The Exploratory Study of Custody and Visitation Rights for Children in Same-Sex Families

Valencia T. Johnson

American Bar Association

Follow this and additional works at: https://digitalcommons.wcl.american.edu/tma

Part of the Family Law Commons

Recommended Citation
Available at: https://digitalcommons.wcl.american.edu/tma/vol9/iss2/3

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in The Modern American by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
The Exploratory Study of Custody and Visitation Rights for Children in Same-Sex Families

This article is available in The Modern American: https://digitalcommons.wcl.american.edu/tma/vol9/iss2/3
Abstract

In today's society, same-sex marriages are being legalized in some states with certain stipulations and statutory requirements that vary by state courts and legislative statues. Due to an increase in same-sex marriage legislation, many Family Law courts are facing tough challenges pertaining to the Custody and Visitation Rights for Children in Same-Sex Families. Due to the lack of legal and judicial interpretation of statutory laws in the Custody and Visitation Rights for Children in Same-Sex Families, further research need to be explored. This article addresses the legal and judicial authority of interpreting the law in various states. First, this article will provide a brief synopsis of federal and state courts conflicting-legal interpretation of law, and how it applies to the visitation and custody rights of the children that are involved in the legal battle. Second, this article will explore the limitation and delimitation of managing sensitive cases using various federal and state statutes in judicial proceedings. Finally, this article will provide federal and state courts focuses on settlement agreements between the parties, which could be enforceable under statutory laws and provisions by lower courts, as it pertains to the children's visitation and custody rights in same-sex families.

I. Child Custody and Visitation Rights Arising from Same-Sex Relationships

In recent years, controversies against same-sex marriages and homosexual families have been a major factor throughout the United States. Though rewarding in many aspects, raising children within a same-sex marriages can be challenging. Similarly to heterosexual families, when gay and lesbian marriages dissolve, each partner’s rights to custody are disputed. What federal or state laws are in place to protect the rights of same-sex couple's children in a custody battle, visitation rights, and legal dispute?

The legal and judicial systems are faced with tough challenges in understanding, interpreting and applying child’s visitation and custody rights laws to the same-sex families in divorce settlements. Family court judges are faced with making critical decisions that are challenging and complicated, with limited legal and judicial interpretation of the law.

The implications of same-sex families with children, in the legal and judicial system, will continue to face criticism and outcry from judges, because of the limited to no legal interpretation in applying the rule of law to same-sex families in a visitation or custody battle. The annotations are collected and analyzed using past and current federal and state legal cases, which the annotations provide a legal understanding of children’s rights to visitation and custody in same-sex families.

II. Child Custody Statutes

Under the Uniform Parentage Act, Cal.Civ. Code § 4600, lesbian former partners of a child’s natural mother lack standing to seek, in an action against the mother, an order of visitation with the child. The court in West v. Superior Court, granted a writ of mandate to the mother, ordering the lower court to set aside its order awarding the partner visitation rights. Thus, the lesbian former partners of the natural mother of two children lacked statutory authority for an award of visitation rights to the children.
A. Child's Custody and Share Parenting of Child

When ruling on the child's custody and shared parenting of a child, a Maryland court held that the trial court should have exercised jurisdiction over the custody action by the mother's same-sex former partner. The Maryland Appellate Court reasoned that the trial court erred by declining to exercise the jurisdictional rights set forth by the Uniform Child Custody Jurisdiction Act (UCCJA).

In most court decisions, the former partner, who was not the biological parent, would like the statutory requirements to bring action in Tennessee Court. The absence of that court's finding would have been the parental custody, which would have resulted in substantial harm to the child, while, by contrast, underlying other state statutes, such as Maryland laws that entitles the opportunity to show that exceptional circumstances that existed, would be made in the child's best interest to grant custody back to the biological and/or adoptive parent.

