

5-1-2016

## What Now?: Divorce Mediation in the Wake of Legalizing Same-Sex Marriage

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### Recommended Citation

Lindsay Simonson, *What Now?: Divorce Mediation in the Wake of Legalizing Same-Sex Marriage*, 8 *Y.B. Arb. & Mediation* 219 (2016).

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WHAT NOW?:  
DIVORCE MEDIATION IN THE WAKE OF LEGALIZING SAME-SEX MARRIAGE  
By  
Lindsay Simonson\*

I. INTRODUCTION

For divorcing couples, mediation provides a functional and attractive alternative to traditional divorce adjudication. Mediation often results in lasting agreements, improved communication and an ability to approach child custody and visitation disputes with an understanding of commitment and cooperation.<sup>1</sup> However, with recent developments in family law,<sup>2</sup> a large group is now effectively left out of traditional divorce mediation: married same-sex couples.

The recent Supreme Court decision in *Obergefell v. Hodges*,<sup>3</sup> recognized marriage as a fundamental right and subsequently legalized same-sex marriage across all states.<sup>4</sup> This decision produced a dramatic shift not only for same-sex couples wishing to marry, but also for family law as a whole.<sup>5</sup> However, just like traditional opposite-sex marriages, some same-sex marriages will inevitably end in divorce.<sup>6</sup> Therefore, same-sex couples must be better incorporated into the practice of divorce mediation. Similar to any major regime change in the law, legalization of same-sex marriage undoubtedly leaves a few issues to be resolved and assimilated into current practice. This article will address in part how traditional mediation methods and the statutory divorce presumptions commonly used today do not always apply to same-sex couples. This article will address why this discrepancy exists, and what can and must be done to change the divorce and divorce mediation systems to account for this new group of divorcing couples.

To begin, there are many benefits of using mediation in divorce cases. In particular, the use of mediation is useful in child custody, support, and visitation conflicts between divorcing couples. The obligation of mediators to be impartial and fair is imperative to the success of divorce mediation, and will further guide the discussion in this article. Next, this article will provide an overview of the legalization of same-sex marriage and some of the various state divorce laws in place that affect same-sex couples.

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<sup>1</sup> See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1502 (1992) (the advantages of divorce mediation).

<sup>2</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

<sup>6</sup> See Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 74-80 (2011) (discussing why divorce is important for same-sex couples contemplating marriage).

It will discuss the reasons why and how same-sex couples do not fall squarely into current divorce laws and mediation practice. Finally, this article will analyze the current practice of divorce mediation for same-sex couples. There is a clear need for change and expansion in this area of law following the federal legalization of same-sex marriage. In particular, child custody, support, and visitation disputes between same-sex couples must be adequately incorporated into divorce mediation practice. The discussion will end with an analysis of how this incorporation can be accomplished and what mediation will look like once this growing group of couples is provided for in divorce mediation practice.

## II. THE FUNCTION OF MEDIATION IN DIVORCE CASES

### *A. The Benefits of Divorce Mediation as a Result of the Privatization of Family Law*

Over the last several decades, the privatization of family law has transformed many procedures and legal doctrines.<sup>7</sup> Particularly, the shift to no-fault divorce regimes has allowed for alternative dispute resolution methods to become increasingly popular.<sup>8</sup> Divorce mediation is one such alternative dispute resolution method used by couples wishing to divorce.<sup>9</sup> With this continued privatization and no-fault divorce, parties are able to decide their financial, child custody, and other dissolution matters privately rather than having their divorce be mandated by state-imposed rules.<sup>10</sup>

Mediation is defined as “[a] method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”<sup>11</sup> A mediator assists the disputing couple in reaching agreements that can then be taken to a court to be enforced.<sup>12</sup> This practice is extremely beneficial for disputing parties, and especially for same-sex couples, wishing to divorce.<sup>13</sup>

Mediation is desirable in the divorce context for many reasons.<sup>14</sup> There is an extremely wide range of disputes that can be determined through mediation.<sup>15</sup> For

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<sup>7</sup> Singer, *supra* note 1, at 1444.

