et seq.

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## How Family is Created Today

- Biological- genetic connection
- By statute- giving birth or married/RDP to mother
- Social- acknowledges child as one's own
- Intentional – contracted to create child F.C. 7613

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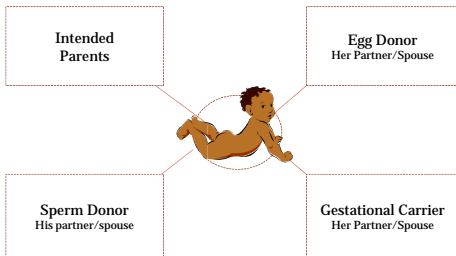
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## Potential Parents of One Child



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## Who Are ART Families?

- Lesbian Couples with a sperm donor
- Gay male couples with an egg donor and a surrogate
- Heterosexual couples with a sperm donor, egg donor and/or surrogate

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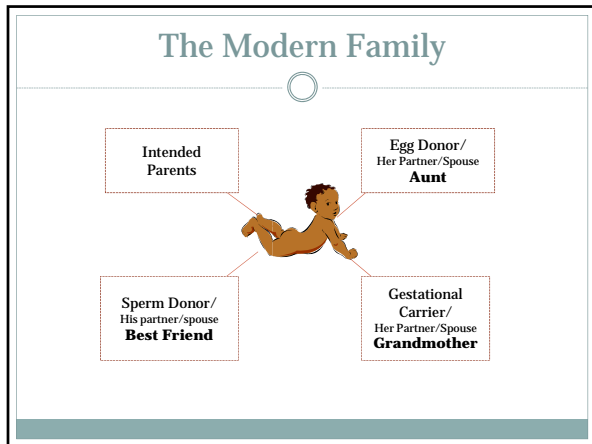
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### Two Models for Parenthood

Homo-nuclear Family  
 (or Hetero-Normative family)

Vs.

Multi- Parent Model

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### Hetero-Normative Family

Benefits	Detriments
<ul style="list-style-type: none"> <li>• Two adults are the parents (social parents)</li> <li>• Socially acceptable</li> <li>• Donor has no rights</li> </ul>	<ul style="list-style-type: none"> <li>• Limited to heterosexual norm</li> <li>• Donor/surrogate has no right to future contact</li> <li>• Lesbian centered parentage seen as anti-male</li> </ul>

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## Donor's role

- Is the donor a parent?
- Does the donor get a say in child raising?
- What if the legal parents die, does the donor have any rights?
- What is the role of the donor aunt/uncle/Friend?

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## Multi-Parent Model

### Benefits

- New category of parenthood
- Clarify parental rights with a contract
- Recognizes caregiving relationship
- Recognizes biologic relationship

### Detriments

- Disrupts nuclear (2 parent) family unit
- Undermines lesbian parental unit
- May Model divorced parenting in court
- Donor may want to parent

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## S.B. 274

- Overturns In Re: M.C. (2011) 195 Cal.App.4th 197
- Amends Uniform Parentage Act
- F.C. 7601 (c) This part does not preclude a finding that a child has a parent and child relationship with more than two parents.

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**F.C. 7612**



- (c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

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**F.C. 3040(d)**



- In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.

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