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Expanding the Definition of Family: A Universal Issue

Maria Gil de Lamadrid†

I'm going to shift gears here a little bit and talk about some of the specific efforts made over the last several years to expand the definition of family as it pertains primarily to lesbian and gay parents. But first, I want to make the point (which I think is probably self-evident to most of us, but I feel a need to make it right at the beginning and you're going to hear me repeat it as I go through my presentation) that expanding the definition of family is not an issue that is restricted to lesbians and gay men. In fact, recent surveys have suggested that only 7-17% of families in the U.S. constitute what the right wing has called “traditional families.” That leaves the vast majority of us struggling for recognition of who our families really are.

That vast majority includes lesbians and gay men but it also includes people across the board: across racial lines and cultural lines, age lines and class lines. As far as people of color are concerned, extended families—which is what we are really talking about when we talk about expanding the definition of family—are an intrinsic aspect of the cultures of African-Americans, Latinos, Asians, and Native Americans. In this country, people of color across the board have traditionally formed families that extended beyond what is considered “traditional” by the right wing.

On that note, I want to make a point now and throughout my presentation, that what we are talking about is a universal expansion of the definition of family. Although right now as I present these cases I'm going to talk specifically about issues pertaining to lesbians and gay men, I'm also going to talk to you about how these issues relate to other cultures. As a unified effort between lesbians and gay men and people of color, we have been able to expand some of the definitions of family in courts to reflect the realities of our families across the board, not just

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simply for lesbians and gay men. When I say not just simply lesbians and gay men, I’m talking about the dominant culture of lesbians and gay men which is the white culture. I want people to remember, we are bigger and better than our opponent. We are the majority; we need to go out there and present ourselves as the majority as much as possible and in unified terms.

I will start with issues that pertain to partnerships of lesbians and gay men, and later I will move into issues pertaining to parenting. One of the big movements around the country is to formalize recognition of domestic partners. Preferably, the definition of domestic partnership should be broad enough to encompass all committed relationships between people who might not otherwise be recognized as significant family members under the current law. As of now there are about twenty-five cities and counties in the United States that have passed various sorts of domestic partnership ordinances. Some of them are just simply like public registers for people to register with the city or county clerk and get public recognition of their family. Some of them are broader and include hospital or jail visitation; some include benefits for public employees for sick and bereavement leave. Some of them also include health insurance coverage and other types of monetary benefits.

Some of the broader definitions of domestic partnership do leave room to include people other than lovers. Of course, there are certainly domestic partnership ordinances and policies that are more restricted than that. And some of them specify only lesbian and gay relationships. I would urge people who are working on domestic partnership policies to work towards broader expanded definitions. We want to be going out there with a unified front. And we are pushing for universal family issues as opposed to simply lesbian and gay issues. In general, there is movement [around domestic partnership law] out there. We are gaining ground, and every month I hear of more and more cities and counties that have passed domestic partnership ordinances.

We have also made progress in about twenty companies across the nation regarding employment policies which recognize and provide benefits to the domestic partners of their employees. The companies are pretty diverse. They range from Lotus and Apple to Levi Strauss, to MGM Studios, to (this is my favorite) Ben and Jerry’s Ice Cream. And the reason why this is my favorite is not only because I like the ice cream, but because we called them at one point and asked them for their policy for domestic partnership. And they said, “Policy? We don’t have a written policy.” And we said, “Well, who do you give these benefits to?” And they said, “Basically, it’s the right thing to do, so whoever needs them gets them.” What a great definition!

There are also about fifteen to twenty schools around the country, primarily universities, that have adopted domestic partnership policies
and have opened various benefits to students and their families—like libraries and recreational facilities and student housing and sometimes health benefits as well. I want to tell you in particular about the University of North Dakota, both because I think it surprises all of us when we learn about their policy, and also because of the reason they passed it. They make a very clear statement, sort of an overarching priority, that the school policies will reflect the diversity of families in the Native American population of North Dakota. It's relatively a large population in the state. As a consequence, the school, without much effort, was able to pass a domestic partnership policy to reflect that diversity in families.

Well, here we are—back to square one. Here's our universal issue: recognition of expanded families. It crosses racial lines and in fact it strengthens our position.

One other recent effort that I want to mention is one that lasted seven years: the Thompson/Kowalski case.\(^1\) Many of you may be familiar with it. It involved two lesbian partners, one of whom, Sharon Kowalski, became severely disabled. At first, Karen Thompson was unable to gain guardianship of her lover. She went through a seven-year court battle with Sharon's parents. It was finally resolved this past spring, when Karen was granted guardianship of Sharon. But it took seven long years of a really horrible, heart-wrenching court battle in order to finally reunify their family. One of the sweet aspects to the victory was that the decision specifically referred to Karen and Sharon as a "family of affinity." It was after seven long years of trial after trial that they finally got that kind of recognition—that they were in fact a family of affinity.

