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Nicole Berner

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Child Custody Disputes Between Lesbians: *Legal Strategies and Their Limitations*

Nicole Berner†

Last year I had the unique opportunity to draft an amicus brief in a case which was very important to me. The case, *Holtzman v. Knott*,¹ is a typical custody dispute arising after the parents dissolved their relationship. The child was five years old when the couple separated, and both parents wanted custody. The brief I drafted was on behalf of the child, and it defended his right to an ongoing relationship with both of his parents. I say the case is a “typical” custody dispute and separation, but courts in cases like this have almost unanimously held otherwise. You see, *Holtzman* is a dispute between two lesbian women over the custody of their son.

The two women planned to have a child and raise it together. After conceiving a child through artificial insemination, the women raised their son together until he was five years old, when they separated. Their son, H., views both women as his mothers. However, after they separated, H.’s biological mother forbade the non-biological mother from seeing H. She claimed that she alone was the child’s parent and that the non-biological mother had no rights in this case. The trial court agreed: the court denied the non-biological mother all custody and visitation rights. In fact, the court held that the non-biological mother lacked standing to sue.² There is something askew in a legal system that even denies standing to a woman who planned, raised and was responsible, financially and emotionally, for a child since his birth.

Another lesbian child custody dispute, unlitigated yet equally poignant, concerns a woman I will call “Rachel.” Over the course of a thirteen-

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† J.D./M.P.P. Cand., Boalt Hall School of Law and Graduate School of Public Policy, University of California, Berkeley, 1996. I would like to thank Alexa King for many hours of discussing these issues.

¹ *In re H.H.K.*, No. 93 FA 1668 (Dane Cty. Cir. Ct. Wis. Oct. 28, 1993), *review and petition to bypass Court of Appeals granted sub nom. Holtzman v. Knott*, 520 N.W.2d 91 (Wis. Apr. 5, 1994) (Table, No. 93-2911).

² *Id.*

year relationship, Rachel and her partner decided to have a child together. The couple agreed that Rachel would bear their first child because she was older and had fewer remaining childbearing years. Today their daughter is six, and a few months ago, Rachel's lover decided she no longer wanted to be in the relationship with Rachel or their child. Thus, in contrast to *Holtzman*, where the non-biological mother was denied all rights to the child, the non-biological mother in Rachel's case chose to shirk her parental responsibilities, both emotional and financial. Because the non-biological mother, unlike most parents, is not legally bound to her previous commitments, the child and biological mother are left without the legal protections they would have had if the couple were heterosexual. In both cases, the failure of the legal system to recognize real parental relationships contravenes the fundamental policy of family law: to act in the best interests of the child.

These stories are not unique. As more and more lesbians choose to parent within lesbian relationships—in contrast to coming out of the closet after having children within a heterosexual marriage—custody disputes between lesbians are becoming more common. Attorneys in the family law section of the American Bar Association estimate that as many as four million gay and lesbian fathers and mothers are involved in raising between six and ten million children in the United States.³ If these numbers are correct, and I expect that they are given my experience in the lesbian and gay communities, then increasing numbers of gay and lesbian families of consent⁴ need ways to protect their relationships legally.

Litigators have used three different strategies to protect parent/child relationships within lesbian families.⁵ These three strategies are: (1) second-parent adoption, (2) contractual agreements, and (3) equitable theories based on the actions of the non-biological mother, such as equitable estoppel, *in loco parentis*, and de facto parenthood. I will briefly describe these three strategies and explain why they have been largely unsuccessful. I will then suggest a different strategy, based on a legal presumption of parenthood for unmarried co-parents. This strategy claims for lesbian couples the same rights and responsibilities afforded heterosexual married couples under the law.

³ Amy Cunningham, *Ozzie and Ozzie: What America Can Learn From Gay Families*, WASH. POST, Sept. 27, 1992, at C1.

