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PROTECTING FAMILIES: STANDARDS FOR CHILD CUSTODY IN SAME-SEX RELATIONSHIPS

Gay & Lesbian Advocates & Defenders*

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* This document was authored by Gay & Lesbian Advocates & Defenders in Boston, in collaboration with a working group of lawyers, mediators, social workers and parents in Boston, as well as with Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, Family Pride Coalition, and the American Civil Liberties Union Lesbian and Gay Rights Project. This document has also been endorsed by Children of Lesbians and Gays Everywhere. Other organizations who wish to be listed as endorsers of these Standards should contact GLAD, and a current list of endorsers can be found on GLAD's website.

These Standards represent the collective recommendations about what we deem a threat currently facing our community. Because of the importance of this to our families and our children, as well as to our continuing fight to be treated appropriately by the legal system, we have taken the unusual step of agreeing to a set of very specific suggestions we are asking our community to follow. All of us ask that those of you who are dealing with conflict within same-sex families read, consider, disseminate, follow, and urge others to follow these guidelines.

I. SUMMARY

These Standards are intended as a tool to help families who are at risk. Families 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. Respecting our own families requires us to play this role for ourselves, our children, and each other. The text accompanying each of these principles is meant to help even those in deep crisis. We urge you to read and use the full document. The overarching aim of the standards, which are listed below, is to help families maintain the status quo for their children to the greatest extent possible at times of crisis or a breakup.

1. Be Honest About Existing Relationships Regardless of Legal Labels.
2. Consider the Dispute From the Perspective of the Child or Children.
3. Try to Reach a Voluntary Resolution.
4. Try to Maintain Continuity For the Child.
5. Remember That Breaking Up Is Hard to Do.
6. Seriously Investigate Allegations Of Abuse In Determining What is Best for the Child.
7. Honor Your Agreements.
8. The Absence of Legal Documents Is Not Determinative of the Issues.
9. Treat Litigation As A Last Resort.
10. Treat Homophobic Law and Sentiments as Off Limits.

II. INTRODUCTION¹

A. *Our Successes In Creating Families*

For many years now, both lesbians and gay men have set out to create our own families with children, often with partners, and sometimes with a partner coming into a family after a child's birth. Many refer to our families as those "of intention and function." As we near the end of the second decade of the phenomenon known as the "lesbian baby boom" or "gayby boom," it is

1. This document began with the efforts of a concerned group of activists, lawyers, mediators, social workers and mothers who were gathered together by Gay & Lesbian Advocates & Defenders (GLAD), and who served as a sounding board and editor to the author, Mary Bonauto of GLAD. These include Silvia Glick, Joyce Kauffman, Sandra Lundy, Diane Neumann, Jenifer Firestone, Maureen Monks, and Arline Isaacson.

important to establish guideposts about how to protect our children when our families separate.

Sometimes we form families with an adult who will not be a parent but is intended to have a special and important relationship with the child. This may be a sperm donor, surrogate mother, or some other person, and is referred to in this document as a "significant adult" or "family member."

Our community has much to be proud of in its successes in creating families outside of conventional models. We want these lesbian and gay families to be treated as families in all contexts and by the law. Many of us have sought to obtain some kind of legal recognition for our families, whether through second parent adoption, coguardianship, domestic partnership benefits, or powers of attorney. To the nongay world, we have stressed that our relationships are those of a "family" rather than of "housemates" or "roommates." We assert that "if it looks like a family, if it holds itself out as a family, if it functions like a family, then it's a family." However, we know that except for second parent adoption, legal mechanisms do not confer equal parental status on all parents, much less do they allow for the nuances of other important roles we have created, such as the involved nonparent, donor, or other significant adult whose role is conceived of as stable and permanent, even if not "parental."

B. The Nightmare of Divorce Without Legal Process

As in non-gay families, our families sometimes separate. As in non-gay families, when our family relationships undergo changes or break-ups, we experience feelings ranging from sadness and betrayal to hostility and anger about the end of the relationship and about the former family member. In addition to the emotional issues that must be resolved, there may be property division issues and child custody and visitation disputes with which to contend. There is no divorce system in the background, poised as a default to help our families sort these issues out according to uniform and predictable rules.