What is the reality as far as the courts are concerned right now? Well, we are making progress, but we are making extremely slow progress. We are not making much headway on the national front as far as litigation is concerned. It's really very much a state-by-state effort, sometimes a county-by-county effort, (particularly where family issues are concerned because they are, for the most part, governed by state law).

Let me talk about a few points concerning state laws and litigation on certain family issues relating to lesbians and gay men. One of the things that we confront all the time in lesbian and gay men's family issues is the fact that twenty-three states in the country still have sodomy laws. Now, many of you may say, "Sodomy laws are criminal statutes. How do they impact on the recognition of lesbian and gay families?" The fact of the matter is that in many ways they make our very existence criminal in the eyes of the court. Therefore, our families are seen as criminal, too. Because of that, they have a very significant impact on the litigation of family issues in those states. They have barred lesbian

\(^1\) In re Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. App. 1991).
mothers from getting custody of their own children. They have barred lesbians and gay men from adopting children.

Sodomy laws have even interfered with a lesbian couple who split up and tried to enforce a property contract that they had drawn up in the beginning of their relationship. The court refused to enforce the contract, assuming that the subject matter of the contract was illegal because of a sodomy statute. This was in Georgia. It went up to the Georgia Supreme Court. Fortunately, we won and it went back to the trial court to be enforced. But it was the sodomy statute that got in the way of getting that contract enforced the first time around. So, sodomy statutes are very important in our efforts towards obtaining a broad definition of family. Their importance cannot be diminished in our minds. They are very clearly a hurdle that has to be overcome in the states where they still exist.

What else is going on? Domestic partnership, as I have mentioned, is certainly going on. And I actually want to make an aside here. Although I am talking about state laws right now, when I referred to domestic partnerships earlier I was speaking on the level of localities, either municipalities or counties. This is an important distinction. Recently I taped an episode of Phil Donahue. It had to do with a lesbian marriage that happened in Texas. I was sort of fast-forwarding it and stopping every so often to listen to it, and I got to a very interesting map that Phil was showing on the screen, so I stopped to listen to what Phil had to say. The map highlighted about eight states in the country that had, according to him, already passed domestic partnership statutes recognizing lesbians and gay men. I thought, “Hey, here's my candidate. He's well ahead of the game.” In fact, that's not true. There are as yet no states in this country that recognize lesbian and gay marriages, or domestic partnerships, on a statewide basis.

As far as child custody is concerned, there are only eleven states in the country that have clear standards recognizing that what needs to be looked at in a lesbian custody case is the best interests of the child. Six states in the country use the “presumption of harm” standard, which is basically irrebuttable. Those states are Arkansas, Kentucky, Missouri, North Dakota (remember North Dakota?), Tennessee, and Virginia. There are a lot of states in between that either have not adopted a standard or whose standard is somewhat hostile to lesbians. Some of them have adopted a standard of rebuttable presumption: a presumption that there is harm, but if the lesbian mother wants to she can try to rebut it.

These are clearly very difficult cases. Typically, they involve women once in heterosexual marriages, now divorced or going through a divorce, who are seeking custody of their children. They are biological

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parents. They have had a bond with the child since birth, and are also often the primary caretakers of the child or children. These are cases where in my mind it’s very clear-cut that the best interest of the child is served by remaining with the mother, or at least by having a shared custody arrangement between the parents. Yet the courts, generally speaking, have been hostile. I might note that such a lesbian case was just argued last week before the Florida Supreme Court, and we’re waiting for the outcome of that case.

As far as adoption is concerned, in a good many states across the country it has not been available to lesbians and gay men. I’m talking individual adoption, as well as joint adoption, where two partners adopt together, not to mention second parent adoption, which is conceptually like a step-parent adoption. Adoptions in most parts of the country are not available. We are very fortunate here in California—all three types of adoption are available to us, particularly in the Bay Area.

There are two states in the country that are so hostile to lesbian adoption that they have enacted laws prohibiting adoptions by lesbians and gay men. One of them is New Hampshire; the other one is Florida. The good news on Florida is that there have been challenges to that adoption statute. One challenge has already succeeded and the other two are still waiting to go to court. The one challenge that has already succeeded came out of Key West—of course, a fortunate choice of venue. The court held the statute unconstitutional on state privacy grounds, state equal protection grounds, and federal equal protection grounds. This was really an incredible victory. Unfortunately, it was the county trial court that issued this decision. Since the decisions are made on a county-by-county basis, it’s slow progress. There are no precedents to overturn such statutes.