⁴ Legally and historically, familial relationships were created either through biological ties or as operation of law (for example, marriage or adoption). Because lesbian and gay families almost invariably are neither legally nor biologically created, the term "families of consent" has been coined to describe the basis upon which these families are created. For an anthropological study of lesbian and gay families, see KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

⁵ In the interest of time and because of the content of this conference, I will address lesbian relationships; however, many of the issues raised are similar for gay male and unmarried heterosexual couples.

I. SECOND-PARENT ADOPTION

The first strategy employed by lesbians to protect their families is what has been termed "second-parent" adoption. Although traditionally adoption by another woman automatically extinguished a biological mother's parental rights, courts in some states have begun to allow another woman to adopt a child without extinguishing the parental rights of the biological mother.⁶ Second-parent adoption is perhaps the most promising mechanism for the protection of lesbian non-biological mothers and their children because after adoption, both mothers are equal parents in the eyes of the law. Thus, children benefit from the increased financial and emotional stability of having two legal parents.

Unfortunately, second-parent adoption is currently a severely limited solution. In the majority of states, second-parent adoption remains unavailable.⁷ Only two state supreme courts, Massachusetts⁸ and Vermont,⁹ have construed their adoption statutes to permit second-parent adoption by same-sex, unmarried partners of biological parents. In other states, including California, Oregon, Alaska, and Montana, individual trial courts have construed the adoption statutes to allow second-parent adoption.¹⁰ However, even these decisions are made on an individual case-by-case basis and thus depend on the discretion of the trial court judge. This discretion leads to uncertain outcomes and what attorneys in the field call a "white picket fence standard"¹¹—a standard allowing only those couples who most strongly resemble the idealized, middle-class heterosexual family (for example, long-term, monogamous, financially stable couples) to adopt children. Furthermore, second-parent adoptions are time consuming and expensive.¹² Finally, second-parent adoption, where allowed, only protects parent/child relationships *after* the adoption is granted. If the couple separates before the adoption is granted, the parent/child relationship remains

⁶ See, e.g., *Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. 1992) (citing numerous cases of adoption by lesbian and gay parents). See generally JOAN H. HOLLINGER ET AL., *ADOPTION LAW & PRACTICE* §§ 3-54 to -57 (Joan H. Hollinger ed., Supp. 1994) (describing second-parent adoption throughout the country).

⁷ See, e.g., *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (denying petition by lesbian partner of adoptive mother to become the child's second adoptive parent because the Wisconsin adoption statute did not permit second-parent adoption for unmarried partners of legal parents). This decision, the first of its kind by a state supreme court, is a major set-back for lesbian and gay parents.

⁸ See *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding the best interests of the child are promoted by allowing two legal parents instead of one).

⁹ See *Adoption of B.L.V.G.*, 628 A.2d 1271 (Vt. 1993) (permitting lesbian partner of biological mother to adopt, thereby becoming the second legal parent of her partner's children conceived through artificial insemination).

¹⁰ See generally NATIONAL CENTER FOR LESBIAN RIGHTS, *LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING* 26-29, 27 n.38 (Maria Gil de Lamadrid ed., 2d ed. 1991).

¹¹ *Id.* at 9.

¹² In Alameda County, California, one must pay \$1,200 for a social worker's evaluation of the home in addition to legal fees for adoption. An adoption can take between six months to several years and outcomes are not guaranteed. Telephone Interview with Shannan Wilber, Staff Attorney, Youth Law Center, San Francisco, California (Jan. 12, 1995).

unprotected. Thus, for example, in the case of Rachel, whose lover had not completed the lengthy process of second-parent adoption at the time of their separation, the child and biological mother were left unprotected.

