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DIVIDED WE PROPAGATE: AN INTRODUCTION TO *PROTECTING FAMILIES: STANDARDS FOR CHILD CUSTODY IN SAME-SEX RELATIONSHIPS*

William B. Rubenstein*

When Lincoln famously intoned that “a house divided against itself cannot stand,”¹ the house he had in mind was the entire nation. But what about a family divided against itself? What rules should govern familial disputes? Who gets to decide the content and application of those rules? By what means? And (how) are they enforced? In the vast majority of circumstances, informal intra-family bargaining supplies the answers to these questions. When the bargaining breaks down, however, families often turn to the legal system.

When they turn to law, most Americans find pre-packaged answers waiting for them. The rules are supplied by the discipline known as “family law” — an intricate set of state law norms developed from the common law and refined over generations of application. But many families, particularly those involving same-sex couples, exist outside of the parameters of existing legal doctrine. For such extra-legal families, the formal rules of living, loving, and separating must either be patched together from the available legal materials or supplied by other means.

Imagine a fairly typical millennial American family — two lesbians jointly raising a minor child. After twenty years of happy homemaking and ten years of joint parenting, the couple’s relationship disintegrates and they decide to go their separate ways. Which woman should have custody of the 10-year-old child? How much visitation should the non-custodial mother have? Who gets what property? How should these questions be

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1. Abraham Lincoln, “*House Divided*” *Speech at Springfield, Illinois*, in *SELECTED SPEECHES AND WRITINGS* 131 (1992).

decided? And by whom? Most often the women will resolve these questions informally and relatively amicably. But when they cannot, one or both of the women might seek a legal resolution.

American courts have confronted such situations for nearly two decades.² I refer to these lesbian divorce situations as "second generation" queer parent cases. They succeed an earlier set of family law cases involving the divorce of legally married couples in which one of the divorcing parents had "come out." In these "first generation" cases, courts struggled to ascertain the extent to which a parent's sexual orientation ought to be a factor in the custody and visitation decision at divorce.³ Our "divorcing lesbians" case also precedes a newer set of cases in which lesbians have coparented with gay male sperm donors and, upon dissolution of the lesbian-donor relationship, their dispute ends up in the traditional legal system.⁴ This complicated "third generation" of cases might also include situations in which the parenting arrangement involved an "adult who will not be a parent but is intended to have a special and important relationship with the child."⁵

All three generations of cases have challenged the capacities of family court judges. In the first generation cases, if courts were unsure how to handle the homosexuality of the divorcing parent, at least they knew where the child came from. In the second and third generation cases, family courts are often mystified by the origin, as well as the dissolution, of the queer family. The worst judges are simply hostile. It is worth remembering that not a single family court judge in America had a sexual orientation course in law school, nor would many have had any continuing legal education on the subject.⁶ Thus, each family judge is pioneering her own course.

Even if the family judge is sympathetic to the non-traditional family situation, the governing legal regime offers her limited guidance. A lawyer's instinctual reaction to a novel fact situation

2. See generally WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 801-918 (2d ed. 1997 & Supp. 1999).

3. See generally *id.* at 808-11.

4. See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994).

5. Gay & Lesbian Advocates & Defenders, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 *UCLA WOMEN'S L.J.* 151, 153 (1999).

6. See William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 *UCLA WOMEN'S L.J.* 379, 401-2 (1998).

is to force the queer peg into the square hole, to apply to the gay family the structure of heterosexual family law. Traditional family law tends to recognize parents of three varieties: marital, adoptive, and biological. Because same-sex couples cannot legally marry, parenting presumptions accorded to a marital unit are unavailable.⁷ As to adoption, increasingly, lesbian coparents are able to take advantage of “second parent adoption” procedures that enable both women to have legally-recognized relationships with the child.⁸ But second parent adoptions remain the exception, legally (as they are approved in only a handful of states) and practically (as they remain expensive and unknown to many queer families).

Divorcing lesbian couples who enter the legal system — which is, as noted above, only the small subset of divorcing lesbian couples who cannot work out their situation informally — therefore do so with one particularly familiar legal ingredient: biology. As American law gives a biological parent significant deference with respect to parenting decisions,⁹ most court decisions to date have enabled a lesbian biological mother to bar the

7. In certain situations, a man married to a woman at the time the woman bears a child may have rights and obligations to the child by virtue of the marriage, even if he is not the child's biological father. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110 (1989) (affirming application of a California statute that presumed a child of marriage to be the child of marital parents against the rights of the biological father). These rights and protections are not available to the same-sex partners of biological mothers and fathers.