So while we’re on the topic of lesbian and gay parenting, why don’t we talk a little about lesbians and gay men becoming parents. Lesbians and gay men are creating families in all kinds of ways, and have been for quite some time. There are lesbians and gay men who become parents in heterosexual relationships, others through adoption. Some become parents through inseminating, either as a single parent, as a couple, or with or without the involvement of donors. Still others arrange for surrogacy, which might or might not involve a group of friends who co-parent. We are creating families in lots of different ways at this point. Our parents are wonderfully diverse, and they reflect the individual needs of the people who are forming the families.

Lesbian and gay parents work—as far as the creation and maintenance of families is concerned. Unfortunately, they don’t work when the courts intervene in them. The courts are behind in recognizing and maintaining the integrity of our families. So, basically what ends up happening when we go to court over custody disputes, paternity disputes, or
any dispute having to do with children, is that the courts cannot deal with the families the way they are. The court's obligation is to look at what the best interest of the child is. The court has a moral and legal obligation to look at how it can serve that child in maintaining the integrity of that child's family. Instead, the courts are, for the most part, applying very rigid and traditional models of "family" in these cases. The models, of course, are one mother and one father, no more and no fewer. It's like trying to shove a square peg into a round hole. And what it's doing is ripping our families apart at the seams.

Some of the most painful cases I was involved in at the National Center for Lesbian Rights (N.C.L.R.) were the lesbian co-parent custody cases. Typically, a lesbian couple had decided to have children together and they inseminated and they had the baby and then for whatever reason their relationship dissolved and they split up. Lesbians are human beings, as are gay men, and as human beings we don't always have the neatest, cleanest breakups. And this is where the help of the court should come in. The court should serve as a forum to resolve the dispute in a manner that serves the best interests of the child. That's not happening at all, or very little, in the lesbian co-parent custody cases.

These cases have been heart-wrenching, although we are finally having some successes. Let me tell you about one that came down here in California, in the District Court of Appeals here in San Francisco.\(^3\) It involved a lesbian couple who had been in a fourteen year relationship. They had two children; when they broke up their oldest daughter was four years old, and the youngest child was less than a year old. The next four years after they broke up they decided that they would have shared custody of the children. The non-biological mother was the primary caretaker for the older child, while the biological mother was the primary caretaker for the younger child. They also had very liberal visitation rights of two days a week per child, so each ended up seeing a lot of both children. Both children considered both women to be mothers and they called each "Mom," or some version thereof. The non-biological mother was clearly involved from the beginning, from the conception, as a mother to these children.

By the end of the four years of the informal custody and visitation arrangement, a rift had developed between the two, and the biological mother decided that she no longer wanted to share custody. The problem here is one of power. The biological mother had all the legal power to do whatever she wanted, and the non-biological mother had no recourse. That doesn't make the biological mother an evil person. It's simply that, as I said, we don't always have the cleanest breakups, or always think clearly or equitably, or in terms of the best interests of the

child when we're splitting up. We may even have legitimate disputes about what serves the child's best interests. Supposedly, that's why the courts exist, to resolve such disputes.

That's not what happened in this case. The non-biological mother went to court for shared custody and visitation with the children, and she was turned away at the doors. Basically, the court refused to take jurisdiction over the matter, refused to look at what served the best interests of the child. The Court of Appeals affirmed this decision, so that here in California non-biological mothers, or as we call them, de facto parents, cannot go to the courts to have disputes resolved unless there are already existing family court proceedings. Of course, in our cases, since we don't go through divorces, we don't have an automatic "in" to the courts. The Court of Appeals says, "This is a tragic result." That's as far as they'll go: acknowledging the tragic result that they in fact helped bring about.

We've had a whole rash of cases involving custody disputes between biological and non-biological parents across the country, and, for the most part, they've all ended up pretty much the same way. One of the cases that shocked many of us was from a town in Minnesota where they had one of the few expanded visitation statutes in the country. By expanded, I mean that they do reserve the right for non-biological parents to seek custody and visitation of the children. The court basically said, "That's fine so long as there's consent of the biological parent, but where there's no consent the court is not going to enforce the right." Well, if there's consent, why would they be in court? Got me! These cases have been horrible.

Then there was the Maryland case. We thought there was some hope in that case because they also had an expanded interpretation of their visitation statute, permitting the court to grant custody and visitation to "non-parents." The trial court found the non-biological mother in this case to be what they called a "significant adult." Because she was a significant adult to that child they granted her some limited visitation—it was one weekend a month and a half-hour phone call a week. It's not very much, but she got more than many others did. So we thought, "We got something here, we got some recognition that parenting is not only biological." Well, the biological mother complied with the visitation order once, then stopped complying. The non-biological mother went into the court to enforce the order. The court sat on it for a year, refusing to move on it at all, and finally the biological mother left the state without notice. So although we did get granted something, it was symbolic more than anything because ultimately it was a non-enforceable order.