<sup>8</sup> *Id.* at 1445 (discussing the privatization of family law).

<sup>9</sup> *Id.* at 1498 (discussing the privatization of the dispute resolution process in divorce and family law).

<sup>10</sup> *See id.* at 1445.

<sup>11</sup> *Mediation*, BLACK’S LAW DICTIONARY 1130 (10th ed. 2014).

<sup>12</sup> *See* Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL’Y. & L. 989, 991-92 (2000) (discussing benefits of divorce mediation).

<sup>13</sup> *See id.* at 1021; Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 FAM. CT. REV. 87, 88-89 (2006) (discussing how mediation is especially beneficial for same-sex couples).

<sup>14</sup> *See* Singer, *supra* note 1, at 1502.

example, divorcing couples have mediated disputes regarding child custody, visitation, child support, property, and financial distribution.<sup>16</sup>

Proponents of mediation assert that mediation is significantly advantageous over both adjudication and divorce negotiation.<sup>17</sup> These advantages include minimizing hostility and conflict between the disputing spouses.<sup>18</sup> This advantage exists because, as a result of the mediation process, communication is encouraged and compromises are sought after.<sup>19</sup> Minimizing conflict between the parties also in many ways benefits any children involved.<sup>20</sup> Mediation, rather than adjudication, increases the probability that the disputing spouses will reach an agreement to which both parties will be committed and with which they are likely to comply.<sup>21</sup> It is thought that when both parties participate in the conflict management through mediation, they are more likely to follow through on their agreements rather than if a judge decided the outcome of the parties' dispute.<sup>22</sup> Further, in adjudication, lawyers replace the disputing spouses and argue toward agreements.<sup>23</sup> This is not desirable for many disputing spouses as compared to mediation, where the spouses utilize and improve their own conflict management and communication skills in reaching agreements through the mediation process.<sup>24</sup> This improves the likelihood that the parties will continue to positively interact with each other when interaction is needed, and also further their ability to resolve future conflicts.<sup>25</sup> When there are children of the marriage, this aspect of mediation can be especially desirable because the parties will undoubtedly have to interact when parenting and adhering to visitation and custody agreements.<sup>26</sup> Additionally, mediation tends to be more efficient, cost-effective, and timely than adjudication.<sup>27</sup> Disputing spouses often value the private nature of mediation over court proceedings.<sup>28</sup> The private nature of

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<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Singer, *supra* note 1, at 1502.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; Beck & Sales, *supra* note 12, at 1020-21.

<sup>22</sup> Singer, *supra* note 1, at 1507-08.

<sup>23</sup> *Id.* at 1503.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See* Singer, *supra* note 1, at 1502-03; *see also* Beck & Sales, *supra* note 12, at 1020.

<sup>28</sup> Singer, *supra* note 1, at 1507-08.

mediation also removes children from being part of negative or hostile court proceedings.<sup>29</sup>

Proponents of same-sex divorce mediation also praise the practice for its gender-equality tendency.<sup>30</sup> Often, the goal of divorce mediation is to help the parties develop agreements reflecting individual financial, property, and parenting agreements.<sup>31</sup> Women and men are relieved of their traditional family roles (for example, the wife as the homemaker and child raiser and the husband as the breadwinner), and instead are treated as individuals equally deserving of fair consideration.<sup>32</sup> These gender roles are typically rejected in divorce mediation as a result of the trend of privatization of family law.<sup>33</sup> This trend is important when considering divorce mediation of same-sex couples, because traditional gender roles may either play an obscure role or may not exist at all within the couple's dynamic.

### *B. Selection and Fairness of Mediators*

A mediator is defined as “a neutral person who tries to help disputing parties reach an agreement.”<sup>34</sup> Mediators can be experts in a field of law, or may be lawyers themselves.<sup>35</sup> However, the mediator qualifications required for divorce mediation vary across jurisdictions.<sup>36</sup> The goal of the mediation process is to arrive at a mutually acceptable agreement with input from both disputing parties.<sup>37</sup> Agreements reached in mediation are not binding, but can become binding if finalized by a court or if put into a legal contract, or if mediation is mandated by a court.<sup>38</sup> Parties are able to control their participation in mediation, and do not have to participate at all if they so desire.<sup>39</sup> The exception to this is court-mandated or compelled mediation, which some jurisdictions utilize.<sup>40</sup> Some states include compelled divorce mediation as part of their no-fault

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1517.