C. Preventing Harm to Children

The general lack of legal recognition for our important family relationships results in disrespect for our families and often can lead to the end of important family or parent-child relationships. After parents or families separate, some birth or adoptive parents terminate contact between the child and the other parent

or family members immediately; others allow visitation for a period of time until they find the visitation too inconvenient or form a new relationship. Of course, some parents work hard to maintain their children's relationship with a parent or other significant adult. Some parents have even sought second parent adoptions of their children with their former partners.

D. *Preventing Harm to Our Collective Interests*

Some parents who are not legally recognized and other significant adults, when faced with a total loss of their relationship with their children, have turned to the courts to restore contact between themselves and their children. Often, although not always, courts interpret state law schemes to give authority to even bring a lawsuit only to those people that the law defines as "parents."² Under these restrictive laws, "parents" are only persons related through birth, marriage, or adoption. In other words, in legal terms, the status of "parent" is an all or nothing proposition. Courts often wash their hands of considering the needs of the child when the family member lacks a biological or adoptive relationship, but may very well have been involved in everything from planning for the birth of the child to caring for the child virtually every day of the child's life.

Legal cases are often very damaging to our collective interests in addition to threatening deep injury to the individual families and especially to the children. A focus solely on the legal rights of the biological or adoptive parent ignores the real relationships of many parents, significant adults, and children. It is extremely damaging to our community and our families when we disavow as insignificant the very relationships for which we are seeking legal and societal respect. Similarly, when an express agreement was entered into by the parties, it is very damaging later to turn around and claim that such an agreement has no

2. In these cases, courts often treat nonlegally recognized parents and other significant adults as strangers to the child and deny the family members' requests for visitation. For example, in Vermont, the courts did not help Christine Titchenal who was forbidden by her former partner from seeing her three-year-old daughter Sarah. In New York, after separating from her partner of 17 years, Lynda A.H. was forbidden by her former partner from seeing her three and a half-year-old daughter. When a nine year lesbian relationship ended in Texas, a three-year-old child suffered the biggest loss when the courts refused to intervene in a birth mother's decision to forbid the child from seeing her other mother. Similar cases have been reported in virtually every state in the country.

validity simply because it has become inconvenient or feelings among the adults have changed.

As a legal matter, cases that go forward along these lines are likely to have the consequence of reinforcing narrow legal versions of what counts as a family and of what mechanisms are available to create security in establishing a family. We convey to the courts a disrespect for our own families when members of our own community insist that our relationships — of whatever duration and however intermingled — do not amount to a “family,” or that the other parent was really nothing more than a babysitter. Obviously, this kind of argument also undercuts efforts in other contexts to win legal respect for our families — whether through domestic partnership, adoption, or resisting restrictions on a divorced parent’s visitation when a same-sex partner is present. More cases stating that the biological parent is the winner in law, or that the only real family that merits court protection is one created by biology or marriage, and that agreements mean nothing, will come back to haunt our community in many contexts.

E. *Protect Our Children*

These Standards are offered as an approach to the resolution of custody disputes upon the dissolution of a same-sex relationship or nonmarried family.

These Standards are based on the belief that decisions about the care and custody of children whose same-sex parents, or other significant adults, share a commitment to and responsibility for those children should be based on the best interests of the children in the context of their actual relationships with each parent rather than on the relationship between the parents or on the existence of a legal relationship with one of those parents.

The Standards are also grounded in the belief that our freedom to continue to create secure and stable families depends on respecting the methods we use to create them. Some individuals take on responsibility for children because they have entered into agreements that provide them some sense of security in their roles with those children. Thus, it is very harmful to our future ability to plan families when courts are encouraged (by some) to find the agreements invalid or legally unenforceable. By the same token, some individuals with a biological connection to a child (a birth parent, sperm donor, or egg donor) agree not to be involved in the child’s life as parents and to forego the legal ad-

vantage that biology would otherwise give them. These individuals are encouraged not to use biology as a trump card that invalidates their agreements and to assert a superior or equal claim to those of the child's actual parents should disputes arise.

