

Protecting Families

by William S. Singer

Many LGBT family law practitioners struggle with 'bad parent' cases. They occur when a same-sex couple splits up and a biological parent denies that the non-biological parent has any right to custody or visitation with a child they mutually planned for and raised. They are heart-wrenching, devastating cases for everyone involved.

More than decade ago, I represented A.B. in one of these cases. We ultimately lost in the New Jersey Supreme Court by a unanimous decision.¹

Two women, A.B. and S.E.W., were in a committed relationship. They had both borne children conceived using sperm from the same anonymous donor. The women parted ways, and although A.B. had helped raise K.W., S.E.W.'s biological child, S.E.W. refused A.B. any visitation. Cards and presents were returned; all contact was denied.

S.E.W. also refused to allow K.W. to have any contact with A.B.'s child, although the two children shared a common sperm donor, making them genetic siblings.

The procedural history is tortuous. If you are interested, you can read the New Jersey Supreme Court decision.

Although the trial judge found that A.B. did stand *in loco parentis* to K.W., he still held against A.B. The judge found that it would not be in the best interest of K.W. to have continuing contact with A.B. or her son, because of the hostility between the mothers.

In the interim, the legal landscape for same-sex couples in New Jersey has changed dramatically. When A.B. first consulted me, there were no domestic partnerships, no civil unions and no same-sex marriages in New Jersey or anywhere in the United States. New Jersey courts had just started to grant second parent adoptions for the same-sex partner of a legal parent.

Four years after A.B.'s trial, the New Jersey Supreme Court issued a landmark decision recognizing the concept of psychological parentage.² That decision gives non-biological parents a clearly defined four-prong test to prove they have established rights as a parent for continued contact with a child.

Unfortunately, all of that came too late for A.B. As a lawyer, I was distressed by my inability to stop the destruction of my client's relationship with her daughter.

Courts throughout the United States continue to adjudicate similar parentage disputes between same-sex couples. Since the law is unsettled, groups hostile to LGBT families exploit these cases to create laws harmful to the LGBT community. Unfortunate results take years to overturn.

At the end of 2010, the North Carolina Supreme Court heard an appeal where a biological mother attacked the validity of the adoption of her son by her same-sex partner.³ The North Carolina Supreme Court ruled that the adoption by the same-sex partner was invalid because the trial court lacked subject matter jurisdiction of her child by her lesbian partner.

In that one holding, *all* same-sex adoptions in North Carolina were invalidated. As a result of one biological parent's zeal to keep her former spouse from seeing their child, all same-sex couples in North Carolina lost protection for their families.

Children being raised by same-sex couples in North Carolina are now at risk. A child's right to continuing contact with a non-biological parent is no longer secure. A child's right to inherit from a deceased non-biological parent is compromised, as well as the ability of that child to collect Social Security benefits.

That case exemplifies a national epidemic. There are too many cases where a biological parent, mostly biological mothers, willfully destroys a family when splitting with a partner. They inflict an incalculable toll on the children. Adult survivors of these battles attest to serious medical repercussions, as well as financial devastation, including bankruptcy. Last year at Christmas, one Texas non-biological parent committed suicide after suffering loss of contact with her child.

Why are these cases so prevalent? Is it because the relationships of LGBT couples have yet to gain widespread acceptance? If other people do not recognize and respect LGBT families, some people in the LGBT community start to take the same attitude. For whatever reason, we, as lawyers, need to take action.

In 1999, the Gay and Lesbian Advocates and Defenders (GLAD) developed a document titled "Protecting Families: Standards for Child Custody in Same-Sex Relationships" to create sensible standards for families in the LGBT community.

This year, under the aegis of GLAD and the National Center for Lesbian Rights (NCLR), I helped revise and update that document. It has been endorsed by all of the major LGBT national organizations, and can be found at <http://www.glad.org/protecting-families/>.

The document calls for respect for LGBT families despite what legal protections exist or what steps the adults took to protect their family. Most importantly, the standards seek to ensure continuity of a child's parental relationships.

The 10 standards are:

- 1) Support the rights of LGBT families.
- 2) Honor existing relationships, regardless of legal labels.
- 3) Honor the children's existing parental relationships after a breakup.
- 4) Maintain continuity for the children.
- 5) Seek a voluntary resolution.
- 6) Remember that breaking up is hard to do.
- 7) Investigate allegations of abuse.
- 8) The absence of agreements or legal relationships should not determine outcome.
- 9) Treat litigation as a last resort.
- 10) Refuse to resort to homophobic/transphobic law and sentiments.

In addition to publishing the document, GLAD and NCLR are asking individual attorneys to endorse the document. By their endorsement, lawyers agree to discuss these principles with their clients. I strongly urge you to go to the website and consider becoming an endorser.

The document and standards can be a powerful tool with clients. Try discussing it with all families, not just families in crisis. Reviewing it with a couple considering creating a family or doing estate and other life planning can bring up subjects that need to be resolved. Consider sharing it with opposing counsel in contested matters concerning children raised by a same-sex couple.

Although New Jersey law is generally favorable in recognizing LGBT families no matter how they are constructed, we as lawyers need to dissuade our clients from the use of destructive tactics that harm the children raised by the couple. ■

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Endnotes

1. *A.B. v. S.E.W.*, 175 N.J. 508 (2003).
2. *V.C. v. M.J.B.*, 163 N.J. 100 (2000).
3. *Boseman v. Jarell*, 704 S.E. 2d 494 (NC 2010).