8. *See, e.g.,* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In the Matter of Dana*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993). *See generally* RUBENSTEIN, *supra* note 2, at 866–74; Sonja Larsen, *Adoption of Child By Same-Sex Partners*, 27 A.L.R. 5th 54 (1995 & Supp. 1998).

9. The right of biological parents to raise their children free of government interference is often characterized as “fundamental,” and thus can be overcome only to effectuate a “compelling state interest.” *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983). *See generally* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 821–22 (2d ed. 1988). Yet, the clarity that biology might provide in identifying a child's parents has not produced analogous clarity in the law. The Supreme Court has issued a confused set of precedents concerning how much notice and how much of an opportunity to be heard must be given to biological fathers of illegitimate children before their parental rights are terminated through adoption proceedings. *Compare* *Stanley v. Illinois*, 405 U.S. 645 (1973) (striking Illinois statutory scheme that provided no notice to illegitimate father prior to termination of parental rights), *with* *Lehr v. Robertson*, 463 U.S. 248 (1983) (affirming New York statutory scheme that provided no notice to subset of illegitimate fathers prior to termination of parental rights). *See generally* CLARK, *supra*, at 855–62. While biology might therefore do less work than is generally assumed, it remains a significant — if not decisive — factor in many disputes between biological and non-biological parents.

lesbian coparent from any involvement with the child, if she so desires.¹⁰ Most often this happens because a court will not even entertain a petition for an evaluation of the child's best interest. A woman lacking a legal or biological connection to her child is deemed to lack "standing" to initiate court proceedings.¹¹ Conversely, this same emphasis on biology has sometimes enabled a gay male sperm donor with limited parenting involvement to initiate legal proceedings against the wishes of day-to-day lesbian mothers.¹² All of this is true notwithstanding the fact that biology may mean less in a family in which the child is the product of some form of alternative insemination and in which the genetic connection may not correlate, even loosely, with the provision of day-to-day care for the growing child.

Against biology are typically pitted two competing factors of varying degrees of strength: course of conduct and intention. When the "second parent" has functioned as a parent — particularly when she has done so on a day-to-day basis and for long periods of time — some courts, labeling her a "de facto" or "functional" parent, have enabled visitation rights.¹³ Finally, in some instances, a coparenting agreement between the women may have some legal significance, though most courts have hesitated to so hold.¹⁴ Such agreements are problematic, in any case, because the bargaining that they represent takes place in the shadow of the biological-preference legal regime. The fact that biology will often triumph over conduct or intention provides one member of the queer couple a legal trump card — if she

10. See generally RUBENSTEIN, *supra* note 2, at 915 (listing cases) & Supp. 1999 at 92 (updating list). But see E.N.O. v. L.M.M., 1999 WL 430460 (Mass. June 29, 1999) (authorizing probate court to exercise equity power to order visitation if it is in the child's best interest).

11. See, e.g., *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).

12. See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994).

13. See E.N.O. v. L.M.M., 1999 WL 430460 (Mass. June 29, 1999) (authorizing probate court to exercise its equity power so as to order visitation rights in cases involving a "de facto" parent). Accord *In re the Matter of T.L.*, 1996 WL 393521 (Mo. Cir. May 7, 1996) (holding that lesbian partner who coparented child was an "equitable parent" entitled to visitation rights to child); *V.C. v. M.J.B.*, 725 A.2d 13 (N.J. App. 1999) (denying joint custody to a lesbian coparent but awarding visitation); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996) (holding that a lesbian partner who coparented a child stood *in loco parentis* and therefore had standing to seek visitation). See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

14. Cf. *In re R.C.*, 775 P.2d 27 (Colo. 1989) (emphasizing the importance of an agreement in a coparenting arrangement between a woman and a known sperm donor).

takes her dispute to a legal system mystified by gay families, her biology will most likely ensure a ruling in her favor.

But at what cost? If the non-biological mother truly functioned as a parent, isn't the child hurt by the bio mom's recourse to biology? If the bio mom contracted to share custody, aren't our social norms of contracting offended by a legal system that simply nullifies the meaning of the contract? Isn't the bio mom's insistence on biology harmful to the gay community, which has fought long and hard to divest biology of its singular significance? Doesn't her recourse to the traditional legal system deny the critical importance of the queer family relationships that she — and other gay people — have constructed within a hostile social and legal world? Should the bio mom care? How much? Why? Is this a situation which pits her obligations to her community against those she believes she has to her children?

More generally, what are the costs of litigating this intrafamily, intracommunity dispute in a legal forum that does not even recognize and appreciate the context of the queer family? Some rabbis have ruled that Jewish law "prohibits a Jewish lawyer from representing a Jewish plaintiff in a civil suit [against another Jew] before a secular court."¹⁵ Would queer parenting disputes be better off in alternative dispute resolution fora?¹⁶ Can they be forced there? If gay couples opt out of the traditional legal system, can they ever educate the players in that system — who will, inevitably handle cases involving their lives — about them? But if they litigate these difficult disputes there, do they not risk making bad law that "reinforc[es] narrow legal versions of what counts as a family,"¹⁷ setting back gay rights in other areas?

