

We Are Family: Family Law Services for Queer and Transgender Couples and Families

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"I never imagined in my lifetime I would be able to marry the man I loved and have a family. And I have that,"¹ - Raphael Alyman, a Montreal father of two.

Queer and Transgender Couples and Families

The "new normal", "among the fastest growing demographics in the country" and "swell of same-sex families" are just a few ways a CBC article² referred to the increasing presence of queer / same-sex couples and families as captured by the results of the 2011 Statistics Canada Survey on "Portraits of Families and Living Arrangements".

Some of the Statistic Canada Survey findings were that:

- The number of same-sex married couples nearly tripled between 2006 and 2011, reflecting the first five-year period for which same-sex marriage has been legal across the country. Same-sex common-law couples rose 15.0%, slightly higher than the 13.8% increase for opposite-sex common-law couples.³
- Female same-sex couples were nearly 5 times more likely to have a child at home (16.5%) than male same-sex couples (3.4%). Overall, more than four-fifths (80.3%) of all same-sex couples with children were female couples.⁴
- Same-sex married spouses and common-law partners were relatively young, with one-quarter (25.3%) aged 15 to 34 compared to 17.5% of individuals in opposite-sex couples. In addition, there were fewer same-sex spouses or partners at older ages, with 6.2% aged 65 and over, compared to 17.8% of individuals in opposite-sex couples.⁵

Queer⁶ and transgender⁷ communities have had increased visibility and presence within the legal discourse of Canada over the last decade. Significant research in Canada and internationally has focused on queer and transgender issues; a specific area of research is devoted to queer relationships and families.⁸ It should be noted that academic research related to transgender relationships and families was described by one researcher as "almost nonexistent"⁹; however, transgender community-based publications, services and groups do provide some useful resources.¹⁰ In addition, it should be noted that documentation of intersex couples and families in regards to family law services is also absent in publications and research.

Although already addressed by my co-presenters in their companion papers for this session, it should be stressed that the terms queer and transgender must not be conflated. Issues of sexual orientation/preference¹¹ are different than gender identity; for example, one can be transgender and heterosexual. There can be overlap too; for example, one can be a lesbian and identify as transgender.

As queer communities experience an increase in marriage, common-law relationships and the creation of intended families through assisted reproduction and adoption, so too are they faced with the breakdown of such relationships through separation and divorce and the need to address the custody, access, parenting time and parenting arrangements of their children after a relationship breakdown.

Prior to the legal recognition of queer relationships, queer couples and families had to negotiate the terms of their relationships and parental roles privately and in some cases via private legal contracts related to property and children. Now that more queer couples are marrying or becoming common-law partners and being captured by federal and provincial family laws, there are also queer couples divorcing and separating, making them more visible in the family law system. However these are still early days for seeing recorded decisions on the breakdown of queer families reflected in the case law.

As my colleague Samantha Simpson has highlighted in her paper, although the majority of cases regarding queer families address same-sex couples in relation to custody and access disputes involving children conceived by way of assisted reproduction, the emergence of more cases involving key family law issues of spousal support, property division and child support are likely to come before the court more often in the next five to ten years.

In addition, queer and transgender couples and families face homophobia and transphobia systemically and individually. For many queer and transgender people, “coming out” remains challenging and the fear of retribution from family, workplace colleagues, community and broader society is a real concern. Threats and attacks on personal safety of queer and transgender community members continue to create a climate of fear when people do choose to disclose their sexual orientation/preference or when people commence transitioning and/or living their lives in their chosen gender.

Limited first person accounts of what queer and transgender persons have experienced when navigating the family law system and a desire to capture a current “snapshot” of the realities and expectations of queer and transgender persons in regards to family law services was the motivation for launching the original survey: Family Law Services for Queer and Transgender Couples and Families.

The Survey

The Family Law Services for Queer and Transgender Couples and Families Survey was created on SurveyMonkey and circulated for over a month through networks of family law lawyers including lawyers that specifically work with same-sex or transgender families; community organizations serving queer, lesbian, gay, bisexual and transgender intersex (LGBTI) community members; listservs for queer and trans families; and direct contact with LGBTI community members, academics, and advocacy/support groups.

