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LESBIAN AND GAY PARENTING: THE LAST THIRTY YEARS¹

Nancy D. Polikoff²

It is my pleasure to be here today. I want to thank all of the students who did an astonishing amount of work to make this very long and fabulous conference happen. I am so impressed by the panelists who will be speaking after me, so I am anxious to hear what they have to say. I would like to start my talk by providing a brief overview of the legal issues affecting lesbian and gay parents. I intend to keep this portion brief because I want to present what I think are some of the most current issues in this area.

It has been about thirty years now since lesbians and gays have been openly raising children. I am going to describe first the legal issues that have arisen in those thirty years. In the past, the greatest number of legal disputes occurred when an ex-spouse came out as lesbian or gay after a divorce and wanted custody or visitation rights with the child. In the 1970s, this was really the only legal dispute in the court system. Even though the courts today address other cutting-edge legal issues regarding gay and lesbian parents, this type of dispute continues to be the most common reason a lesbian or gay parent will wind up in court.

Despite the enormous social changes in the last thirty years in the acceptance of homosexuality, I think this continues to be the most significant legal problem for lesbian and gay parents because many young people continue to resist coming out. They deny their sexual orientation because they want to live a more

1. This article is an edited transcript of comments delivered on September 23, 2004 at the Honorable James R. Browning Symposium, *Children and the Law*, held at the University of Montana School of Law. The author's more comprehensive history of lesbian and gay parenting disputes through the year 2000 appears as a chapter in *CREATING CHANGE: PUBLIC POLICY, CIVIL RIGHTS, AND SEXUALITY* (John D'Emilio, William Turner & Urvashi Vaid eds., 2000) and as part of the article Brad Chambers & Nancy Polikoff, *Family Law and Gay and Lesbian Issues in the Twentieth Century*, 33 *FAM. L.Q.* 523 (1999).

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conventional, and what they think will be a less conflicted life. Consequently, they marry hoping that they will make a life that is more accepted in the world. After a period of time, however, these marriages fail. These kinds of disputes appear to be no less common than thirty years ago.

In such cases, the issue is always whether the sexual orientation of the parent will be used against that parent in custody or visitation. In the 1970s, the courts split concerning how to deal with lesbian and gay parents in the custody context. Now here we are in the twenty-first century with the same split. There are certainly some states where the attempt by a heterosexual parent to raise homosexuality as a reason to deny custody would be virtually laughed out of court. But then there are other courtrooms where raising the fact that one parent is gay or lesbian essentially seals the fate of the case because the court will automatically deny custody and restrict visitation.

A slightly less common scenario in which lesbians and gay men lose parental rights occurs when a third party – usually a grandparent – attempts to gain custody. Theoretically it should be harder for grandparents to obtain custody since parents have a greater right to raise a child than any third party. There have been numerous cases, however, where grandparents have succeeded. One of the most famous cases is from Virginia where Sharon Bottoms lost custody of her son to her mother.

The above examples represent the contexts of court cases when children come out of heterosexual relationships. But beginning in the late 1970s and steadily building over the last twenty-some years, adults have been able to come out as gay or lesbian without going through a period of denial and marriage. Consequently lesbians and gay men found themselves realizing that if they wanted to be parents, they would actually have to do something affirmative to make that happen. Many lesbian and gay individuals, as well as couples, choose to raise children. There are numerous avenues through which these parenting relationships arise – adoption, the use of assisted reproduction, alternative insemination with a known semen donor or an anonymous semen donor for a lesbian, or the use of a surrogate mother for a gay man.

The first set of legal issues arises for these couples when both partners want recognition as the legal parents of their child. Acknowledgment of both partners as parents can occur if the couple jointly adopts the child. Alternatively, if one partner

gives birth to the child, the other parent can become a legal parent through a vehicle that has come to be known as second-parent adoption. While second-parent adoptions have occurred nationally, state appellate courts have split on their legality. Of the appeals courts that have decided the issue, more have approved second-parent adoption than have disapproved it.

In addition, it is important to note that around the country in hundreds of counties judges grant second-parent adoptions without challenge but without definitive precedent from appeals courts affirming the practice. For example, last year the California Supreme Court ruled that second-parent adoptions could be done in the state. Yet, the phenomenon of intentional lesbian and gay parenting began in California, and the first generation of children born in that context are now beyond law school age and well into adulthood. The first second-parent adoption granted in California took place in 1985 or 1986, which means it was nearly twenty years before an appeals court ever looked at this application of the state's adoption practice. Trial courts all over the state had been granting adoptions for all of that time. This is happening now in many states.

