

# Family formation in a post-Roe world: A rise in second-parent adoptions?



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The Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization* is likely to have an impact on the practice of family formation law and the breadth and scope of services our clients may be looking for.

As we know, and in a vast oversimplification of the *Dobbs* decision, the Court overturned *Roe v. Wade* on the finding that abortive services are not a fundamental right provided for in the Constitution or within our other broader rights, nor are they a historically recognized right.

Although the majority opinion suggests that the *Dobbs* decisions is directed solely at *Roe* and should not "be understood to cast doubt on precedents that do not concern abortion," Justice Clarence Thomas's concurring opinion signals to many that challenges to the cases recognizing the rights and protections of those in the LGBTQ+ communities may be coming.

Among those potential challenges, it is anticipated that *Lawrence v. Texas* (recognizing that same-sex relations are protected) and *Obergefell*

*v. Hodges* (recognizing that same-sex marriage is also protected) are subject to attack.

Indeed, if Thomas stands on his reasoning and statements set forth in his, he is calling for the court to "reconsider all of this Court's substantive due process precedents," which include *Lawrence* and *Obergefell*, because all decisions based on this standard are "demonstrably erroneous," and the court has a duty to "correct the error."

With the uncertainty of many marriages perhaps hanging in the balance, families are wondering what they can do to further protect and formalize the parentage of their children in the event that their marital and/or parentage relationships are no longer legally recognized.

One option – and one that the LGBTQ+ community has historically utilized – is second-parent adoption (also known as confirmatory adoption).

Second-parent adoption formalizes via court order the parentage of children who were born to other parents, e.g., to just one of the parents or through assisted reproduction (such as gestational carrier). It is also sometimes used in adoption proceedings in states where adoption agencies will not offer adoption to gay or lesbian couples to later formalize the adoption to both parents.

Even parents who are already identified on the birth certificate may want to take advantage of second-parent adoption. For example, some states presume parentage based on marital relationship at the time of birth. In these instances, both parents

are identified on the birth certificate as parents of the minor child.

However, because the birth certificate only reflects a legal presumption that a child born to the marriage is the child of both parents, second-parent adoption may still be an important and necessary step to take.

By adopting the minor child through second-parent adoption, the other parent is taking steps to ensure that their parentage is legally recognized by a court order to reduce the possibility that their parentage is called into question if their marriage is no longer valid or not recognized in another state.

Second-parent adoption has been recognized in Maryland since 1996 and gives the "second parent" the same parentage rights as the "first parent," who is either the biological or other adoptive parent of the child. The first parent does not lose any rights by way of the second-parent adoption.

In addition to second-parent adoptions, there are a number of other steps we can take to protect our clients' family formations. We should be advising our clients on the need for powers of attorney, executed acknowledgements of parentage, updated beneficiary designation, and, comprehensive estate planning that identifies the other parent as the guardian of any minor children.

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