

LESBIAN/GAY FAMILY DISSOLUTION

Joanna Bunker Rohrbaugh, Ph.D.

MAGAL News: Newsletter of the Massachusetts Association of Guardians ad Litem. Nov. 2000, 5(4), 1, 6-7.

Lesbian and gay relationships are becoming increasingly visible and accepted in many regions of this country. This increasing acceptance has coincided with a gay and lesbian “baby boom” that presents a new set of challenges to both the gay and legal communities. When a same-sex relationship ends, the emotional turmoil and interpersonal conflict are comparable to those in heterosexual divorce. This is to be expected, since the conflict is based on each couple’s emotional investment and ensuing sense of disappointment, hurt, and betrayal. In order to resolve a child custody dispute, however, the same-sex couple must deal with a more complicated set of social and legal issues.

The central difficulty in same-sex child custody disputes is the mismatch between psychological and legal definitions of parents.

The central difficulty in same-sex child custody disputes is the mismatch between psychological and legal definitions of parents. Over the past two decades increasing numbers of gay men and lesbians have deliberately created families with children and a variety of adult caregivers. Two adult partners may decide to have children together and raise them as equally participating parents. A single adult may birth or adopt a child and plan to have involved friends or family members who will have substantial and special relationships with the child. Single or coupled adults may seek out a known sperm donor who agrees to have a substantial, limited, or no relationship with and responsibility for the child. A previously married parent may re-couple with a same-sex partner who then takes on the role of a stepparent. Grandparents are often involved with lesbian and gay families but their legal status varies: they may be the birth-parent, the non-biological or non-adoptive parent, or the sperm donor. And many same-sex (as well as heterosexual) couples have an extensive network of “aunties” and “uncles” who have significant relationships with the child that do not correspond to any recognized social or legal role. All of these care-giving relationships offer the potential for the adults to offer the kind of day-to-day emotional and physical support that is recognized in the concept of a “psychological parent” (Goldstein et al. 1979). Despite the fact that children usually form deep attachments to multiple adult care-givers, however, only those adults who have a biological or adoptive link to the child are usually recognized as having legal standing in a custody dispute.

After divorce, gay or heterosexual, children fare best when there is continuity, especially in the major care-giving relationships in their lives. Thus in any family configuration it is essential to recognize and protect the nature of the child's relationship with each care-giving adult. For the mediator or GAL working with a gay or lesbian family, this means obtaining a careful history in order to determine the nature of the multiple adult/child relationships that may exist. Do not assume that the biological and/or adoptive parent is the only or even the major care-giving figure. The "psychological parent" and "defacto parent" standards should be applied here in order to clarify the child's situation. Be sure to explore the possibility of non-biological/adoptive adult relationships in the child's life.

The lack of legal recognition for lesbian and gay parents is part of the general lack of social recognition accorded lesbian and gay families. These families have often struggled to create a sense of family connection in the face of public intolerance and rejection. The adults have had to repeatedly affirm their status as parents regardless of whether or not they are birth-parents. The children have had to repeatedly explain (or hide) their family structure. They may have two moms or two dads; they may have no dad or no mom. They may also have to argue that they are truly a sister or brother to their siblings.

When the parents separate, the parental conflict may become so intense that the parents attack *the very relationships they have worked so hard to establish and defend*. Just like heterosexual parents in high-conflict divorce, same-sex parents in high-conflict "divorce" may look for any advantage they can find in seeking custody. The biological parent may exploit the limitations in legal definitions of parents, claiming that he or she is the true or only parent. Angry parents may also ignore the very sibling relationships they have worked so hard to foster. In at least one recent Massachusetts case this has taken the form of each biological mother taking "her" (biological) child when the family dissolved. Neither the judge nor the GAL objected, presumably because they did not really see this group of people as a family in which the children were siblings, and thus did not see that the children were entitled to the protection and continuation of their relationships with *both* parents as well as with each other.

There are now some legal protections for gay and lesbian parents. In eight states, including Massachusetts, second-parent adoptions protect the relationship between the non-biological (or initially non-adoptive) parent and the child without challenging the legal standing of the other parent. There are a variety of reasons why a parent may not have sought this legal protection prior to divorce, however, including (1) the expense, (2) the risks involved in revealing one's sexual orientation through such a court proceeding, (3) lack of knowledge about the availability of second-parent adoption, (4) the need to wait until the adoption of subsequent children is completed (since many adoption agencies and jurisdictions only permit adoptions by "single parents"), (6) the impossibility of obtaining the required consent from another person (former spouse or sperm

donor), and (7) the unavailability of second-parent adoption in the jurisdiction in which the couple previously lived. Thus the failure to complete the second-parent adoption procedure should not be used as a guideline in determining the nature of each parent's relationship to the child.

The unique issues involved in gay and lesbian "divorce" have been the subject of considerable concern in the lesbian and gay community and among professionals working with these families. The lawyers in Gay & Lesbian Advocates and Defenders (GLAD) recently collaborated with other lawyers, mediators, mental health professionals, and parents to develop a document entitled "Protecting Families: Standards for Child Custody in Same-Sex Relationships" (First printing April 1999, downloadable from www.glad.org). The authors recommend that families in distress consider involving family friends or relatives to help mediate disputes, or else retain the services of a mediator or arbitrator to help them reach a voluntary agreement. Given the lack of legal recognition for gay and lesbian families, they suggest that court proceedings be avoided. The recommendations in this document are very helpful in thinking about how to protect the best interests of children, especially in situations where the legal system does not offer adequate protections.