Problems occur when lesbian and gay couples have not done second-parent adoptions. No matter how the family functions, after a couple splits, one ex-partner is a legal parent while the other is not. By now there are many, many cases around the country in which the legal parent has tried to cut the other parent out of the child's life. The courts have been forced to grapple with issues of custody and visitation and how they can, if they are so inclined, treat the non-legal parent as something other than a legal stranger to the child. Interestingly, there have been courts – including courts in New York and California where the greatest number of such families live – that have said that in the absence of a second-parent adoption, the other parent has no legal status with respect to the child at all. As a result, countless children have been harmed by losing a relationship with their legally unrecognized parent. More recently courts have grappled with a different series of cases in which the biological parent has the child and seeks child support from the legally unrecognized parent, who then tries to avoid paying child support by saying she is not really the child's parent.

The final set of disputes involves lesbian couples who have used known semen donors. There are a variety of reasons why a lesbian choosing to bear a child might prefer a known individual

rather than an anonymous sperm bank. In these instances, there is usually an agreement – sometimes formalized, sometimes not – concerning the semen donor's role. But in some cases the agreement breaks down and the cases wind up in court with semen donors asserting rights to paternity. Again, without a set of legal principles designed to address this kind of family, the courts consider the case of a lesbian and semen donor through an application of mainstream legal doctrine that really does an injustice to the intentional family that the individuals have created. In almost all instances, a biological father can assert paternity and gain full parental rights. In fact, in almost all instances, semen donors asserting paternity rights have been successfully declared the legal father of the child – even when a written agreement states that the semen donor will not have a parental role.

Thus, the court cases involving intentional lesbian family constellations have been a clash between new family structures and family law rules not designed for those structures. Inevitably, and unfortunately, if one of the individuals in such a family constellation can use traditional family law principles to achieve his or her aim, he or she will do so, even if it harms the family they were a part of before, and even if it negatively impacts the child. This occurs, of course, because the courts do not broach the issue of the child's best interest until the parents are legally established.

When a party utilizes traditional family law principles to break up a lesbian or gay household, homophobic arguments are often involved, even on the part of a gay or lesbian parent. The most extreme example I can think of involved a lesbian couple who did a second-parent adoption in Washington, a state that has been granting them for more than twenty years. The women moved to North Carolina and subsequently split up. The biological mother asked the courts in North Carolina not to recognize the second-parent adoption for public policy reasons grounded in the state's anti-gay laws and court decisions. Fortunately, the trial judge refused to decide in favor of this argument. Instead, the trial judge said that North Carolina's public policy gives full faith and credit to adoptions granted in other states.

During the same period of time that these legal disputes have arisen – roughly the last thirty years – mental health professionals have studied the children of gay and lesbian

parents. Without going into enormous detail about their findings, the studies have essentially found that children raised by gay and lesbian parents are not disadvantaged in any way.

By now there have been more than fifty peer reviewed studies with small samples published. While these studies have often included samples of convenience, many of them utilized control groups. All of them concluded that there is no relationship between the sexual orientation of a parent and the well-being of a child. To summarize, gay and lesbian parents have equal parenting abilities to heterosexuals, and raise children as happy, healthy and well adjusted as children raised by heterosexual parents. The studies show no difference in the rate of psychiatric, emotional, or behavioral difficulties, and no differences in the quality of peer relationships, self-esteem, or popularity of children raised by lesbian and gay parents.

In fact, every major professional organization associated with the mental health of children supports lesbians and gay parenting, including the American Academy of Pediatrics, the American Psychological Association, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatrists. These organizations have all participated in numerous friend-of-the-court briefs, and have written public position papers, in which they credit the research that has been done on lesbians and gay men raising children.

There has been one area in the research where it looks like there may be some differences between children raised by gay and lesbian parents and children raised by heterosexual parents. A few studies show that children raised by lesbian and gay parents, more than children of heterosexual parents, depart from traditional sex roles and gender-typed play activity and career goals. This means that in the research, more of the lesbian and gay-parented girls played with boys' toys and said they wanted to grow up to be doctors.