Goal of the Survey

The goal of the survey was to capture the perspective of members of the queer and transgender community, including both those who have used family law services in the past and those who have not required family law services but wished to provide their feedback about what they would like to see in the provision of family services for queer and transgender couples and families.

Demographics

Thirty-six (36) people completed the Family Law Services for Queer and Transgender Couples and Families Survey. Of the survey participants (participants could select more than one choice):

- 1 person identified as transgender
- 1 person identified as transgender MTF (male to female)
- 2 people identified as transgender FTM (female to male)
- 24 people identified as female
- 8 people identified as male
- 3 people identified as genderqueer¹²
- 3 people identified as transsexual
- 0 people identified as intersex
- 1 person skipped responding

Participants selected the following for their sexual orientation/preference (participants could select more than one choice):

- 15 people identified as lesbian
- 5 people identified as bisexual
- 5 people identified as gay
- 4 people identified as heterosexual
- 18 people identified as queer

In terms of diversity, survey participants were also asked to list any other identities that they chose to, such as their racial/cultural identity, etc.:

- Some participants identified as being people of colour, immigrants, working class, people with disabilities, survivors of abuse, Jewish, Buddhist, and mixed heritage.

In terms of relationship status, participant responses included (participants could select more than one choice):

- 18 people were legally married
- 10 people were living in a common-law relationship
- 4 people identified as not living together but in a committed relationship
- 4 people identified as single
- 1 person identified as divorced
- 1 person identified as being polygamous
- 1 person identified as being widowed

Children

Participants were asked if they had children, which included biological and non-biological children, children conceived by way of surrogate, adopted children, fostered children and children for whom the participants may identify as having a parental role. Based on this broad definition, twenty-four (24) participants identified having children.

Family Law Services

Participants used a range of services, with the survey highlighting the following (participants could select more than one choice):

- 24 people used the services of a family law lawyer
- 2 people used the services of a family law mediator
- 1 person went to a family justice counsellor
- 3 people used the services of access pro bono
- 4 people used legal aid
- 3 people used lawyer referral services
- 1 person used a collaborative law lawyer
- 6 participants did not answer this question

Family Law Issues

The majority of participants sought legal assistance for adoptions and custody, access or parenting arrangements. Division of family property, divorce, child support and separation agreements were also areas in which participants sought legal assistance. Very few people (3) identified the need to address spousal support.

Selection of Family Law Lawyer

Participants indicated that they used “word of mouth” as their primary source for selecting the family law lawyer they ended up retaining. Sixteen (16) participants selected that “word of mouth” influenced their selection process. Advertising in queer or transgender resources and advertising in mainstream resources were closely tied as additional resources people used to find their lawyers.

The survey also sought out whether or not it was important for the lawyers retained to identify as a member of queer or transgender communities and if being LGB (lesbian, gay, bisexual) or queer positive or supportive would be important. Most identified that it was important that if they retained a family law lawyer that they be positive or supportive of LGB and queer communities. It was not a priority to have the lawyer identify as being queer or transgender.

Twelve (12) out of twenty-four (24) participants responded that they felt their lawyer had an understanding of same-sex and queer couples and families. Six (6) out of ten (10) participants responded that they felt their lawyer had an understanding of transgender couples and families.

Qualitative Survey Responses

The qualitative responses provided in the survey are the most helpful for family law service providers to understand the positive and negative experiences of queer and transgender people as they engage the family law system. The feedback also provides some guidance as to the professional development and competencies family law practitioners working with queer and transgender communities should consider meeting in order to provide more accessible legal services. Highlighted below are a few selected comments (direct quotes) from survey participants.

If you worked with a family law lawyer: What made the experience positive?