These Standards may serve as a guide to individual families. More broadly, they may serve as the basis for a continued discussion within our community about how to establish an ethic that respects and protects the actual parent/child and other important relationships in our families. These Standards are intended to be aspirational and voluntary and are certainly not intended to generate disputes that may result in additional litigation. Nor should the Standards be cited as legal authority.

F. *Create Documents Supporting Your Family and Take Advantage of Legal Protections in States Where They Exist*

People should be strongly encouraged to create legal and other documents articulating their intentions and expectations about the families they have and are creating. These may be coparenting agreements, estate planning documents, or other types of agreements used in their state. A secondary benefit of such agreements is that the process of reaching an agreement can uncover, and encourage resolution of, areas where the understanding among the parties is unclear or where there is outright disagreement. It is very important to identify and resolve as many potential disputes as possible. In the process, unexpected and undesired future scenarios should be considered, with special attention to the possibility of the family breaking up.

When possible, it is important to take advantage of legal mechanisms that exist in some states to protect the relationship between the parents and the child. A number of states permit coparent adoption, a process by which non-biological parents become legal parents to the child. (Contact an attorney to find out if this is available in your area). Even in states without second parent adoption, a legal parent may be able to name another parent as a coguardian or the nonlegal parent may be able to obtain a limited parental status under state law. It is important to utilize all of the protections which may exist unless there is some important reason why that is not practicable (e.g., a known sperm donor who will not waive his parental rights for a second parent adoption where such waiver is required).

G. *Encourage Families in Distress to Review These Standards*

As a community, we must remember to speak up, and use the power of our own voices when we encounter families in distress. Encourage those families to review and apply these Standards. The lack of legal recognition of our family relationships has an enormous impact on our community and on every family among us. As a community, we need to provide the support and incentive to behave reasonably even at very difficult times. All of us have a responsibility to educate others to the reality that litigating custody disputes in conventional courts of law may well lead to erosion of the societal and legal credibility our community has gained for our families.

These Standards are offered in the spirit of community and in the hope of creating a community where our children are safe, loved, and protected. We encourage people to apply them to their own disputes and to help friends and loved ones who may benefit from them by providing them this document and support in following its principles.

III. STANDARDS

1. *Be Honest About Existing Relationships Regardless of Legal Labels.*

Individuals should be forthright and honest about the existence and nature of the relationships between and among the parents, other significant adults, and the children.

Each situation is unique and there is no single approach that will work for all families. It is critical to recognize the actual relationships between the parties and the child. A focus on legal labels can easily obscure the actual relationships.

Of course, not everyone who claims to be a "parent" or "significant adult" after a dispute is actually a person whose relation to the child is contemplated in the spirit of these standards. It may be that the relationship between the adult and child is of such a short duration, is so intermittent, or is so profoundly troubled in some way that no parent-child or other significant relationship exists.

Agreements and documents, particularly when coupled with an ongoing course of conduct that establishes the intent of parent(s) to share parenting or allow an important relationship to develop with another parent or significant adult should be given

great weight in determining the context in which the parties' relationships to the child developed.

2. *Consider the Dispute From the Perspective of the Child or Children.*

Separating parents or families experiencing conflict with a significant adult should consider the best interest of the children involved to be paramount and should consider the child(ren)'s perspective. Continuity of their relationships with significant adults is vital to children's well-being. While individuals may be critical of each other, to a child even a marginal parent is a parent. The abrupt termination of a relationship that was contemplated as permanent is very damaging. Sustaining the family members' present relationships with their children should be a primary goal of the resolution of the custody dispute.³

3. *Try to Reach a Voluntary Resolution.*

At a minimum, this means that the persons involved should endeavor to reach a voluntary resolution about future care and support for the child. If the parties are at an impasse, consider involving family friends or relatives who know the family well or retaining the services of a mediator or arbitrator who can help the parties reach a voluntary agreement.

