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Parental Rights of Gay and Lesbian Couples: Will Legalizing Same-Sex Marriage Make a Difference?

I. GOODRIDGE v. DEPARTMENT OF PUBLIC HEALTH

On Monday, March 17, 2004, same sex couples were granted the right to marry in Massachusetts. Thus, the United States joined the Netherlands, Belgium and Canada and became one of only four countries permitting same-sex marriage. The Massachusetts legislation permitting the legal union between partners of the same sex was enacted in response to Goodridge v. Department of Public Health, a case in which the Massachusetts Supreme Judicial Court held that same sex couples have a constitutional right to be legally married. Massachusetts is the first state of the union to grant the right to marry to same-sex couples.

The Goodridge case began on April 11, 2001, when fourteen individuals from Massachusetts filed a complaint against the Massachusetts Department of Public Health, seeking a declaratory judgment against the Department and against the Commissioner of Public Health for violating Massachusetts law by failing to provide marriage licenses to same sex couples. In response to claims that failure to grant marriage licenses to same sex couples was a violation of law, the Massachusetts Department of Public Health raised three arguments for why same sex marriages should remain prohibited: (1) to create a favorable setting for procreation; (2) to provide the most favorable setting for child rearing, which the department argued requires two parents of the opposite sex; and (3) to preserve state resources. The Supreme Judicial Court of Massachusetts briefly touched upon the first argument, noting that nothing in the law requires couples to promise to procreate as a prerequisite for obtaining a marriage license. The court held that the second argument lacks validity because there are numerous same-sex couples already raising children, either their own from a previous heterosexual relationship or those adopted by the same-sex couple. The court also held that state economic issues

2. Goodridge, 798 N.E.2d at 949.
3. Id. at 961.
4. Id.
5. Id. at 962-63.
have no rational relationship to the issue of same-sex marriage.\textsuperscript{6} Further, the Massachusetts judges relied at least in part upon the United Supreme Court ruling in \textit{Lawrence v. Texas},\textsuperscript{7} which held that the United States Constitution insists upon respect "for the autonomy of the person" in making decisions regarding family, marriage and child-rearing. Justice Anthony Kennedy, writing for the five justice majority, declared in the \textit{Lawrence} opinion that: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do . . . ."\textsuperscript{8} While the decision in \textit{Lawrence} did not expressly hold that same-sex marriages are constitutionally protected, it seems to have laid the groundwork for the Supreme Court to do so.

The legalization of same-sex marriage in Massachusetts may have important consequences for children either adopted or conceived by one of the partners in a homosexual relationship. The legalization of same-sex marriage, at least in Massachusetts, will make it easier for a homosexual person to obtain custodial or visitation rights to their children upon divorce or separation from their same-sex partner. This comment addresses the unique challenges faced by homosexual couples, specifically lesbians, who are unable to be legally married and the child custody and visitation issues often faced when a homosexual relationship is dissolved.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."\textsuperscript{9} This amendment has been interpreted to include the right to establish a home and to bring up children\textsuperscript{10} and prohibits states from interfering with these liberties.\textsuperscript{11} However, states can intervene into a parent-child relationship when it is determined that it is necessary to protect the welfare of a child.\textsuperscript{12}

\textsuperscript{6} Id. at 964.
\textsuperscript{7} 539 U.S. 558, 574 (2003).
\textsuperscript{8} \textit{Lawrence}, 539 U.S. at 574.
\textsuperscript{9} U.S. CONST. amend. XIV, § 1.
\textsuperscript{10} Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
II. TROXEL V. GRANVILLE

In June 2000, the United States Supreme Court held that a parent's fundamental right to make decisions concerning the care, custody and control of his or her children cannot be determined solely by a judge's determination of what he believes is in a child's best interest.\(^3\) \textit{Troxel v. Granville}, a decision by the Washington Superior Court ordering the grant of visitation rights to grandparents, was found to be unconstitutional, as it was based solely upon the state trial judge's beliefs that increased visitation with grandparents would be beneficial to the child.\(^4\) The United States Supreme Court held,

\[\text{[S]}\text{O long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.}\(^5\]

