



Custody Litigation

by Craig Kaczorowski

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Since the 1970s, when gay men and lesbians began gaining wider acceptance, there has been a substantial increase in the number of children being reared by glbtq parents. According to the 2000 U.S. census, 34 percent of lesbian couples and 22 percent of gay male couples are raising at least one child under the age of 18 in their home. Recent studies conducted by Lambda Legal estimate that some 250,000 children are being raised by same-sex couples in the United States.

However, the custodial rights of glbtq parents vary widely from state to state. While the courts of some states have been almost unremittingly hostile to gay men and lesbians involved in custody litigation, others, as epitomized in a 2005 ruling by the California Supreme Court, have declared that glbtq parents have the same rights and responsibilities as other parents.

Custody and Visitation Issues

There are three main contexts in which glbtq parents face custody and visitation issues. First, a person who enters into a heterosexual marriage and has children may later divorce after discovering that he or she is gay, lesbian, bisexual, or transgender.

In most heterosexual parenting relationships, both spouses are legal parents by biology, adoption, or marriage. This gives each parent grounds to argue for custody or visitation privileges. However, one parent may attempt to argue that the court should consider the sexual orientation or gender identity of the glbtq parent as a *negative* factor in determining custody.

Some judges agree with such arguments and still believe unsupported myths about the unsuitability of gay and lesbian parents, and may, therefore, award sole custody to the heterosexual parent instead of the glbtq one.

Second, same-sex couples who are raising a child or children together may separate and then become involved in a dispute over custody or visitation. Because it is often the case that only one of the partners is a legal parent, whether biologically or through adoption, the dissolution of a same-sex relationship involving children frequently raises unique legal issues.

The legal parent in such cases is more likely to win custody, no matter how close and committed both adults' relationship to the child may be. However, some states are granting parenting privileges according to the principle of *de facto* parenthood, which, while limited and varied from state to state, essentially bestows certain parenting privileges on the person who has assumed the role of a parent on a daily basis.

Third, in cases where a lesbian couple has produced children utilizing the services of a known sperm donor or a surrogate mother or where a gay male couple has produced children with the aid of a surrogate mother, legal issues sometimes arise if the donor or surrogate sues to determine his or her parental rights.

Furthermore, there are two aspects of custody: *physical* custody, meaning who has the right to have the child live with him or her, and *legal* custody, which designates who has the right to make major life decisions for the child, such as health care and education. These elements may be awarded in different ways. For example, one parent may win both legal and physical custody and the other none; or both may win legal custody while only one may be granted physical custody.

Custody and the Courts

There are few laws about custody and visitation on the books. This is due to the fact that every child custody dispute is resolved on a case-by-case basis. However, every state has guidelines, rules, and precedents that set the parameters by which custody cases should be decided in that state, regardless of the sexual orientation or gender identity of the parties involved.

But the way courts treat custody and visitation conflicts involving a lesbian or gay parent may vary even more than most because glbtq parenting continues to be a controversial issue in many jurisdictions.

Whether a lesbian, gay, or bisexual parent will lose custody solely based on sexual orientation is to some extent a matter of geography. As of 2007, in approximately 21 states and the District of Columbia, sexual orientation is not, by itself, considered an appropriate basis for denying a parent custody. Rather, in those jurisdictions a court will look to whether the parent's conduct or actions are in fact detrimental to the child. These states include California, New York, New Jersey, Ohio, Massachusetts, Vermont, Alaska, and perhaps a dozen others. Generally, in these states a lesbian, gay, or bisexual parent will not lose custody or have visitation restrictions put in place based on sexual orientation alone.

In approximately a dozen states the issue of sexual orientation and custody has yet to be directly addressed by an appellate court and, consequently, there is no reported case law. Some of these states include Oregon, Hawaii, Nebraska, Arizona, and Idaho. In these states, courts may be less likely to focus on sexual orientation in determining custody and may be far more concerned with facts and evidence about who was the primary caretaker, if the children are more bonded with one parent than another, and which parent is best suited to care for the children after the divorce or break-up.