- He spoke clearly with me.
- Got the job done with no hitches.
- She seemed to know her stuff and was comfortable with same gender issues.
- Was current with how to do an adoption for a same sex couple where one person had given birth.
- Never undermined our family experience.
- Fast, inexpensive (comparatively) and easy.
- Very affirming, competent, didn't feel like time was wasted.
- My ex responded better to a lawyer than to me, even when saying the same things. My lawyer was very on-task and also collaborative (though not officially in a collaborative law agreement).
- She listened and got it.
- Lawyer took care of everything so it was stress free.
- This lawyer fully understood trans issues and was not "weirded out" by being confronted with a trans person; this lawyer also gave us excellent advice on the sponsorship issue that only an informed and engaged lawyer could have advised.
- Efficiency and friendly.
- She was not queer but very kind. I wanted someone to help me understand what was fair not just what the law said, and she understood that.
- He heard my fears and was very proactive and supportive.
- Being respectful of my identity and my partner's identity.
- Gay friendly.
- Caring, genuinely "heard" our story, felt supported.
- The person I used was very respectful of my situation and a good advocate.
- Queer friendly, knowledgeable on queer family issues.

If you worked with a family law lawyer: What made the experience negative?

- Expensive.
- Little to no explanation.
- The cost and the inherent adversarial (nature) built into the legal system.
- Errors on the documents and expensive.
- The potential cost was overwhelming, driving me to settle probably against my own best interests.

Did being Queer and/or Transgender factor in the way you dealt with your family law issues? If yes, please describe.

- Yes - we emigrated from a country where we could not be married or both be acknowledged as parents of our child, so in Canada we did this paperwork to protect our family.
- Yes, it was important that this person understood the legal ramifications such as healthcare issues - we wanted to legally be able to represent each other if ever we were incapacitated for some reason.
- Yes! We hired a lawyer to make sure that the non-biological parents' rights were protected.
- Yes. Wanted to make sure the person knew how to handle common law queer relationships, both in terms of knowledge of the legal system and in terms of respect (e.g., not homo/queerphobic).
- Yes, it was the basis for my questions and for the issue arising at all ("step" parent adoption of child by insemination).
- Yes. I was sponsoring my trans partner to come to Canada. We were married legally but could not know if the government would recognize us as a same-sex or an opposite sex couple. The lawyer advised on how to proceed with the application given this ambiguity.
- The system is set up for heterosexual disputes and I felt our situation was handled in stereotypically het ways. Wasted all my retirement savings paying lawyers and am now looking to court representing myself.
- Yes being queer and not supported in our law system was the reason we had to seek out the services of a lawyer and pay money to legally be the parents of our own child.
- Being trans, I felt terrified to rock the boat because I feel marginal. Institutions/bureaucracies can be terrifying and alienating and the "law" is the most emblematic of that. I imagined if I tried to stand up for myself that I would be ritually humiliated. And so I backed down. Having grown up incredibly poor also meant that I just don't feel entitled. For example, despite having co-owned a house, and renovated, and paid the mortgage with my ex-partner for over a decade with my name on the papers, I had a hard time believing that I really could deserve half of it, because she had paid the down payment all those years ago.
- Yes because my partner isn't biologically related to our child.
- I was very concerned for the privacy of my children. I didn't want a big court fight, but my ex left no options. So more people in their school and lives knew about their same sex parents than they were necessarily comfortable with at a young age.
- Yes, if we were a straight couple we wouldn't have had to proceed with a 2nd parent adoption.

What feedback would you provide to lawyers, mediators, judges and others in the family law system about what they could do to better serve same-sex/queer and/or transgender couples and families who require family law services?

- Within family law - law regarding couples and law regarding parenting and children should as much as possible be recognized as two separate set of interests - to allow queer parenting to be more about parenting and less about couples issues overlapping onto parenting issues. They are two separate sets of responsibilities and relations and often get confounded.
- 1) Queer and trans couples and families are often afraid of accessing services based on past experiences of discrimination and mistreatment. It helps to have someone advertise that they are queer & trans-welcoming, or have symbols that suggest this (e.g., brochures/posters of diverse families that include visibly same-sex & gendervariant individuals). 2) Be cognizant of the limits of your knowledge and experience, and be willing to do your own homework rather than expecting the people before you to educate you. 3) Be aware of the impacts of the historical criminalization of same-sex sexuality and gender variance, and the continued clashes between the legal system and poor/working class queer and trans people who are in the survival sex trade (disproportionately high numbers of Indigenous two-spirit people and trans women of colour). Negative experiences with police and the criminal justice system make it very difficult to have confidence about being treated in a fair and compassionate manner in other aspects of the law. In family law queer and trans people have historically experienced tremendous negative stereotyping (e.g., dangerous to children) and biased, homophobic/transphobic rulings - if there are positive recent examples of rulings this may be reassuring to queer/trans people who are afraid their children will be taken away or they will be denied visitation solely because they are queer/trans. 4) Do not group queer/trans together or assume the issues are the same. Many trans people are heterosexual, and many queer people are not gender-variant. 5) Be aware of the basics regarding gender transition and the impacts it can have on a family and on family dynamics.
- Need to understand the current issues that face our families legally.
- Advertise that they are queer/trans/etc. positive so that we feel safer coming to them in the first place.
- That they themselves must attend workshops/drop-ins whatever it's called to be aware of trans issues & how to treat w/ respect trans folks.
- If you don't get it, don't take the clients or, take a course, talk to people, figure it out.
- Don't assume everyone is straight, be welcoming and make it visible so people know your position before they approach you.
- Compassion backed with experience and an unflinching manner when it comes to barriers breaking.