It may be helpful to know that courts themselves increasingly utilize the services of alternative dispute resolution providers. Mediation, the most common form of alternative dispute resolution, involves a confidential and voluntary form of structured negotiation designed to help the participants reach an informed and agreed-upon resolution with the assistance of one impartial mediator. Other forms of dispute resolution include arbitration and agreements negotiated with lawyers or in couples' therapy. (Consult an attorney knowledgeable in this area of law for recommendations of mediators and arbitrators.)

3. Initial reluctance to add children to a family — a factor often used to suggest that one person has a more legitimate claim to a continued relationship than another — is not justification at all for terminating contact between a child and a person who has played a significant or parental role. As with any family, people who are ambivalent about having children often overcome their initial reservations and bond deeply. The fact that a person might not have anticipated doing so is completely irrelevant to the child's experience of that family member and the injury that the loss of such a person causes.

4. *Try to Maintain Continuity For the Child.*

In arriving at a plan for the future, the parties should start with a presumption that an arrangement that most closely resembles the child's relationship with his or her family over the last two years (or for the life of the child when the child is under age two) is best from the child's perspective.

Although it may be difficult, each person should allow and encourage a comparable level of involvement in the child's life and activities as each had before the dispute unless they agree otherwise. This applies to school and extracurricular activities, as well as to the need to share or alternate holidays and other special occasions. To the best of their ability, all family members should aim to continue to provide financial support for the child. Maintaining the status quo to the extent possible should be the goal for the family. Continuity of their relationships with significant adults is vital to our children. The abrupt departure of a loved adult simply because one parent has changed his or her view of that person can cause great harm to a child.

Hand in hand with assuming the child's perspective in considering the rights of family members comes viewing responsibilities for support and caretaking that way too. Just as one who wishes to deny the relationship of the child and another family member must be urged to consider the impact on the child, a family member should do everything possible to maintain the status quo for the child in terms of support as well.

5. *Remember That Breaking Up Is Hard to Do.*

Individuals should be helped to understand that the end of a relationship is invariably difficult and disruptive to all involved. Even the most amicable divorces take months to process and many divorces are not entirely amicable. This is all the more reason to seek out the services of a trusted friend or professional mediator who can help the parents avoid impulsive and expedient decisions which are likely to be harmful to the child.

6. *Seriously Investigate Allegations Of Abuse In Determining What is Best for the Child.*

Abusive adult relationships and child abuse do occur in some of our families. If there are allegations of domestic violence, it is important to determine, based on a thorough history, whether or not the allegations are founded. If abuse is substanti-

ated after investigation, whether it is physical or emotional abuse between the parties and/or between the parties and the child, then it should have a role in determining what is in the child's best interest. The focus should be on safety and treatment, not on using the fact of abuse to deny another person's status as a parent or other significant adult. When a parent or significant adult is abusive, the other family members should use legally available means to protect themselves as well as the child. In some cases, this may mean a suspension of visitation or supervised visitation. Research shows that children are often negatively affected by domestic violence even if they are not physically hurt or do not directly witness physical violence. The impact of any abuse on the children should be discussed and incorporated into all negotiations.

Allegations are different from substantiation. Allegations of abuse should be seriously explored in order to reach an honest determination as to whether there was abuse, or whether the feelings stated are those commonly associated with the break-up of a family relationship. A professional evaluator hired at the expense of the parents may be helpful.

7. *Honor Your Agreements.*

Whether written or verbal, it is important to honor the agreements you have made. Of course circumstances can change from the time an agreement was formalized or a promise made. A commitment to a child involves significant emotional investment on both the child's and the adults' parts, so it is vital to be assured that important relationships are respected and permitted to remain stable by the child's other parent or caregivers.