Finally, and most troubling, there are a handful of states where gay, lesbian, or bisexual parents have recently lost or been denied custody based almost solely on sexual orientation. These states include Missouri, Mississippi, Alabama, Virginia, and North Carolina.

There is, however, one common principle used to resolve custody disputes: what is in "the best interest of the child." Some states have rules that help judges determine this in a particular case, but it can be especially difficult to gauge how a judge might weigh the best interests of a child when one or more parents are lesbian or gay.

Generally, judges use their own reasoning by considering how much time the parents spend with the child and who provides the primary care. Other questions they might consider are the quality of the parent and child bond; where the child has been living; whether one parent undercuts the other parent's relationship with the child; whether a parent acts in a way that could cause harm to the child; and whether one parent offers a child the opportunity to build relationships with siblings in a way that the other does not.

Even when a glbtq parent receives custody of a child, judges may impose onerous conditions, such as not allowing a same-sex partner to live in the household.

Groundbreaking GLBTQ Custody Cases

One of the earliest same-sex custody battles took place in Washington in 1972, when Sandy Schuster and Madeleine Isaacson, two lesbians in a relationship with each other, were allowed to retain custody of the six children between them after divorcing their respective husbands. However, the judge also stipulated that the two women could not live together, a dilemma the couple resolved by renting apartments across the hall from each other and maintaining joint households. Two years later, their ex-husbands sued again for custody. This time the judge not only awarded custody to the mothers, but also lifted all restrictions, setting an important state precedent for the rights of gay and lesbian parents.

In a similar case, some thirty years later, Ulf Hedberg and his ex-wife separated when their son was four years old; the child went to live with Hedberg and his male partner. Five and a half years later, the boy's mother petitioned for custody. The court allowed Hedberg continued custody on the condition that his partner move out of the family's home. The couple sold their house and moved into separate apartments. Hedberg later asked the court to lift the restriction in light of the havoc it was causing in the boy's life. In March 2006, the Maryland Court of Special Appeals ruled that it was not in the child's best interest for his father and his father's partner to be separated, and the family was reunited.

The vulnerability of glbtq parents is nowhere more evident than when a third party, often one of the child's grandparents, challenges a glbtq parent's right to raise his or her own child. One of the most famous cases involved Sharon Bottoms, a divorced lesbian mother from Virginia, who was sued by her mother, Kay Bottoms, for custody of her son Tyler. The trial judge awarded custody of Tyler to his grandmother, ruling that Sharon Bottoms was unfit because she lived with her partner April Wade and because her sexual conduct was both illegal in Virginia at the time and, in the opinion of the judge, immoral. Although the homophobic ruling was reversed at the appellate level, it was reinstated by the Virginia Supreme Court.

In The Matter of J.D. Fairchild, a very visible case revolving around Ohio's 2004 constitutional amendment prohibiting marriage between same-sex couples, concerned Therese Fairchild, who lived in a relationship with her partner, Denise Fairchild, for many years. The two jointly planned their child's conception and in 1996 Denise gave birth to their son. To ensure that Therese had a protected legal relationship with the child, the two women entered into a court-approved joint custody agreement in 2001. Several years after signing the agreement the couple's relationship ended, and Denise attempted to keep the boy from Therese by arguing that Ohio's antigay amendment invalidated the court's shared custody order. In January 2007, a judge ruled that a custody agreement between two lesbian parents is valid and enforceable despite the state's amendment prohibiting same-sex marriage.

Jones v. Boring involved Patricia Jones and Ellen Boring, who were partners for 14 years. They planned a family together and both became caregivers to their twins. After the couple separated in 2001, a Pennsylvania court found that Jones had parental rights to the children and awarded joint custody to both mothers, with primary physical custody going to Boring, the biological parent. Later, Jones filed for primary physical custody, citing Boring's history of contempt in observing the visitation schedule set by the court. The court found "convincing reasons" that being in Jones's custody would be in the best interest of the children and awarded her primary physical custody. Boring appealed the decision, contending that as the children's biological mother she could not have her children removed from her custody unless a court found her unfit. The Superior Court of Pennsylvania rejected Boring's argument and upheld the lower court's decision to grant primary physical custody to Jones.