<sup>31</sup> *Id.* at 1504.

<sup>32</sup> *See id.* at 1517-18.

<sup>33</sup> Singer, *supra* note 1, at 1517-18.

<sup>34</sup> *Mediator*, BLACK'S LAW DICTIONARY 1130 (10th ed. 2014).

<sup>35</sup> Dodge, *supra* note 13, at 97.

<sup>36</sup> *See Beck & Sales, supra* note 12, at 991.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See Singer, supra* note 1, at 1497-98.

<sup>40</sup> *See id.*

divorce regimes.<sup>41</sup> The purpose of these mediation programs can be to provide reconciliation services before divorce or to replace divorce adjudication altogether.<sup>42</sup>

Mediation programs have different goals and requirements depending on the jurisdiction, but many divorce mediation programs emphasize the development of child custody and visitation agreements that reflect the child's best interests.<sup>43</sup> The goal of most of the divorce adjudication in the United States is also based on this standard, but is sometimes criticized for being too vague.<sup>44</sup> However, when used in a mediation setting, the best interests of the child standard is functional because the mediator can address the emotionally charged parties and help them craft an agreement that works for their specific case and also incorporates the best interests of the child or children involved.<sup>45</sup> Mediation can reduce the amount of hostility and the frequency of revisiting the agreement, all reducing stress on the children and enforcing their best interests.<sup>46</sup>

The ability of a mediator to be neutral is an underlying relevant factor in the functionality of divorce mediation.<sup>47</sup> A criticism of mediation is that neutrality is an unreasonable goal.<sup>48</sup> But if possible, a neutral mediator can effectively guide communication and agreement between disputing spouses so as to result in lasting compromises.<sup>49</sup> Some parties may choose a mediator without worrying whether or not the mediator is neutral, but other parties may choose a mediator based on the mediator's reputation, skills set, trust the parties have in the mediator, or any other reason.<sup>50</sup>

### *C. Qualifications and Standards for Mediators*

Initially, with the emergence of divorce mediation as a result of the privatization of family law, mediators were originally social service personnel who had assisted in court-mandated reconciliation programs.<sup>51</sup> Mediation training was not necessarily

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<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See Beck & Sales, supra* note 12, at 989-90.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 989-91.

<sup>47</sup> *See generally*, Paula M. Young, *Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, a Defining Features Matrix, Games, and an Exercise Based on Grievances Filed Against Florida Mediators*, 11 PEPP. DISP. RESOL. L.J. 309 (2011).

<sup>48</sup> *Beck & Sales, supra* note 12, at 1001.

<sup>49</sup> *Id.*; *see also* Young, *supra* note 47.

<sup>50</sup> *See, e.g., Beck & Sales, supra* note 12, at 1001.

<sup>51</sup> Singer, *supra* note 1, at 1498.

provided.<sup>52</sup> With the rise of divorce mediation programs in the 1970s and 1980s, professional mediators started to come into the picture.<sup>53</sup> Professional organizations emerged, such as the Association of Family and Conciliation Courts.<sup>54</sup> Organizations like the American Bar Association developed mediation training programs, and model standards of divorce and family mediation were issued.<sup>55</sup> Some jurisdictions also expressly adopted training practice standards and qualifications.<sup>56</sup>

As mentioned earlier, qualifications for mediators vary.<sup>57</sup> Some jurisdictions do not require any specific training for divorce mediators, and even employ volunteers to assist in court-mandated divorce meditation.<sup>58</sup> The mediation field is continuing to grow with the publication of books and manuals describing mediation practice.<sup>59</sup> However, despite jurisdictional requirements, or lack thereof, training for divorce mediators is important for the success of the parties.<sup>60</sup> Therefore, selecting a mediator to aid in their divorce mediation session is a task that divorcing couples should take very seriously.