Thus, because the former partner was not a biological mother, the mother argued that she had no standing under Minnesota law to seek custody of the child. However, the court held that the mother's lesbian former partner had standing to seek custody of the child, even though she was not the child's biological mother, as Minn.Stat. § 518.156 (1998) provides that a custody proceeding could be commenced "by a person other than a parent" under certain circumstances, including those where a decree of dissolution was not sought, and the parties were not seeking a dissolution. Thus, the court subsequently determined that the record supported by trial court's findings for joint legal custody of the child, by the child's mother and the mother's former partner; would be in the child's best interest.

The evidence that they were willing to try to cooperate for the child's sake, outweighed evidence of their inability to cooperate. Additionally, the court there examined the methods in place for resolving any disputes that might arise. Therefore, the court also held that the visitation provisions of a settlement agreement between the parties could be enforceable.

The court stressed that the petitioner was required to prove all of these elements before a circuit court could consider whether visitation was in the best interests of the child. Saying that the proceedings should focus on the child, the court observed that, when a nontraditional adult relationship was dissolving, the child was as likely to become a victim of turmoil and adult hostility, as well as, a child subject to the dissolution of a tradition or a same-sex marriage. Such a child, the court declared, needed and deserved the protection of the courts as much as a child of a dissolving traditional relationship deserve. Rejecting the mother's argument that, as the biological parent, she had a constitutional right to determine who could visit her child, and that this right superseded rights asserted by her child or the partner, the court replied that the law did not support the claim that biological or adoptive parents had absolute rights in their children.

Thus, the court determined that state public policy, which is established by the legislature, and directed the courts to respect and protect parental autonomy and, at the same time, serve the best interests of the child. Accordingly, the court remanded the case to the trial court for a determination of whether the partner could satisfy the tests established in the court's opinion. On the other issues, the appellate court held that: (1) state statutes did not provide for a visitation award, (2) the court possessed power to enforce the parties' co-parenting agreement, and (3) the trial court had properly dismissed the action insofar as the partner sought custody of the child.

In other words, the court said, the legislature did not intend that the statute "occupy the field" of visitation. Also, being able to understand the mindfulness of preserving a biological or adoptive parent's constitutionally protected interest of the child's life, safety, and welfare. The court concluded that,

A person who was neither a biological nor an adoptive parent who sought visitation with the child which could be granted, if such visitation was in a child's best interest. And if the person seeking visitation first showed that a parent-like relationship existed with the child, and a significant triggering event justified state intervention in the child's relationship with a biological or adoptive parent.
B. Equitable Parent and Equitable Estoppel Distinguished

A California court explained that equitable estoppels have been invoked to impose support obligations on a husband who had represented to his wife's children that he was their natural father and then subsequently sought to deny paternity for the purpose of avoiding support obligations.\textsuperscript{19} It was important, the court continued, not to confuse the partner's argument regarding equitable estoppels with the concept of an "equitable parent."\textsuperscript{20}

The court determined that the primary difference between the concept of an "equitable parent" and the equitable estoppels theory advanced by the partner was that unlike equitable estoppels theory, the "equitable parent" theory was rooted in a statutory recognition of "equitable adoption" for purposes of inheritance, and might require proof of an express or implied contract to adopt.\textsuperscript{21} The court also held that the partner was not entitled to visitation with the child on statutory grounds or as the child's de facto parent.\textsuperscript{22}

C. Interference with Child's Relationship with Custodial Parent as Effect of Visitation

A Vermont Supreme Court recognized that, "in this age of the disintegrating nuclear family, there were public-policy considerations that favored allowing third parties claiming a parent-like relationship to seek court-compelled parent-child contact."\textsuperscript{23} There, the court deferred to the legislature, noting that the legislature possessed a deeper understanding of the long-term effects of custody and visitation rights decisions. Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the court reasoned that enforcement of the visitation provisions of the settlement agreement would, as a matter of law, be against the best interests of the child.\textsuperscript{24} Noting the partner's insistence that tests could be created to assure that only those third parties who had developed an intended and shared de facto-parenthood with a child could petition for visitation, the court replied that it was not persuaded by this argument. Jurisdiction, the court emphasized, should not rest upon a test that would in-effect examine the merits of visitation or custody petitions on a case-by-case basis.\textsuperscript{25}