II. PARENTING AGREEMENTS

The second strategy used to protect relationships between non-biological lesbian mothers and their children is to draft private contractual agreements. So-called parenting agreements seek to establish a legal parental relationship, generally before the child is born.¹³ While some parenting agreements have been enforced by courts in circumstances where all parties have conflicting legal claims to parenthood, such as surrogacy,¹⁴ courts have almost invariably refused to enforce such agreements in the context of lesbian child custody disputes, finding them contrary to public policy.¹⁵ The major policy concern raised by private parenting agreements is that they promote the commodification and exploitation of children—that is, children should not be objects of contractual agreements.¹⁶ Furthermore, contractual agreements, because they can be changed or breached at will, do not provide the continuity and stability necessary for parenthood.

III. EQUITABLE SOLUTIONS

The final strategy is to use equitable legal theories to defend the relationship between non-biological mothers and their children. Such theories include de facto parenthood, *in loco parentis*, equitable estoppel, and functional parenthood. Each of these theories, emerging from a different area of law, attempts to establish parent-like status for a non-parent based on her past conduct and relationship with the child. In court, non-biological mothers proffer these theories to support granting a continued relationship between the non-biological mother and child or children upon dissolution of the adults' relationship.¹⁷

Yet, once again, courts almost invariably reject non-biological mothers' arguments based upon these theories because these theories can

¹³ See, e.g., HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES §§ 3-7 to -13 (7th ed. 1993).

¹⁴ See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), cert. denied, 114 S. Ct. 206 (1993).

¹⁵ See, e.g., *Georgia P. v. Kerry B.*, Nos. A059817 and A060829 (Cal. Ct. App. Jan. 31, 1994) (unpublished opinion, copy on file with author); see Nicole Berner, *Intent-Based Parenthood Held Inapplicable in Case of Lesbian Mothers*, 9 BERKELEY WOMEN'S L.J. 213 (1994). But see, *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), review denied, 827 P.2d 837 (N.M. 1992) (holding that co-parenting agreement may be enforced if it is in the best interests of the child).

¹⁶ See, e.g., Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925-36 (1987) (discussing cultural disdain for contracting over children).

¹⁷ See, e.g., *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990) (denying standing to sue for custody or visitation to the partner of a biological mother who had planned the child with the mother and played an equal role, financially and emotionally, in the child's life); see also *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991).

only create *parent-like* status to one who is still legally a “stranger” to the child; they do not transform legal strangers into legal parents. Thus, because the dispute remains one between a legal “stranger” and a legal “parent,” courts will generally deny a non-biological mother standing to bring a claim against the biological/“legal” mother. Even where a non-biological mother is granted standing, these equitable theories fail because even someone who has in fact acted “like a parent” cannot prevail against a legal parent’s will unless the legal parent is first found unfit.¹⁸ Although courts often lament these results, acknowledging that they are unfair, they fear that expanding the definition of parent would “expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family.”¹⁹ I call this the “fear-of-baby-sitters” argument. According to one court, “[n]o matter how narrowly we might attempt to draft the definition [of a de facto parent], the fact remains that the . . . resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status.”²⁰

IV. A New Strategy: Legal Presumption

What are we left with? Three largely ineffective legal strategies for protecting real relationships between mothers and their children. At this point I will suggest a fourth possibility, one which is grounded not in the relationship between the non-biological mother and her child but in the relationship between the two women.

Although the courts in lesbian child custody cases usually insist that biology determines parental rights, the Supreme Court held otherwise in *Michael H. v. Gerald D.*²¹ In *Michael H.*, a married woman became pregnant as a result of an adulterous affair. She and her husband (who was definitively found not to be the biological father) had been granted exclusive custody of the child under a California statute which created a conclusive presumption that a child born to a married woman, living with her husband, is the child of the husband.²² Thus, *Michael H.* bases parental rights not upon the relationship between child and adult, but rather upon the existence of a unitary family. The husband is presumed to be the legal

¹⁸ This situation creates a difficult dilemma for many lesbian litigants. Currently, arguing unfitness of the biological mother may be the only way for a non-biological mother to prevail on a claim for custody of or visitation with her child. However, such an argument undermines the fundamental premise that both mothers deserve equal rights vis-a-vis their child.