- If you want to serve these folks, you need to a) never be weirded out by them, work out all your issues now, outside of work (i.e. do not let your mind travel to a person's genitals); never ask about a trans person's surgeries, etc -- this is not an opportunity to sate your curiosity, no matter how sympathetic you think you might be to trans people's issues -- this makes us feel like specimens; get to know our issues by doing good research (watch movies, documentaries, talk to people, read blogs, etc) about the issues.
- I think they all need to go to unlearning homophobia workshops even when they think they are already queer friendly.
- Less costly options and 'do it yourself guides to adoption'.
- Recognize the vulnerability that your transsexual clients bring to the table.
- Spend some time with queer/transgendered families and listen to their needs/problems.
- I would hope that all people would be treated respectfully and without judgement. The legal rights of any couple and family should be the only concern.
- Include education in law schools on issues facing queer/trans communities; discrimination, family rejection, poverty, violence, LGBTQ asylum seekers, etc. As well as info about how to be inclusive and respectful.
- Educate themselves. Challenge norms around gender, sexuality, and parenting. Don't make assumptions based on appearances, background, or family status. Let the clients guide the process. Practice empathy and patience.
- Get some basic training in issues, legal rights, and precedents of LGBT people before accepting clients who expect this level of professionalism.
- Access and approachability.
- Have more knowledge about the issues/struggles we face.
- Greater acceptance of and proactive, visible support for diversity.
- I really thought the family law system dealt with us well, including both lawyers and the judge. The only thing that still surprises me in law offices and with court staff, for example, is when a neutral term such as 'spouse' is what you use, people still tend to say "and what's HIS name" or "what does HE do"... the assumption in language is almost always heterosexual if they don't know you, and then it's uncomfortable when I have to correct it. They don't mean to be rude, but they're insensitive to how it makes people feel 'outside the norm' when they default to something that's not true for the person in front of them.
- Diversity training for all graduating.
- Strong familiarity with queer family issues.

Conclusion

Queer and transgender couples and families want many of the same things from family law services as non-queer or non-transgender couples and families. They want the services to be efficient, reliable and cost-effective and ultimately they want their family law matters solved in the most appropriate way to address their legal issues and concerns. They want to know their legal rights and entitlements and have a lawyer that will advocate for the same.

Survey participants identified wanting to be listened to and respected. They want to not be judged and have a safe environment in which to share their personal family law matters. These are universal comments that most consumers of family law services regardless of gender identity or sexual orientation/preference would likely echo if canvassed.

However, participants clearly identified that it was very important for them to go to family law practitioners that “get” their lives. Survey participants want to see family law lawyers educated on queer and transgender issues in professional development as well as in first year law school curriculum. Participants don’t want to spend time educating family law lawyers or to have to navigate stereotypes and assumptions about queer and transgender persons.

Participants want spaces and services that are physically and ideologically queer and transgender positive. Terminology, identity and how one chooses to name themselves are very important. Although there seems to be more acceptance of queer issues in society (far lesser for transgender issues¹³), prejudice, discrimination and individual and systemic oppression continue to place queer and transgender persons and communities at risk for their safety.