### III. SAME-SEX MARRIAGE LEGALIZATION AND DIVORCE LAWS

#### *A. History of Same-Sex Marriage under State and Federal Law*

Same-sex marriage has for many years been a highly-publicized, emotionally charged, and politicized topic.<sup>61</sup> Historically, the states have had varying reactions to both same-sex couples and same-sex marriage, reflected by the array of same-sex marriage state statutes, or lack thereof, across the country.<sup>62</sup> Massachusetts became the first state to legalize same-sex marriage in 2003.<sup>63</sup> It was not the first jurisdiction in the world to recognize same-sex marriage, as some Canadian provinces, Belgium, and the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1500-01.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Singer, *supra* note 1, at 1500-01.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1502.

<sup>60</sup> *See id.* at 1499-1500.

<sup>61</sup> *See* Dodge, *supra* note 13, at 88 (discussing the history of same-sex marriage).

<sup>62</sup> *See, e.g., id.*; *see also* Oppenheimer, *supra* note 6, at 79-82.

<sup>63</sup> Dodge, *supra* note 13, at 88.

Netherlands, for example, had enacted earlier same-sex marriage legalization laws.<sup>64</sup> But Massachusetts' recognition began a monumental change in the United States' family law.<sup>65</sup> Following Massachusetts' lead, other states followed the trend that same-sex couples have the right to marry.<sup>66</sup> These decisions came either through court rulings or legislative enactments.<sup>67</sup>

Under federal law, the Defense of Marriage Act (DOMA), enacted by Congress in 1996, defined marriage as only between one man and one woman.<sup>68</sup> The Supreme Court ultimately invalidated DOMA in 2013, allowing lawfully performed same-sex marriages to be recognized as valid.<sup>69</sup> In this decision, the Supreme Court recognized that it was impermissible to disparage same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community."<sup>70</sup>

### *B. The Supreme Court's Recent Decision in Obergefell v. Hodges*

In 2015, the Supreme Court finally addressed the issue of same-sex marriage directly in the landmark case *Obergefell v. Hodges*.<sup>71</sup> The Court addressed two questions: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex," and "whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right."<sup>72</sup>

In a close 5-4 decision, the Court held that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry.<sup>73</sup> Further, the Court invalidated state laws excluding same-sex couples from marriage.<sup>74</sup> Also, because the Court held that same-sex couples can exercise the fundamental right to marry in all states, there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of it

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Oppenheimer, *supra* note 6, at 80.

<sup>68</sup> Defense of Marriage Act (DOMA), 1996 Enacted H.R. 3396 (repealed 2013); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

<sup>69</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013); see *Obergefell*, 135 S. Ct. at 2597.

<sup>70</sup> *Obergefell*, 135 S. Ct. at 2597; *Windsor*, 133 S. Ct. at 2689.

<sup>71</sup> *Obergefell*, 135 S. Ct. at 2593.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2599.

<sup>74</sup> *Id.* at 2602.

being between a same-sex couple.<sup>75</sup> This holding means that if an opposite-sex couple is legally able to marry, same-sex couples in the same circumstances cannot be denied merely because they are a same-sex couple.<sup>76</sup>

The implications of this decision have yet to unfold completely. However, as a result of this decision, states can no longer enact or enforce laws denying same-sex couples the newly recognized fundamental right to marry. Further, if a same-sex couple marries in one state, and then moves to another state, the second state cannot fail to recognize the marriage as lawful for any purpose if an opposite-sex marriage would be recognized on the same grounds.<sup>77</sup>

### C. Same-Sex Couple Divorce Laws

In the wake of the *Obergefell* decision, the states' same-sex marriage and divorce laws and court decision trends inevitably have to be altered. Although same-sex couples across the country rejoiced at the *Obergefell* decision and the recognition of same-sex marriage as a fundamental right, there will inescapably be same-sex couples whose legally recognized marriages end in divorce.<sup>78</sup> Marriage equality, as a result of this Supreme Court decision, comes with a necessity of equal access to divorce.<sup>79</sup> Historically, however, the states' divorce laws have not necessarily allowed legally married same-sex couples to divorce.<sup>80</sup> Many states have residency requirements for divorce, whereas they might not have the same residency requirements for marriage.<sup>81</sup> A major problem with this trend is that same-sex couples who were legally married in one state, and then moved to another state, were not able to get divorced in the state in which they were married.<sup>82</sup> Nor could they potentially get divorced in their home state if the state had not legalized same-sex marriage.<sup>83</sup>