In a historic settlement reached in Florida in 2005, a state judge granted child custody to Michael Kantaras, a transsexual stepfather in a bitter divorce case, ruling that the stepfather was legally male under Florida law, although he had been born female. The ruling, the first of its kind in the state, affirmed that Kantaras was the legal parent of his former wife's teenage son, whom he had adopted, and a daughter she conceived through artificial insemination during their marriage. The court determined that Kantaras was the better, more fit parent and that his ex-wife had tried to turn the children against him. The ruling was hailed by

national gay and lesbian advocacy groups as a landmark decision in favor of transsexuals, particularly in a state that had banned same-sex marriages and barred homosexuals from adopting children.

Adoption, Artificial Insemination, and Surrogacy Issues

Some of the most difficult legal questions involving custody issues pivot on the legal status of glbtq partners who choose to have children through adoption, artificial insemination, or surrogacy. When a same-sex couple decides to rear a child together, in most states only one of them can legally adopt. In such circumstances, the nonadoptive parent is not considered a legal parent.

Only by completing a joint or second-parent adoption can the parental rights of the other parent be protected, and only a minority of states allow joint adoption by glbtq couples. Second parent adoption (also known as Co-Parent Adoption) is a legal procedure that allows one partner of a same-sex couple to adopt the other partner's biological or adopted children without terminating the first parent's rights as a parent. Second parent adoptions give the child two legal guardians. It protects both parents by giving both of them legally recognized parental status.

Second parent adoptions often take place when a lesbian has a child through artificial insemination and her lesbian partner adopts the child as her own also. It is also sometimes used when a gay male couple has a child with the aid of a surrogate mother; although only one of the partners is the biological father of the child, both partners are legal parents.

Many couples who conceive children through artificial conception or surrogacy sign written agreements with the donors and surrogates concerning their child-rearing intentions, often limiting the donor's or surrogate's role in parenting the children. Many courts, however, have ruled that these agreements are unenforceable. In most states, courts have been unwilling to deny parental rights to known sperm donors even when they have agreed to relinquish such rights before conception.

As a result of the legalization of same-sex marriage in Massachusetts and Canada, and the adoption of Civil Unions in such states as Vermont and New Jersey, same-sex spouses in those jurisdictions are able to have both their names included on the birth certificates of children adopted or conceived by artificial insemination or surrogacy.

Resources

A number of activist legal and political organizations deserve credit for the progress that has been made in securing a fair hearing for glbtq parents in custody litigation.

The National Center for Lesbian Rights (NCLR) has been focusing on family and parenting law for over 30 years. Among the catalysts for its founding (as the Lesbian Rights Project) in 1977 was to assist lesbians who were losing custody of their children. They subsequently have led in the quest for joint adoptions. In the beginning of 2007, NCLR launched the Family Protection Project, which works to improve access to family law services for low-income same-sex parent families, with a focus on serving families of color.

New England-based Gay and Lesbian Advocates (GLAD) has also been a pioneer in ensuring equal rights for glbtq parents and families. Thanks to its advocacy, most of the New England states recognize de facto parents or permit joint adoptions or joint guardianship by glbtq couples.

Since the 1980s, Lambda Legal Defense and Education Fund has also focused on family law and same-sex marriage. Recently, they successfully challenged an Oklahoma law so extreme that it left children adopted by same-sex couples in other states orphans in the eyes of the law when their families moved to or traveled through Oklahoma.

Conclusion

Though much progress has been made throughout the country on child custody and visitation rights for gay and lesbian parents, many courts continue to deny completely a parent's rights or restrict a parent from exercising those rights in the presence of a same-sex partner. Yet, research shows that glbtq mothers and fathers have high parenting skills and that their sexual orientation has no negative impact on their children. In fact, studies demonstrate that children of lesbian and gay parents generally have positive relationships with their peers and that their relationships with adults of both sexes are also satisfactory.

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