Legislature Updates Adoption and Parentage Statutes to Protect Families

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Despite this year's unusual legislative session, the legislature passed House Bill 1162, modernizing New Hampshire's adoption statute and adding additional legal security for children conceived via assisted reproduction. As of January 1, 2021, New Hampshire unmarried couples finally will be able to secure legal parentage through adoption. Furthermore, non-genetic parents will have access to a court judgment of parentage and confirmatory adoption. *See* RSA 170-B:4 & RSA 168-B:2.

A 2019 decision of the New Hampshire Supreme Court highlighted the urgent need for this legislation. In *In re J.W.*, the Court ruled that eleven-year-old J.W., who had been raised since he was four years old by his father and stepmother, could not be adopted because the couple was unmarried. 172 N.H. 332 (2019). This result was tragic. J.W. had only one legal parent—his father—and the only family he knew was his father, his stepmother, and his siblings born of that relationship. The Court concluded that it was constrained by the text of RSA 168-B:2, but acknowledged "the modern family has taken on many different forms" and invited the Legislature to decide if "eligibility to adopt should be expanded." *Id.* at 340.

After several years of advocacy by New Hampshire adoption practitioners, *In re J.W.* was the case needed to catapult to legislative victory. House Bill 1162 passed with overwhelming bipartisan support, thanks in no small part to the leadership of Rep. Ed Butler and many other cosponsors.

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The bill goes further by ensuring that every family who conceives via assisted reproduction is eligible for an adjudication of parentage, either by confirmatory adoption, a court order, or both, which can be an essential tool for couples, even when married. The law has long recognized the rights of non-genetic fathers, and the marital presumption applies to children born of any marriage, but confirmatory adoption provides critical additional security for parents, allowing all families who use donor gametes to strengthen the legal bonds tying their families together. The added protection of a legal judgment especially is important for same-sex parents. It was just five years ago that the right to marriage for same-sex couples was secured under the U.S. Constitution, *Obergefell v. Hodges*, 576 U.S. 644 (2015), and only ten years since it was secured by the New Hampshire legislature, RSA 457:1-a. Confirmatory adoption offers LGBTQ families security, especially in the face of the ongoing attacks on the right to marriage. *See Fulton v. City of Philadelphia*, No. 19-123, 2020 U.S. LEXIS 961 (S.Ct. Feb. 24, 2020)(allowing cert. in case determining whether a state-funded adoption agency has a constitutional right to refuse to allow same-sex couples to adopt). As the U.S. Supreme Court unanimously decided in *V.L. v. E.L.*, by virtue of the Full Faith and

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The Court stated that it would "look, however, to principles governing antenuptial agreements for guidance." *Id* at 251. The Court stated that "an antenuptial contract 'carries with it a presumption of validity,'" referencing the *Yannalfo* and *MacFarlane* cases. The Court then stated: "As a result, the parties seeking invalidation of the agreement must prove that: (1) the agreement was obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of a material fact; (2) the agreement is unconscionable; or (3) the facts and circumstances have so changed since the agreement was executed as to make the agreement unenforceable.'" (citing Yannalfo and MacFarlane). "Because of the fiduciary nature of the marital relationship, 'the parties must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the terms and execution of the proposed agreement, with fairness being the ultimate measure.' *In Re Estate of Hollett*, 150 NH at 42-43 [citation omitted, emphasis in original]." *Estate of Wilber* at 251-252.

Parties seeking postnuptial agreements often fall into one of three categories: (1) Elderly couples who have suffered the loss of a spouse and have remarried late in life with children they wish to benefit upon their death. (2) Couples whose marriage is on the rocks and one spouse has raised the issue of divorce and the other wishes to remain married. The unhappy spouse has the leverage. (3) Situations where events may have occurred such as an inheritance, the change in the structure of a business, the success of one of the parties' enterprises or a desire by one of the parties to ensure that assets pass to their children.

Likely, those cases most susceptible to invalidity are those where the marriage is shaky and a subservient spouse "gives in" to the other spouse's demands with the hope of saving the marriage. Counsel representing the submissive spouse should warn the client that the agreement may very likely become a divorce decree. Counsel representing the controlling spouse should warn that the agreement may be set aside for duress, undue influence or coercion.

Food for thought: In New Hampshire there is a statute authorizing prenuptial agreements and a presumption they are valid. No such statute exists for postnuptial agreements.

Part of the consideration for prenuptial agreements is the marriage itself; not so for postnuptial agreements.

For prenuptial agreements the motivation often is marriage. For postnuptial agreements the motivation often is divorce or its avoidance.

Postnuptial agreements may require a "greater indicia of fairness" than prenuptial agreements.

One thing is clear: predicting the enforceability of postnuptial agreements is no sure thing.

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Credit Clause of the United States Constitution "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." 577 U.S. ___, 136 S.Ct. 1017 (2016)(per curiam). Accordingly, NH orders of adoption and parentage must be given full force and effect in all 50 states and territories, providing legal security for children and families.

In enacting HB 1162, the legislature recognized that more than ever Americans are choosing to delay or bypass marriage. As of 2016, a record 18 million Americans were living with an unmarried partner, up 29% since 2007, (Christina Cauterucci, More Unmarried Americans Than Ever Are Cohabiting, Slate (Apr. 7, 2017), https://slate.com/human-interest/2017/04/more-unmarried-americans-than-ever-are-cohabiting.html), and with same-sex couples less likely than different-sex couples to choose marriage (Cara Buckley, Gay Couples, Choosing to Say 'I Don't', New York Times (Oct. 25, 2013), https://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html). With so many nonmarital families forming nationwide, it is imperative that the law adapt to protect the children of these relationships. The updates to RSA 168-B make adoption available to these families.

Further, the legislature acknowledged that in recent years the opioid crisis increased the number of children being cared for by grandparents or other family members who are not married but who are teaming up to care for children. In passing HB 1162, the legislature made clear that children deserve first and foremost the security of a family, and parents do not need to be married or even a traditional couple. This will provide the ability for more family members to come forward to provide permanency for children in crisis.

This legislation added common-sense access to protections for children across the state. While there is always more to do—including ensuring expanded access to the key administrative route to parentage, Voluntary Acknowledgments—this bill is a meaningful, positive step forward for New Hampshire's children and a reminder of the power of attorneys to identify and correct gaps in statutory protections.

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