After *Obergefell*, all states must grant marriages to same-sex couples on the same terms as opposite-sex couples.<sup>84</sup> But this leaves the question of how these married same-

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<sup>75</sup> *Id.* at 2605.

<sup>76</sup> *Obergefell*, 135 S. Ct. at 2605.

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.*, Oppenheimer, *supra* note 6, at 74.

<sup>79</sup> *See* Oppenheimer, *supra* note 6, at 74.

<sup>80</sup> *See id.*; *see also* Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 10-11 (2009) (discussing same-sex couples' ability to divorce).

<sup>81</sup> *See* Oppenheimer, *supra* note 6, at 74; *see also* Brower, *supra* note 80, at 10-12; *see also* Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 448-49 (2011).

<sup>82</sup> *See* Oppenheimer, *supra* note 6, at 74-76.

<sup>83</sup> *See id.*

<sup>84</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

sex couples should go about getting divorced if their marriages do not last.<sup>85</sup> Divorce is the only way by which married couples can legally disentangle themselves from their spouse.<sup>86</sup> The privatization of family law and the access to no-fault divorce across the country has become an important feature of family law, and is important for all couples regardless of their same- or opposite-sex status.<sup>87</sup> The ability to get divorced may even affect a same-sex couple's decision to marry in the first place.<sup>88</sup>

#### IV. DIVORCE AND DIVORCE MEDIATION FOR SAME-SEX COUPLES

##### *A. Current Divorce and Mediation Practice*

Turning to divorce mediation for same-sex couples specifically, this article will now discuss why and how same-sex couples do not fall squarely into current divorce and mediation practice. The current divorce and mediation trends do not always readily apply to same-sex couples, but mediation itself is an extremely beneficial tool for divorcing same-sex couples. Therefore, it is important that same-sex couples wishing to divorce have access to potentially successful divorce mediation.

Historically, as mentioned earlier, same-sex couples have not universally been able to take advantage of divorce.<sup>89</sup> However, with the recent Supreme Court decision in *Obergefell*, the states will be required to grant divorces to same-sex couples, regardless of the jurisdiction in which they were married.<sup>90</sup> Courts may also find themselves granting divorces to same-sex couples regardless of a state's residency requirements.<sup>91</sup> An even more beneficial practice may be for the states to begin a trend of amending their divorce residency requirements to accommodate for same-sex couples married elsewhere.<sup>92</sup> Because the states legalized same-sex marriage at different times,<sup>93</sup> the states could naturally have a differing number of married same-sex couples residing therein. Therefore, residency requirements could affect the ability of same-sex couples to divorce,

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<sup>85</sup> See Oppenheimer, *supra* note 6, at 74-76.

<sup>86</sup> *Id.* at 76.

<sup>87</sup> See *id.* at 77.

<sup>88</sup> *Id.* at 76-77.

<sup>89</sup> See Oppenheimer, *supra* note 6, at 79-80.

<sup>90</sup> See *id.*; see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>91</sup> See Oppenheimer, *supra* note 6, at 79-80.