The survey provides a snapshot of how family law lawyers can expand and make accessible their legal services for queer and transgender communities. As family law practitioners we have the opportunity to be responsive, inclusive and proactive in our support and involvement with queer and transgender communities and issues. We have the ability and duty to educate ourselves and make family law a safe space for all couples and families.

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¹ <http://www.cbc.ca/news/canada/montreal/swell-of-same-sex-families-ushering-in-the-new-normal-1.1204886>

² Ibid.

³ <http://www12.statcan.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>

⁴ Ibid.

⁵ Ibid.

⁶ The term “queer” is used to include those that identify as being in same-sex relationships and/or have a preference, orientation or desire for members of the same sex; LGBT (lesbian, gay, bisexual and/or transgender persons) represents a broad umbrella term that captures both sexual orientation and gender identity diversity.

⁷ “Transgender” is an umbrella term that encompasses anyone whose behavior or identity crosses gender roles assigned to them by society based on their anatomical sex. This includes a wide range of identities: transvestites, cross-dressers, two-spirit people and drag queens and kings, as well as pre-operative, post-operative and non-operative transsexual people. Transgender people may identify as heterosexual, homosexual or bisexual. Cited from: <https://www.pflagcanada.ca/en/glossary-e.html>

⁸ See: “Lesbian, Gay, Bisexual, and Transgender Families” by Timothy J. Biblarz and Evren Savci, University of Southern California at <http://204.14.132.173/pi/lgbt/resources/biblarz-savci.pdf>; “Queer Parenting in the New Millennium: Resisting Normal” by Rachel Epstein, *Canadian Women’s Studies*, 2005 at <http://pi.library.yorku.ca/ojs/index.php/cws/article/viewFile/6108/5296> and “Lesbian Mothers and the Law of Custody, Access and Support” by Joanna Radbord 1999 at <http://pi.library.yorku.ca/ojs/index.php/jarm/article/download/2817/2022> (“Lesbian, Gay, Bisexual, and Transgender Families” article courtesy of the website of barbara findlay Q.C. at <http://www.barbarafindlay.com/resources.html>, which also has very useful additional resources for practitioners); “LGBT Families and Assisted Reproductive Technologies” by Joanna Radbord, Canadian Bar Associate, 2010 at http://www.cba.org/cba/niagara2010/PDF/2.1_Radbord_paper_final.pdf;

“From Same-Sex to No Sex? Trends Towards Recognition of (Same-Sex) Relationships in Canada” by Claire Young and Susan B. Boyd, 2007 at http://www.researchgate.net/publication/228145439_From_Same-Sex_to_No_Sex_Trends_Towards_Recognition_of_%28Same-Sex%29_Relationships_in_Canada?ev=prf_cit; and “Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act” by barbara findlay QC and Zara Suleman for the Continuing Legal Education Society of British Columbia, January 2013 at http://www.barbarafindlay.com/uploads/9/9/6/7/9967848/baby_steps.pdf.

⁹ “Lesbian, Gay, Bisexual, and Transgender Families” by Timothy J. Biblarz and Evren Savci, University of Southern California at <http://204.14.132.173/pi/lgbt/resources/biblarz-savci.pdf>.

¹⁰ See: Trans Alliance Society at <http://www.transalliancesociety.org>; Catherine White Holman Wellness Centre at <http://www.cwhwc.com>; Transparent Canada at <http://www.transparentcanada.ca/?file=kop1.php>; Forge at <http://forge-forward.org/publications-resources/av-faq-sheets>; and Egale Canada at <http://egale.ca/category/trans-rights>.

¹¹ I note “preference” and “orientation” on a cursory level to address the diversity in how queer persons may frame their sexuality whether as “a choice” and or “not a choice” regarding their sexual partnerships.

¹² “Genderqueer is a term that may be used to describe those with non-normative gender, either as an umbrella term or a stand-alone identity, typically encompassing those who are in one or more of several categories”. For more information see: <http://genderqueerid.com/what-is-gq>

¹³ See:

<http://www.theprovince.com/news/Vancouver+transgender+school+policy+that+discourages+segregated+activities+causes+divisions/9868850/story.html> and <http://dailyxtra.com/vancouver/news/vancouver-school-board%E2%80%99s-proposed-trans-policy-update-draws-fire>.