Well, ok, so now that I've got you depressed about these cases,

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what's the good news? The good news is New Mexico. New Mexico's case also involved a custody dispute between lesbian co-parents. When the lesbian partners split up, they not only reached an informal agreement about how they were to share custody, but they went into court and got a consent decree. They got the court to basically rubber-stamp their arrangement. Well, that turned out to be the key because of the fact that New Mexico has a history of enforcing these consent decrees, even when they involve non-parents. So, when there became a dispute between the co-parents, they went back into court and the court agreed to look at the consent decree. We're waiting to see what they'll say about it, but it's good because the court basically said that the consent decree will be reviewed on the basis of what's in the best interest of the child, which is the standard that we've been trying to reach for a long, long time.

Shortly after the decision came out, I was at the National Women and the Law Program, where I got to see a family court judge from Santa Fe. I talked to her about this case. And what she told me was actually of no surprise to me and very much confirmed what I suspected. I said, "Well, why did this happen in New Mexico? People are surprised." She told me that people shouldn't be surprised. The population of New Mexico is predominantly Native American and Chicano. "We honor extended families here; we give great weight to extended families." The circle comes back again to the fact that we have a lot of unifying forces in our families, and if we work together, we end up benefitting all of us.

The problem that we all foresee in this case when it goes back to trial is that they may look at the best interests of the child, but it's probably going to be a weighted look since the non-biological mother still isn't a parent in the eyes of the court. So, the consent decree will probably be given some weight but I anticipate that we are not going to have a full-blown victory in this case. We almost certainly aren't. Still, at this point in time, those of us who are involved in these cases are making an effort to try to get people in other states to obtain these consent decrees. It's our one ray of light that there's something enforceable for non-biological parents.

I shouldn't say one ray of light. There is another, and that is what we call second-parent adoptions. In fact, that's a very strong ray of light in this area, but it's not a very wide-spread option. In most parts of the country, second-parent adoptions aren't available. As I said earlier, it's conceptually like a step-parent adoption, meaning that the first mom—the biological parent, who is the first parent recognized under the law—does not relinquish her parental rights. The second parent, the non-biological parent, adopts that child without the first parent relinquishing her rights. As a result, the first parent doesn't give up her rights, and the

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second parent gets to adopt, and they're both legally recognized as parents.

The first second-parent adoption happened in Alaska, and we've always called it a second-parent adoption, but in fact it was a third-parent adoption. What does that mean? It meant a lesbian couple who inseminated and who wanted the donor (and the donor also wanted) to remain involved in the child's life. They wanted legal recognition for all three parents. The donor happened to be Native American, and the lesbian couple consisted of two white women. The donor also gave consent to the adoption before the adoption happened, and the court granted the adoption. The significant thing here again is the court's comments that the adoption, I should say that the family unit, was promoted and encouraged because it was in the child's best interests to maintain the relationship with the donor to maintain cultural ties and cultural roots. The court was willing to recognize the non-biological parent as well. Again, we've come back full circle to the significance of maintaining cultural ties and a more progressive liberal attitude in the courts to recognize expanded families. This is particularly significant where parents are involved in the lives of their communities, primarily communities of color.

I want to tell you about a third-parent adoption that's going to happen here in San Francisco. I say going to happen because I feel pretty confident about it. We've had second-parent adoptions for a number of years in San Francisco, and we've been very successful at them. We've worked very diligently at expanding access to second-parent adoptions. They used to be available primarily to lesbian and gay couples who were middle class. We used to call them "white picket fence standard." They [middle-class lesbian and gay couples] fit into this image that the court had of family. It was undeniable to the court that everything was "perfect" about them, and they fit into a very traditional model of the family. We've been very successful in expanding that. We've been able to get second-parent adoptions for disabled parents, or parents with less money, or a number of parents of color of various races, so on and so forth down the line.

N.C.L.R. is now involved in pushing through the first third-parent adoption involving a lesbian couple and a donor who wants to remain involved in the life of the child. Here we're talking about a Latina and white woman in the lesbian couple, and a Latino as the donor. The white woman is the biological mother. We're talking about a strong promotion of the child's interest remaining involved in her Latin roots on both sides of the family, the donor as well as the non-biological mother. We're also talking about a phenomenon that's very common among lesbians and gays of color. The vast majority of lesbian and gay men of color who are thinking about artificial insemination are talking about it as a three-per-
son effort, a three-parent family. People of color see that it's in the best interest of the child to have these family ties acknowledged both because of the actual family ties and because of their cultural significance.

I want to leave you with a thought that I've been repeating throughout this presentation. The issue of expanded families is a universal issue. We are the majority and we need to respond as a majority. We need to be going out there in a unified front and seeking the broadening of the definition of family that will apply to all of us. We cannot afford to be as narrow as the right wing.