<sup>92</sup> See *id.*

<sup>93</sup> Dodge, *supra* note 13, at 88.

even following the federal recognition of marriage as a fundamental right for same-sex couples.<sup>94</sup>

Two important characteristics of mediation that are helpful in divorce mediation for same-sex couples are that it is conducted privately and that it is nonbinding.<sup>95</sup> One way to make a mediation agreement binding is to bring the agreement to a court, so it can be enforced as an order.<sup>96</sup> Another way to make an agreement binding is to put it in a legal contract.<sup>97</sup> First, the confidential nature of mediation simply means that agreements are not made public.<sup>98</sup> The agreements are not a product of a proceeding conducted in a court or issued by a judge.<sup>99</sup> Therefore, there is no binding precedent by which a mediator must rely.<sup>100</sup> This gives divorce mediators wide flexibility to consider each disputing couple's situation individually, case-by-case and allows mediators to help the couple determine the best agreement for them specifically. Second, the confidentiality and nonbinding nature of mediation assure that the case will not be relied on by the mediator in dealing with the next disputing couple.<sup>101</sup> The disputing couple can select a mediator with whom they feel comfortable and, if they desire, who they know has mediation experience, without worrying that the mediator will introduce former mediation session agreements like a court would with binding precedent. In these ways, mediation itself is well-suited for divorcing same-sex couples. There is no precedent on which the mediator must rely, and the confidential nature of mediation helps ensure this practice.

However, despite the seemingly clear integration of same-sex couples into divorce practice and divorce mediation, challenges to this incorporation exist. Statutory presumptions and provisions may complicate divorce and mediation for same-sex couples. These presumptions ultimately favor and are geared toward opposite-sex couples.<sup>102</sup> This article will proceed by discussing specific issues raised during divorce mediation, and how these topics do not fit squarely into current divorce and mediation trends for same-sex couples. The discussion will continue by analyzing how this incorporation can be accomplished and the ways in which mediation practice will develop when same-sex couples are provided for in these areas.

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<sup>94</sup> See *Obergefell*, 135 S. Ct. 2584.

<sup>95</sup> Singer, *supra* note 1, at 1502-07.

<sup>96</sup> *Id.* at 1507-08.

<sup>97</sup> *Id.* at 1507.

<sup>98</sup> *Id.* at 1507-08.

<sup>99</sup> See *id.*

<sup>100</sup> Singer, *supra* note 1, at 1507-08.

<sup>101</sup> Singer, *supra* note 1, at 1507-08.

<sup>102</sup> Dodge, *supra* note 13, at 88.

### *B. The Biological Parent Link and Legal Rights to a Child*

If an opposite-sex married couple has children and is pursuing divorce, mediation is especially beneficial. Mediation reduces hostilities and promotes communication between the parties, aiding in a more positive experience for the children involved.<sup>103</sup> It helps the disputing spouses to develop lasting custody and visitation agreements.<sup>104</sup> The same is true for same-sex couples wishing to divorce.<sup>105</sup> However, certain statutory presumptions and provisions may complicate divorce and mediation for same-sex couples who have children.<sup>106</sup> For example, many state statutes have language regarding children “born of” a marriage.<sup>107</sup> This is typically clear when applied to opposite-sex couples. A child born during the marriage is usually biologically born to the wife, and the husband is presumed to be the father.<sup>108</sup>

However, a complication with this presumption arises when, in a same-sex couple, one spouse is the biological parent of the child and the other spouse is not.<sup>109</sup> Both parents should be equally considered in regards to custody, regardless of their biological link, or lack thereof, with the child.<sup>110</sup> This is especially true in same-sex couples where, unavoidably, one spouse simply cannot be a biological parent.<sup>111</sup> Some states, such as Vermont, afford both parents the same legal rights to child custody, but some states do not.<sup>112</sup> Typically, the biological parent is granted legal rights to the child and the nonbiological parent is left to the compassion of the biological parent to gain legal rights.<sup>113</sup> This is a fundamental unfairness that the states will unavoidably begin addressing now that same-sex marriage is legalized.

To incorporate same-sex couples into current divorce trends, statutory provisions should be amended to include situations in which a same-sex couple has a child, but only one spouse is the biological parent.<sup>114</sup> This situation occurs frequently, but is not fully

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<sup>103</sup> See Singer, *supra* note 1, at 1502.

<sup>104</sup> See *id.*

<sup>105</sup> See generally, Dodge, *supra* note 13.

<sup>106</sup> *Id.* at 88.

<sup>107</sup> See Brower, *supra* note 80, at 21.

<sup>108</sup> See *id.* at 19-20; see also Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 320-21 (2015) (discussing opposite-sex families).