Importantly, in the beginning, those of us attempting to use the mental health literature in the courts tried to make the argument that no differences existed between children raised by lesbian and gay families and those raised by heterosexual families. If some differences in the traditional sex roles and gender-typed play activity and career goals do exist, then we necessarily must evaluate what we think about that difference. Does it mark a reason for concern? Is such a difference a reason lesbian and gay parents should be restricted from raising

children? Perhaps, instead, these findings highlight that it is an inappropriate goal for all children to conform to certain stereotypically male or female activities. In other words, maybe it is not such a bad thing that some children are growing up with less gender-typed play activity and career goals. I will get back to this shortly.

For most of this same period of time – the last thirty years – advocates for lesbian and gay parents have seen themselves as part of a larger struggle to promote respect, nondiscrimination, and recognition of diverse family structures, including single parent families and extended families. In this context, they have consistently argued against privileging marriage. These advocates included themselves in a larger movement of scholars and mental health professionals who argued for tailoring public policy to family function rather than family form. In other words, public policies should support those who actually do the work of caretaking in families, rather than privileging one family form – marriage – and discriminating against, or stigmatizing, other family forms.

This framework for thinking about family took place independently of any advocacy for same-sex marriage. The issue of parenting focused on the children – their best interest, who raised them and how they should be dealt with in the courts. The relationship between the two adults, except as it concerned their legal status with respect to their children, was an unnecessary part of the equation.

As we all know, however, there have recently been numerous court challenges to bans on same-sex marriage. Individual gay and lesbian couples, as well as the legal organizations representing their interests in litigation, have tried to convince the courts to overturn same-sex marriage bans. The litigants argue that the ban is unconstitutional. Consequently, the states defending the ban have been forced to explain why it exists, no matter what level of scrutiny the court decides to give in its legal analysis. As it turns out, all of the briefs and arguments opposing lesbian and gay marriage have argued that the government should promote heterosexual marriage because children do best when raised by a married couple who are their biological parents. In other words, the legal argument against same-sex marriage now revolves entirely around parenting.

After decades of developments concerning lesbian and gay parenting, completely separate from recognition of lesbian and gay adult relationships, opponents of same-sex marriage have centered their argument on the notion that children do best when raised by a heterosexual married couple. Consequently, advocates for gay and lesbian families have been forced to respond to this argument, which they have done in two different ways. They first argue in much greater detail, and more persuasively, what I explained earlier about the mental health literature and the positions of the mental health organizations on the well-being of children raised by lesbian and gay parents. Advocates of lesbian and gay parenting essentially tell the opposition that it is wrong – that there is no reason to have a policy based on the idea that children do best raised by heterosexual married parents when we have thirty years of mental health research that supports the conclusion that children do just fine when they are raised by lesbian and gay parents. I have no problem with this argument.

Unfortunately, advocates for same-sex marriage have also made a different argument in which they accept the position that children benefit the most from being raised by married couples. They say it's a really great thing for children to have married parents – better than having unmarried parents. Under this argument, of course, the state should permit gay and lesbian couples to marry because then those children will have married parents.

I want to explain why I am troubled by this strategic argument by some same-sex marriage advocates. First of all, the argument does not distinguish advantages the law provides married couples and their children from any sort of inherent advantages. For example, if a married person who has served in the workforce dies, social security survivors' benefits go to her children. The children receive this benefit regardless of the parent's sexual orientation. The surviving parent, however, only receives survivors' benefits if he or she had been married to the deceased parent. In other words, if a legally married person dies after serving in the workforce, her spouse receives survivors' benefits, along with her children. However, if a working parent of an unmarried couple raising children dies, the children receive benefits, but the surviving parent does not. The fact that social security benefits are tied to marriage means that this discrepancy occurs regardless of whether the surviving parent

serves as the children's primary caretaker.

I think we can all agree that the entire family benefits when the caretaker spouse, as well as the children, receive the deceased parent's social security survivors' benefits, because the surviving spouse will have more money and options to provide for the children. Importantly, the law – not inherent advantage – provides these benefits to married couples and their children when a working parent dies. To the detriment of many children, the law only recognizes a dependent primary caretaker married to the deceased worker. If the deceased parent and the surviving caretaker were not married, the law says that it will not provide any benefits to the surviving caretaker. Consequently, the law completely ignores hundreds of functioning family forms.