The decision in \textit{Troxel} has been seen as having great significance for gay and lesbian families in that it requires each state court to interpret family law statues in a manner which will continue to protect the constitutional rights of a parent in situations where a third-party is seeking visitation or custody rights concerning that parent's child. Such a situation often results from the dissolution of a homosexual relationship.\(^6\) Because of its requirement that family law statutes be interpreted in such a manner as to protect the constitutional rights of a parent, the \textit{Troxel} decision has been most helpful to homosexual individuals in a situation involving a challenge from a lesbian mother's ex-husband, or other relatives, who believe that a child should not be raised by a homosexual parent.\(^7\)

\(^{14}\) 530 U.S. 57 (2000). Section 26.10.160(3) of the Revised Code of Washington provides that "any person may petition the court for visitation rights at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." This statute was struck down as violative of the mothers substantive due process rights as it was based upon the state trial judge's beliefs that increased visitation would be beneficial to the child. \textit{Troxel}, 530 U.S. at 67.

\(^{15}\) \textit{Troxel}, 530 U.S. at 57.

\(^{16}\) \textit{Id.} at 68.

\(^{17}\) Silverthorn, supra note 12, at 911 (citing Dena M. Castricone, \textit{Custody and the Legal Progeny of Same-sex Parenting}, 49 R.I. B.J. 17, 21 (2001)).

\(^{18}\) \textit{Id.}
In *Bottoms v. Bottoms*, the Virginia Supreme Court awarded custody of a child to its grandmother rather than to its mother, who was a lesbian living with her same-sex partner. While the *Bottoms* opinion properly stated that the Virginia Supreme Court had previously held that a lesbian mother is not a *per se* unfit parent, the dissent in the *Bottoms* case pointed out that the majority ignored the trial court’s refusal to apply this standard while proceeding to reverse the Court of Appeals and remand the case for reinstatement of the trial court’s order. It is not clear what effect the *Troxel* decision would have on a case such as *Bottoms* today, however, the *Troxel* decision makes it clear that state courts are required to apply an “exceptional circumstances” analysis to protect the biological parents’ fundamental interest in making decisions regarding the care of their children.

On the other hand, the *Troxel* decision may hurt many separated lesbian couples when it is the non-biological mother who is seeking visitation. The decision in *Troxel* has been interpreted by many states to place a non-biological lesbian parent on the same footing as any other third-party. For example in *In re: Bonfield*, the Ohio Supreme Court interpreted the *Troxel* decision as one that reaffirmed the family protection from interference by the state but did not guarantee a non-biological parent the “benefit of statutes that are clearly inapplicable to such a familial arrangement.” Thus, the decision in *Troxel* tends to reinforce the view that a non-biological parent in a homosexual relationship does not have the same parental rights as the biological partner but rather is treated the same as would any other third-party seeking visitation or custody rights to a child.

Many different doctrines have been utilized by various state courts to better define the changing definition of what constitutes a parent. The first and often the most difficult obstacle faced by a non-biological parent in seeking to obtain child visitation or custody is that non-biological parent’s must establish that they have

20. Id. at 109.
23. 780 N.E.2d 241 (Oh. 2002).
24. *Bonfield*, 780 N.E. 2d at 247. However, the court went on to state that the Ohio Juvenile Court could take steps to determine whether shared custody was in the children’s best interest. *Id.* at 248.
standing to bring a claim before they may have their plea for visitation or custody heard by a court.25 Standing of a non-biological parent is most often denied on the basis of constitutional privacy concerns based on the Fourteenth Amendment. However, recognizing that the word "family" now encompasses so many different definitions, many state courts have utilized various legal doctrines as a tool to permit standing by a non-biological parent. Among the various doctrines used are the doctrines of in loco parentis, psychological parent, and de facto parent.

III. IN LOCO PARENTIS

The court in T.B. v. L.R.M. explained the doctrine of in loco parentis, which confers upon one who undertakes the duties and obligations incidental to the parental relationship "the assumption of a parental status."26 The rationale for finding standing based upon the doctrine of in loco parentis is to protect the child's best interests when the child has established "strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of parent."27 The court also held that "a person may stand in loco parentis to a child regardless of that person's ability to marry the biological parent or to adopt the child. . . ."28

IV. DE FACTO PARENT OR PARENT BY ESTOPPEL

The American Law Institute's Principles of the Law of Family Dissolution allows one who is a "de facto parent" or a "parent by estoppel" the right to claim partial custody.29 In E.N.O. v.
L.M.M., the ALI Principles were applied by the Massachusetts Supreme Court to award visitation to a de facto parent under the best interests standard. The court defined a de facto parent as:

[O]ne who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of care taking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

E.N.O. and L.M.M. decided to have a baby via artificial insemination. L.M.M. became pregnant and E.N.O. was present during both the actual artificial insemination sessions and the birth of the child. The couple sent out birth announcements indicating that both women were the child's parents and they executed a co-parenting agreement which expressly stated that E.N.O. would retain her parental status if the couple separated. Upon the separation of the couple, the probate court granted to E.N.O. temporary visitation rights, noting that a Massachusetts paternity statute provides that "children born to parents who are not married to each other should be treated in the same manner as all

(iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights or responsibilities, when the court finds that recognition as a parent is in the child's best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child's best interests.

(c) A defacto parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,

(A) regularly performed a majority of the caretaking functions for the child, or

(B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

36. E.N.O., 711 N.E.2d at 891 (citing Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999)).
37. Id. at 888.
38. Id. at 889.
L.M.M. appealed the decision of the probate court based on the argument that there was no statute granting an order of visitation to a third party acting as a parent. The Massachusetts Supreme Court affirmed the judgment of the probate court and held that E.N.O. met the requirements of a de facto parent, and that the grant of visitation rights in her favor was, therefore, proper. The court stated that “the recognition of de-facto parents is in accord with notions of the modern family.”

Further, the court stated that the child’s interest in maintaining a relationship with E.N.O. outweighed the custodial interest of L.M.M.

V. PSYCHOLOGICAL PARENT

As the definition of what constitutes a family evolves, it is harder to define the word parent. As our family structures continue to change there are many people who act as parents for children but who lack legal recognition as such. While the opinion in Troxel did not address the psychological parent doctrine in refusing to rule that all visitation statutes include a showing of harm, it permits the state courts to use this doctrine.

The New Jersey Supreme Court in V.C. v. M.J.B., granted visitation rights to a non-biological lesbian co-parent finding that she functioned as a “psychological parent” to the children. The two women involved in the V.C. case began their relationship in 1993, and in 1994 M.J.B. became pregnant through artificial insemination. The two attended Lamaze classes together, and V.C. was present when M.J.B gave birth to twins. After the birth of the children, V.C. participated in parenting decisions, including medical decisions, and was generally held out to be the twins’ other

34. Id. at 889, (quoting the trial court) (citing a Massachusetts child support statute MASS. GEN. LAWS ANN. CH. 209C §1 (West 1998)).
35. Id. at 889-90.
36. E.N.O., 711 N.E.2d at 894.
37. Id. at 891.
38. Id. at 893.
40. Id. at 771.
41. Silverthorn, supra note 12, at 909-10 (citing Troxel, 530 U.S. at 73).
42. 748 A.2d 539 (N.J. 2000).
43. V.C., 748 A.2d at 556.
44. Id. at 542.
45. Id.
In 1995, the couple bought a home together and had a commitment ceremony where they, together with their children, were blessed as a "family." The couple separated in 1996, and V.C. moved out of the home but continued to see the children every other weekend. In 1997, M.J.B. stopped permitting V.C. to spend time with the children and V.C. filed suit seeking visitation rights.

The court utilized a four-part test to determine that V.C. was a psychological parent to her former partner's biological children: (1) the legal parent must consent to the child's relationship with the third party; (2) the third party must have lived with the child; (3) significant parental functions must be performed by the third party; and (4) a parent-child bond must be formed. The court held that once a third party is deemed a psychological parent, "he or she stands in parity with the legal parent" and custody and visitation issues are, then, to be determined by looking at the child's best interests.

The court reasoned that the purpose for the allowance of these rights to psychological parents is in response to the "recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."

In addition to the doctrines used by the courts to help recognize the parental rights of non-biological co-parents, there are alternatives available to a non-biological parent who wishes to protect his or her parental rights. Among the alternatives most often used are co-parenting agreements and second-parent adoption.