¹⁹ *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991).

²⁰ *Id.*

²¹ 491 U.S. 110 (1989).

²² CAL. EVID. CODE § 621 (West Supp. 1989) (current version at CAL. FAM. CODE § 7540 (West 1994)).

father of the child because he was married to and lived with the mother of the child at the time of the child's conception and at birth.

Although earlier Supreme Court cases granted biological fathers constitutional protection of their parental rights,²³ the *Michael H.* Court held that the biological father of a child born to a married woman who is not his wife does *not* have a constitutionally protected "liberty interest" in fathering that child. Justice Scalia, in the plurality opinion, states that these previous cases "rest not upon isolated factors [such as biology or an established parental relationship] but on the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop with the unitary family."²⁴ Thus, the Court upheld a state's right to protect existing familial relationships over biological bonds. A conclusive presumption of parenthood in a unitary family expresses, and indeed furthers, a state's policies of (1) protecting the integrity and privacy of existing families and (2) holding husbands responsible for the children born of their marriage.²⁵

A legal presumption that both partners are parents of any child born into a unitary lesbian family would further these same important policies and end the lack of certainty and justice in lesbian child custody disputes. Although I am not naive enough to believe that Justice Scalia intended to include lesbian families in the category of "unitary families," the valid policy justifications and analysis in *Michael H.* can be equally applied to cases involving lesbian families. Indeed, even Justice Scalia does not confine the term "unitary families" to heterosexual married couples. In footnote three of the opinion, he states that although the marital family typifies what the Court refers to as a "unitary family," this definition "also includes the household of unmarried parents and their children."²⁶

I return for a moment to the theories of parenthood upon which lesbian non-biological mothers have attempted to establish legal rights. The equitable theories each stem from the non-biological mother's relationship with the child and explicitly avoid naming the nature of the relationship which existed between the two women. Whether out of fear of judges' heterosexism or their own internalized homophobia, lesbian litigants have avoided arguing that their families deserve the same protections as heterosexual families. Because these equitable theories erase the intimate nature of the relationship between the two parents and the existence of a real family, lesbian co-parents can be analogized to baby-sitters and nannies.

²³ See *Stanley v. Illinois*, 405 U.S. 645 (1972) (protecting illegitimate children's relationship with the unmarried father who raised them); *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that a biological relationship, per se, is not determinative in establishing parental rights); see also *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

²⁴ *Michael H.*, 491 U.S. at 123.

²⁵ *Id.* at 119-20.

²⁶ *Id.* at 124 n.3.

If parental rights were based on the familial relationship instead of upon the parental relationship, *only* a co-parent and (ex-) lover of the biological mother (as opposed to a baby-sitter or nanny) could bring such a claim. This would alleviate the policy concerns inherent in other equitable arguments. Under a *Michael H.*-type analysis, courts would not determine whether the non-biological mother was a de facto parent of the child, but rather whether she and the biological mother were a unitary family at the time of the child's conception and at birth. If they were, the non-biological mother would be a presumed parent of any child born into their relationship and would be held responsible for the child's care and have parental rights to the child on par with those of the biological mother.

Yet because lesbian couples still cannot legally marry in any state,²⁷ the existence or lack of a familial relationship could not be based on the legal construction of marriage as it was in *Michael H.* In light of this situation, and given the reality of growing numbers of lesbian families of consent, courts need another way to determine who is a "unitary family." To do so, courts could employ common-law marriage doctrine to analyze whether the couple were in a marriage-like relationship, and thus whether their relationship should be considered a unitary family for purposes of parental presumption. I am not suggesting that courts should consider lesbian couples married, based on common-law marriage doctrine, for this would truly overstep the power of the judiciary.²⁸ Rather, for the purpose of custody determinations, courts should look to the well-established theories of common-law marriage to determine whether a lesbian family fits the description of a unitary family deserving protection under *Michael H.*