The law must change, in all respects, with regard to how it treats the children of unmarried parents. Of course, if the law provided for all children, regardless of their parents' marital status, advocates for same-sex marriage could no longer argue that gays and lesbians should be allowed to marry because it would benefit their children. Again, these benefits are not inherent to married couples, they are provided in the law – which can be changed.

A second reason I am troubled by some advocates' arguments for same-sex marriage is that they sound dangerously close to accepting the ideological position that favors marriage above all other family forms. This abandons the long-time commitment that advocates for gay and lesbian families have to defining and evaluating families based on function rather than form. These advocates distance lesbian and gay families from other stigmatized family forms because they essentially say, "Just let us marry and then we will be the good families, like heterosexual married couples." This argument implies, of course, that all the other family forms – such as single mother families, divorced parents, extended families with grandparents raising children – are less worthy.

I find fundamentally wrong-headed and misdirected the advocacy within the gay and lesbian community that promotes marriage as a higher form than other family structures. I would rather see continued advocacy that asks the legal system to recognize, respect and value the work of raising children without caring one bit about the whether the parents are married or whether another family form exists. I think the time has come

to put to rest the notion that children are disadvantaged and deserving of community pity if they grow up in any other family form than one with married parents. If we change cultural attitudes and legal principles to respect all families equally, we can get away from the notion that heterosexual marriage is the only valid family form.

I want to talk about the focus on children in anti-gay marriage rhetoric. I think that everyone who believes in gender equality should find this rhetoric disturbing. Opponents start by saying that children do best in homes with heterosexual married couples. When they are challenged as to why children suffer if they do not have married parents, the opponents list the advantages of being married. In response, advocates for same-sex marriage ask why they opposed same-sex marriage if children benefit significantly from having married parents. In answering this question, opponents must tell us their true beliefs regarding why children need to be raised by *heterosexual* couples. Every time, the answer comes down to the belief that women and men are so innately different from each other that in order for children to thrive they must have one parent of each gender.

In developing this argument, opponents of lesbian and gay parenting describe a profoundly gendered world – a world in which roles are rigidly divided based on gender, where women have a particular role to play and men have a particular different role to play. Regardless of the role division in a gay male couple or a lesbian couple, the family unit does not function based on biological sex because both partners are members of the same sex. In some such couples, one person serves as primary breadwinner and the other as the primary caretaker – although more commonly, the partners share both the breadwinning and caretaking roles. In other words, in these families, at least one partner defies traditional gender roles. Men actually raise children. They get up in the middle of the night, comfort them when they cry, change diapers, walk them to school on the first day of kindergarten, make school lunches, know when they need to get new shoes and take them to the store, and do the work one has to do to raise a child. There are men actually doing this work successfully without women. And there are women, who in addition to doing the things most associated with the caretaking role, actually earn money to support the family, make budgets, decide on household

appliances, know how to fix the things that go wrong at home, coach their children in sports, barbecue, and do the other things traditionally associated with the male role.

Now, there will always be families in which men do the things most associated with the male role and women do the things most associated with the female role. But I thought that forty years of modern feminism had established that we have more options than the traditional roles – that men and women, heterosexual and gay and lesbian, have options. If public policy and law were to support only structures that ingrain in children fixed, innate gender difference then we would be abandoning feminist ideals.

As law students, I am sure you have all read the excerpt from the mid-nineteenth century decision about the woman in Illinois who had the audacity to believe that she should gain admittance to practice law in that state when the law did not allow women to be lawyers. When the case reached the United States Supreme Court, one of the justices explained that the state can prevent women from serving as lawyers because a woman's natural role was in the home taking care of children. Judges may not write opinions like this anymore, but we are not that far removed from such a time when it is legitimate public policy to state that without a male and a female in the home a child misses out on something so important that the law must prevent that family from parenting children.

Thus, the argument against same-sex marriage most disturbs me because of the way in which it suggests rigidity of gender roles for all people – not just gays and lesbians. I find this gender typing profoundly destructive to notions of liberty, autonomy, equality, and individual and collective well-being. I believe that advocates for same-sex marriage should name this argument what it is – a call to return to the ideology of male domination that accompanies a rigidly gendered society. When lesbian and gay advocates instead articulate how much same-sex marriage will help children, I think they inadvertently buy into a different harm by encouraging the flawed public policy that allows some children to receive fewer benefits than others. The law should be changed to make sure that children have all of the rights and benefits that any child is entitled to, so that children with married parents do not receive privileges in the law above children in other family forms.