<sup>109</sup> Dodge, *supra* note 13, at 90.

<sup>110</sup> *Id.* at 93.

<sup>111</sup> Dodge, *supra* note 13, at 93.

<sup>112</sup> *Id.* at 90.

<sup>113</sup> *Id.* at 93.

<sup>114</sup> See Brower, *supra* note 80, at 21.

embraced by the divorce practice.<sup>115</sup> Further, since mediators can help disputing couples come to agreements regarding their own personal situations, divorce mediation is the best method for divorcing same-sex couples to achieve fair custody agreements. The trouble is that a court may not necessarily enforce an agreement that does not fit into the statutory guidelines. With the legalization of same-sex marriage, however, courts will likely begin enforcing such custody agreements, regardless of the existing statutory presumptions.

### *C. Same-Sex Couples and Adoption*

Many couples, both same- and opposite-sex, adopt children into their marriages.<sup>116</sup> The adoption process is well established for opposite-sex couples.<sup>117</sup> State and federal governments clearly encourage adoption through various policies and funding programs.<sup>118</sup> In 2010, it was approximated that more than 1.5 million children were living with adopted parents.<sup>119</sup> Adoption has been widely viewed as a kind of virtuous duty.<sup>120</sup>

Some states have allowed same-sex couples to adopt as well as opposite-sex couples.<sup>121</sup> To date, tens of thousands of children have been adopted by same-sex couples.<sup>122</sup> Many of these children are in foster care or are living under state charge.<sup>123</sup> Adoption has been shown to be a major method of becoming parents for same-sex couples.<sup>124</sup>

However, problems arise in same-sex couple adoption when one parent is designated as the primary adoptive parent and, as a result, the other parent has no legal rights to the child. One way in which both spouses in a same-sex couple are able to enjoy the benefit of adoption is if one spouse formally adopts the child, and then the other spouse is added as a “second parent.”<sup>125</sup> Second parent adoption generally allows the second parent to have the same legal rights to the child as the original adopting parent.<sup>126</sup>

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<sup>115</sup> *See id.*

<sup>116</sup> *See, e.g.,* Godsoe, *supra* note 108, at 312.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 326.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Godsoe, *supra* note 108, at 312.

<sup>122</sup> Godsoe, *supra* note 108, at 313.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 332.

<sup>125</sup> Dodge, *supra* note 13, at 89; *see* Godsoe, *supra* note 108, at 322.

<sup>126</sup> Dodge, *supra* note 13, at 89.

It also allows both parents to have legal custody of the child.<sup>127</sup> Same-sex couples may desire this for many reasons. One reason is that if something happens to the original adopting parent, such as serious illness or death, the other parent will have legal rights to the child and be able to care for the child.<sup>128</sup> Parents are often concerned about what will happen to their children in the event of their death, and same-sex couples are no different.<sup>129</sup> Additionally, the adoption process is set up in a way that it tends to be easier if one spouse does the adoption application, rather than both spouses immediately being listed as parents.<sup>130</sup>

Unfortunately, in some jurisdictions, listing same-sex couples as parents on adoption applications can detrimentally affect the couples' ability to adopt.<sup>131</sup> Further, not all jurisdictions allow for second parent adoption.<sup>132</sup> This practice should be expanded across the country to allow for same-sex couples to enjoy the same benefit of adoption as opposite-sex couples. However, divorce mediation can allow for divorcing same-sex couples to arrive at agreements reflecting fair legal custody of their children, regardless of who the primary adopting parent is and the second parent adoption laws in that jurisdiction. This affects divorce mediation because if a same-sex couple is legally listed as their child's parents, a mediator can assist the couple with custody and visitation, without worrying about which parent has legal rights to the child. Avoiding this hurdle makes the mediation process smoother, and also makes it more likely that a judge will enforce a mediation agreement for the parties.