Attorneys representing lesbian mothers and gay fathers have debated these issues for a generation. Out of an effort to redirect that experience comes the following document, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*. Gay & Lesbian Advocates & Defenders (GLAD), a regional gay rights organization based in Boston, convened a

15. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 *CARDOZO L. REV.* 1577, 1603 (1993) (citing Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 *J. HALACHA & CONTEMP. SOC'Y* 105, 112 (1985)).

16. See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 *UCLA L. REV.* 1687 (1997).

17. Gay & Lesbian Advocates & Defenders, *supra* note 5, at 155.

working group of attorneys to develop standards to guide attorney and client conduct in queer dissolution situations. The goal was to create a set of canons that would advise parents and attorneys at the dissolution of queer families so as to decrease acrimony and to guard against anti-gay family law rulings. GLAD's Legal Director Mary Bonauto drafted the outcome of the proceedings, circulated it for comment and approval among queer legal organizations throughout the country, and attempted to incorporate the comments she received. The product could prove to be a milestone, an initial chapter in what might ultimately be entitled the "Restatement (First) of the Ethics of Family Behavior."

Several aspects of the endeavor are worth highlighting. First, this document represents a laudable effort at community-organizing. GLAD pulled together a range of attorneys, as well as mediators, social workers, and parents in Boston, and welcomed input from similar individuals and organizations throughout the country. As with all such enterprises, it inevitably invites inquiry about the nature and breadth of the decision-making group.¹⁸ Is this an example of "experts" dictating rules to community members? Was a more "democratic" means of decision-making available or even appropriate? Perhaps random individual mothers in these circumstances need standards established by repeat-playing experts to help guide their decision-making. But what about the fact that the most problematic legal arguments from the gay community's perspective are often made by family law attorneys with no prior connection to the gay community nor commitment to gay liberation. To include these nonspecialized practitioners in the development of this very specialized document would have been impossible. To produce the document absent a broader spectrum of the bar, however, may limit its utility. Despite these concerns, there have been far too few community-enhancing attempts to confront community-erasing divisions within the lesbian/gay/bisexual community and the organizers of this one deserve credit for their work.

Second, although the document is entitled *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, it is primarily focused on what appears before the colon, not after. The post-colon title implies a set of substantive standards (con-

18. See generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

tract trumps biology, etc.), but the document's primary contribution is a set of ethical behavioral norms for parents and attorneys. It might more aptly be sub-titled, "Standards for Behavior During Child Custody Disputes in Same-Sex Relationships." The emphasis of the document throughout is that the child custody cases represent a "threat currently facing our community."¹⁹ The threat is that "[f]amilies whose ties are not defined by biology, adoption or marriage are put at risk by a legal system that does not provide a mechanism for protecting their relationships at times of crisis."²⁰ The drafters are particularly concerned about biological mothers who make arguments about "standing" and contract "unenforceability" that attempt to bar a family court from reaching the "best interest" analysis. Distasteful as these arguments might be from the community's perspective, they are nonetheless often successful and thus offer a biological mother willing to make them some protection. Perhaps the best title for these norms might therefore be "Protecting Our Families From Each Other('s Recourse To The Traditional Legal System)."

Finally, we are left with the ultimate question — of what persuasive value will the norms be? The guidelines concede that they are "aspirational and voluntary,"²¹ but will parents in the midst of a split-up volunteer to abide by them? It would be one thing to ask parents to accept these guidelines from behind a veil of ignorance, but queer parents enter the coparenting set-up knowing exactly where biology, and hence law, lies. Further, lawyers are urged to undertake representation of biological mothers in these cases only upon limited terms that require the bio mom to forfeit community-detracting arguments.²² Can attorneys square these goals with their duties to the clients? Will the clients agree to the limitations? What if they do not?

All concerns aside, the drafters of the guidelines deserve enormous credit for their effort. Not only do they represent a path-breaking moment of queer communal organization, the resulting content is well-written, well-organized, practical, sage, and pithy. The proof will be in the pudding. Will these guidelines be able to persuade couples going through stressful break-ups to act reasonably and in their children's best interest? Will

19. Gay & Lesbian Advocates & Defenders, *supra* note 5, at 151.

20. *Id.* at 152.

21. *Id.* at 156.

22. *Id.* at 162.

the norms compel women (and occasionally men) with decisive legal protection to eschew legal arguments that might provide protection? You be the judge.