D. Sexual Orientation as Basis for Denial of Shared Custody or Visitation

This court also affirmed the dismissal of an action seeking an award of visitation rights and a higher court denied an appeal of the case.\textsuperscript{26} The court noted that parents were permitted to enter into an agreement with another person concerning the custody of a child.\textsuperscript{27} A parent's power in this regard was not limited, and the court declared an agreement between a parent and another party concerning a child was subject to judicial modification when such modification was in the best interests of the child. Although the lower court purported to determine that enforcement of the visitation provisions of the settlement agreement would, as a matter of law, be against the best interests of the child, the court stressed that a determination of the best interests of the child was required to be made based on evidence before the court.\textsuperscript{28}

III. Conclusion

Courts have determined that a partner's sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation.\textsuperscript{29} Moreover, aside from the settlement agreement, a person in the partner's position might be able to establish deprivation of a legally recognized right to
maintain some type of continuing relationship with the child. In most cases, an appeal from an order awarding temporary visitation rights in an action by the lesbian former partner of a child's natural mother seeking an enforcement of the parties' co-parenting agreement, the court stated that the agreement was enforceable insofar as it was in the best interests of the child.\textsuperscript{32} The court in its principal holdings declared that, while there was no statutory authority for an award of temporary visitation rights to the partner, which the award was properly made under the court's equity jurisdiction, since the partner was the child's de facto parent and visitation would be in the child's best interest.\textsuperscript{33}

(Endnotes)

\textsuperscript{1} Dr. Valencia T. Johnson is a Judicial Officer and Chairperson with the GP Solo, Small Firms and General Practice Division of the American Bar Association. Dr. Johnson specializes in EEOC, Diversity Laws, Criminal Law, Appellate and Government Law. Dr. Johnson has published various legal and education articles with Berkeley Press, IBLS, and Baltimore Career Examiner.

\textsuperscript{2} Williams, Laura L. "The unheard victims of the refusal to legalize same-sex marriage: the reluctance to recognize same-s", Journal of Gender, Race and Justice, winter 2005 Issue


\textsuperscript{4} Id.

\textsuperscript{5} See generally V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000).

\textsuperscript{6} See generally Miller-Jenkins v. Miller-Jenkins, 555 U.S. 888 (U.S. 2007).


\textsuperscript{8} Id.


\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Williams, Laura L. "The unheard victims of the refusal to legalize same-sex marriage: the reluctance to recognize same-s", Journal of Gender, Race and Justice, Winter 2005 Issue

\textsuperscript{13} William P. Hogoboom. "THE CALIFORNIA FAMILY LAW ACT OF 1970: 21 MONTHS EXPERIENCE", Family Court Review, 03/15/2005

\textsuperscript{14} Id.


\textsuperscript{16} Williams, Laura L. "The unheard victims of the refusal to legalize same-sex marriage: the reluctance to recognize same-s", Journal of Gender, Race and Justice, winter 2005 Issue

\textsuperscript{17} Betsy J. Walter. "LESBIAN MEDIATION: Resolving Custody and Visitation Disputes When Couples End Their Relationships", Family Court Review, 03/15/2005

\textsuperscript{18} Williams, Laura L. "The unheard victims of the refusal to legalize same-sex marriage: the reluctance to recognize same-s", Journal of Gender, Race and Justice, winter 2005 Issue


\textsuperscript{20} Id. at 218-19.

\textsuperscript{21} Id at 219.

\textsuperscript{22} Id.

\textsuperscript{23} Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997).

\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Titchenal, 693 A.2d at 689 (Vt. 1997).

\textsuperscript{28} Id.

\textsuperscript{29} Titchenal, 693 A.2d at 689 (Vt. 1997).

\textsuperscript{30} Id.


\textsuperscript{33} Id.