#### *D. Child Support Obligations*

It is important to note that in virtually all jurisdictions, parents across the country are responsible for the financial support of their children.<sup>133</sup> This is especially true when the child is born into the marriage.<sup>134</sup> However, this obligation becomes unclear when the parents of a child are of a same-sex couple.<sup>135</sup> Some states have developed gender-neutral child support statutes in their family law jurisprudence.<sup>136</sup> These statutes make it easier to determine the child support obligations of divorcing parents, regardless of their same- or

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Dodge, *supra* note 13, at 89.

<sup>132</sup> *Id.* at 91.

<sup>133</sup> Singer, *supra* note 1, at 1459.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

opposite-sex status. But this is assuming that other aspects of the state's statutory provisions are unambiguous and easily apply to same-sex couples.

Now that same-sex couples are legally able to marry in every state, support issues should not arise on the basis of the couples' same-sex status. Divorcing spouses should readily be covered under state divorce and child support laws. The problems arise where the states have not amended their divorce laws to incorporate gender neutrality when considering child support.<sup>137</sup>

Mediation is especially beneficial to determine child support agreements between same-sex couples. Mediators can assist the divorcing couple in achieving a fair agreement with which both spouses will comply.<sup>138</sup> However, utilizing court enforcement methods may be desirable for divorcing spouses who are worried or may become worried at a later time that their former spouse will not comply with the agreement.<sup>139</sup> Therefore, amending divorce laws and support obligation provisions specifically is likely a route many states will need to take. Without a court order, spouses are not guaranteed enforcement of their agreements. Courts might be unwilling or uneasy about ordering an agreement with which the jurisdiction has a conflicting statutory provision.<sup>140</sup>

#### *E. Premarital and Private Agreements*

One way for same-sex couples to ensure that their mediation agreements are enforced by a court in the event of their divorce is to create a binding premarital agreement.<sup>141</sup> Premarital agreements emerged as a result of no-fault divorce and the privatization of family law.<sup>142</sup> These agreements are viewed by courts as generally enforceable, and can be a successful way to determine certain issues in the event of the couple's divorce.<sup>143</sup> Same-sex couples can also take advantage of creating premarital agreements, now that marriage is a nationally recognized legal benefit for same-sex couples.<sup>144</sup> As long as premarital agreements meet certain standards, such as voluntariness, conscionability, and acceptable disclosure, courts are very likely to enforce them.<sup>145</sup>

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<sup>137</sup> *See id.*

<sup>138</sup> Singer, *supra* note 1, at 1502.

<sup>139</sup> *See id.* at 1475.

<sup>140</sup> *See id.*

<sup>141</sup> *See* Singer, *supra* note 1, at 1475.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 1475; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

<sup>145</sup> Singer, *supra* note 1, at 1475.

Private agreements can be a way to avoid legal battles, and can also be facilitated by a mediator.<sup>146</sup> Now that same-sex couples enjoy a fundamental right to marry, courts should be expected to widely enforce these private agreements. These agreements can also be considered by a divorce mediator if or when the couple decides to divorce. The agreements presumably reflect the disputing spouses' wishes and can guide the mediation session in a way that results in a lasting agreement that the spouses are comfortable giving to a court to enforce. Utilizing these agreements in a divorce mediation session would help alleviate tensions, reduce conflict, and aid the mediator in determining the disputing spouses' interests.<sup>147</sup>

## V. CONCLUSION

Divorce mediation is an extremely beneficial and potentially successful method by which married same-sex couples can pursue divorce. Current divorce practice does not readily incorporate legally married same-sex couples. However, mediation can bypass some of the hurdles same-sex couples face. All married couples should be able to get divorced if they so choose, and the divorce trends will inevitably shift following the *Obergefell* decision. True marriage equality will be achieved when all couples can enjoy the benefits of marriage, and one of those benefits is, undeniably, divorce.

Currently, same-sex couples are best served by divorce mediation when seeking a divorce. Mediation allows couples to create lasting agreements regarding important issues such as their financial, property, and child custody and support situations. In time, divorce practice will evolve to better incorporate same-sex couples. In the meantime, when same-sex couples inevitably decide to divorce, divorce mediation is there to provide an inclusive method of untying the marriage knot.

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<sup>146</sup> Dodge, *supra* note 13, at 90.

<sup>147</sup> *Id.*