8. *The Absence of Legal Documents Is Not Determinative of the Issues.*

While it is important to take the available legal steps to protect our families, some cannot or do not pursue legal protections for their families. Some families do not fit the all or nothing definitions common in law. Money to obtain those protections may be an obstacle for some. Others may legitimately fear losing their jobs or homes by coming out in a court proceeding. Other obstacles may exist. For example, even in a state where second parent adoption is available, there may be another person (*e.g.*, former spouse or sperm donor) whose non-consent to the adoption may prohibit the adoption under some states' laws.

Thus, the failure of the parents and family members to take legal steps to secure their status as a family is only one factor in any evaluation of the child's best interests or of an agreement among the parties. In and of itself, the failure to take such legal steps cannot be a guiding or determining factor.

9. *Treat Litigation As A Last Resort.*

Individuals need to understand that litigation is both a costly and time consuming process. In addition, court proceedings and files are often open to the public, thereby compromising the family's privacy. Lawsuits have a public dimension both for the family involved and, to some degree, for other same-sex families. Those lawsuits in which a parent asserts that another parent or family member who has no adoptive or biological relationship to the child cannot be heard from in court on the issues of visitation or custody run the risk of making bad legal precedent and signal very real disrespect for our own families.

More particularly, litigation provides a highly structured forum in which the final decision remains with a judge. Mediation, as discussed in Standard 3, gives all parties input into the dispute-resolution process and the content of any voluntary resolution.

10. *Treat Homophobic Law and Sentiments as Off Limits.*

No one should reveal, or threaten to reveal, the sexual orientation of an opposing parent or other significant adult to employers or others in an attempt to harass or intimidate the opposing party. No one should use the fact of a person's transgendered identity to gain any advantage over another.

When litigation occurs, it is improper and unethical to appeal to anti-gay laws or sentiments. Individuals should not use the fact that gay and lesbian relationships are not recognized under current law to gain some advantage. Specifically, we emphatically urge those who are confronted with lawsuits not to resort to arguing that a person who has had a parental or significant relationship with the child but who is not a biological or legal parent cannot ask for visitation or custody because of "standing." If there is a well-founded belief that the child's best interests compel limiting contact between the child and former family members, then the court case should proceed on those terms and not whether an agreement is enforceable or whether a non-legal parent can be in the court proceedings to begin with.

Lawyers should consider: (1) limiting the terms of their representation to non-litigation options from the outset of the attorney-client relationship; (2) not relying upon laws or sentiments supporting the notion that parents have a more legitimate right to their children if they are biologically related to their children or related through adoption, than if they are not; and (3) after full discussion and disclosure to their clients, refusing to make arguments about lack of standing, refusing to disavow written agreements, and so limiting their representation at the outset.

IV. CONCLUSION

We can all agree that our children deserve to be loved and protected. This means that we ourselves as well as others should respect our families and our children's relationships whether the legal system would do so or not. We hope these proposed standards will be the basis for fruitful discussion and bring all of us closer to our shared goals.

Dated in Boston, April 11, 1999.

APPENDIX

Organizations Endorsing the Standards

Gay & Lesbian Advocates & Defenders

294 Washington Street, Suite 740

Boston, MA 02108-4608

(617) 426-1350 (phone)

(617) 426-3594 (fax)

www.glad.org

Lambda Legal Defense and Education Fund

120 Wall Street

New York, NY

(212) 809-8585 (phone)

(212) 709-0055 (fax)

www.lambdalegal.org

National Center for Lesbian Rights

870 Market Street, Suite 570

San Francisco, CA 94102

(415) 392-6257 (phone)

(415) 392-8442 (fax)

www.nclrights.org

American Civil Liberties Union

Lesbian and Gay Right Project

125 Broad Street

New York, NY 10004-2400

(212) 549-2627 (phone)

(212) 549-2650 (fax)

www.aclu.org

Family Pride Coalition

P.O. Box 34337

San Diego, CA 92163

(619) 296-0199 (phone)

(619) 296-0699 (fax)

www.FamilyPride.org

Children of Lesbians and Gays Everywhere

3543 18th Street, #17

San Francisco, CA 94110

(415) 861-5437 (phone)

(415) 255-8345 (fax)

www.COLAGE.org