The recognition of common-law marriage generally requires a mutual and capable contractual agreement by the couple, either express or implied, that they wish to be married.²⁹ Furthermore, in most states, the couple must mutually assume marital rights and responsibilities immediately after they agree to be married.³⁰ Whether the couple mutually assumed marital rights and responsibilities can be legally established by showing that the parties held themselves out publicly as a couple, that they were generally recognized in the community as a couple, that they have joint credit, or by other facts and circumstances that would establish in the minds of persons in the couple's community the belief that they were actually married.

These same factors could be used to establish the existence of a unitary family in the case of lesbian couples. The person claiming parental status

²⁷ See IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 49 (2d ed. 1991). *But see* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the equal protection clause of the Hawaii Constitution requires that strict scrutiny be applied to state law that prohibits marriage between same-sex partners).

²⁸ *But see* DEANA POLLARD, CALIFORNIA LEGISLATURE JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, *Reinstating Common Law Marriage, in CALIFORNIA COUPLES: RECOGNIZING DIVERSITY & STRENGTHENING FUNDAMENTAL RELATIONSHIPS* (1988).

²⁹ *Id.* at 144.

³⁰ *Id.* at 145.

must show that there was an express or implied mutual and capable agreement to be in a marriage-like relationship. This could be established through an actual contract, registration as domestic partners, a commitment ceremony, or any similar expression of an intent to commit that is common in lesbian relationships. The non-biological mother also would have to show that immediately after this agreement, the couple lived together and assumed the rights and responsibilities of a couple. Once this relationship was established, any child born into the relationship to either partner would be considered, through a legal presumption, the child of both partners.

Basing parental rights on familial relationships avoids the concerns inherent in the parenting agreements discussed earlier. Courts have eschewed parenting agreements for two reasons: (1) contracts about children are contrary to public policy; and (2) contracts can be changed or breached at will, and thus parenting agreements would not form stable family units.

First, basing parental rights on familial relationships refutes public policy concerns because these agreements are contractual agreements to be partners, in contrast to agreements to parent. Marriage contracts, or in this case marriage-like contracts, fundamentally concern the relationship between two adults, not the relationship between adults and their children. Common-law marriage begins as a contract between two adults, and this initial contract creates a new relational status between the parties to the contract (and between the parties and others).³¹ From this relational status stem rights and responsibilities, including parental rights and responsibilities for child-rearing. Consequently, basing parental rights on the familial relationship avoids the policy problems inherent in contract-based arguments for non-biological mothers' parental rights because these contracts are not about children, they are about adults.

Second, basing parental rights on familial relationships creates more stability because the relational status would be legally enforceable against either party even after dissolution of the relationship. The concerns that contractual parenting agreements could be changed or breached at will and are thus unstable would not apply to contractual agreements to enter into a committed relationship.

Finally, finding a strategy that effectively protects the relationship between non-biological mothers and their children is important for another reason: in contrast to *Michael H.*, where two fathers' competing constitutional rights were in question, the choice in lesbian custody disputes is between providing a child with two legal parents, who will be responsible to her emotionally, physically, and financially, or leaving her with only one.

³¹ According to California's marriage statute, for example, "[m]arriage is a personal relation arising out of a civil contract . . ." CAL. FAM. CODE § 300 (West 1994).

This theory is not without its flaws and limitations. Once again it only protects lesbian couples with relationships that resemble those of heterosexual couples (the “white picket fence” couples), and decisions about who is a parent would be discretionary. Ideally, all lesbian families of consent would receive the protections the law provides for heterosexual families; rulings should not turn on attributes of the couple or a judge’s personal predilections about homosexuality. However, these problems notwithstanding, I believe basing parental status on the existence of a family is a more principled and honest approach—one which furthers the policies of family law, respects individual choice and privacy, and acknowledges the existence of real families of consent.