VI. SECOND-PARENT ADOPTION

In an effort to protect a family who is adopting a child from the later intrusion of the natural parents, most state laws include a provision that prohibits adoption by another adult until the rights of the legal parents have been terminated. However, an exception has been recognized for step-parents, which provides that the

51. Id. at 543.
52. Id.
53. V.C., 748 A.2d at 544.
54. Id.
55. Id. at 551.
56. Id. at 554.
57. Id. at 559.
spouse of the child's biological or adoptive parent may adopt the child without the termination of the biological or adoptive parent's rights.\textsuperscript{54} This allows the child to enjoy the benefits of having two legal parents. Among the benefits enjoyed are inheritance and support rights, as well as health and other benefits provided by either parent's employers.\textsuperscript{55} However, since 49 of the 50 states do not permit homosexual couples to legally marry, step-parent adoption is not an option for same-sex couples.

When two lesbians decide to have a child, they have two options; they can either adopt a child, or one of the women can conceive and give birth. While most state's adoption statutes have been interpreted as allowing gay and lesbians to adopt, the laws of Florida and Mississippi prohibit gay or lesbian individuals from adopting under all circumstances.\textsuperscript{56} Second-parent adoption has developed in response to the difficulties gay and lesbian couples have encountered where both wish to be recognized as legal parents to their children.

Second-parent adoptions permit the partner of a legal parent to adopt the legal parent's child without requiring the legal parent to terminate his or her parental rights.\textsuperscript{57} Second-parent adoption has most often been utilized to permit the non-biological mother in a lesbian couple to become recognized as a legal mother to her partner's biological child. The significance of second-parent adoption is that, upon separation, the non-biological parent has the same parental rights to the child as does the biological parent, thereby ensuring the non-biological parent's legal right to custody, or at least to visitation. While second-parent adoptions can alleviate some concerns, not all states permit them. Currently, only eight states and the District of Columbia have approved second-parent adoptions for gay and lesbian couples.\textsuperscript{58} On August 20, 2002, Pennsylvania's Supreme Court held,

\begin{itemize}
  \item \textsuperscript{60} Id. at 936.
  \item \textsuperscript{61} Id. at 943-44.
  \item \textsuperscript{64} The states that currently permit second-parent adoption for lesbian and gay parents are: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Vermont.
\end{itemize}
[T]here is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents. It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of one of the partners prior to the filing of the adoption petition.  

VII. CHILD SUPPORT

A critical issue relevant to the topic of this Comment is that of child-support obligations. Such obligations are often difficult to enforce upon a non-biological parent where a second parent adoption has not been granted. As discussed above, while many states now recognize doctrines to permit visitation by non-biological parents, no state currently provides for mandatory support to be paid when the non-biological parent is not seeking visitation or custody rights. Recently, an appellate Court in California held that a lesbian woman was not a parent of the children within the meaning of the Uniform Parentage Act and, therefore, the UPA could not be used to impose a support order upon her. This conclusion was reached despite the presentation of evidence showing that the two women jointly selected the children’s names and hyphenated their last names as the children’s surname, and held the children out as being children of both of them.

In December 2002, the Pennsylvania Superior Court held that the doctrine of equitable estoppel prevented a party from denying an obligation for monetary support while maintaining that the doctrine of in loco parentis provided her with standing to seek visitation rights. In L.S.K. v. H.A.N., H.A.N. claimed that she was not under a legal duty to provide support relying on the reasoning of Garman v. Garman, which held that generally a stepparent has no legal duty to support a stepchild following a dissolution of marriage. Unlike the California holding above, the Pennsylvania Superior Court held that when a stepparent holds a child out as his own, he may be estopped from denying paternity and will

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68. L.S.K., 813 A.2d 872.
69. Id. (citing Garman, 646 A.2d 1251(Pa. 1994)).
therefore be responsible to support the stepchild relying on the doctrine of equitable estoppel. That same reasoning was applied to the decision in H.A.N. and resulted in a holding that H.A.N. was responsible for paying child support.

VIII. CONCLUSION

In addition to parental rights, there are numerous other hurdles same-sex couples face. In the July 2004 issue of the ABA Journal, an article entitled "The Changing Face of Gay Legal Issues," points out the difficulty faced by attorneys in advising their homosexual clients due to the Defense of Marriage Act adopted by Congress in 1996. This legislation does not force the states to give full faith and credit to same-sex marriages, which may be lawful in other states. Currently, Senator Wayne Allard of Colorado is sponsoring a proposed constitutional amendment, declaring,

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

However, neither the Democratic, nor Republican leaders are able to agree on a procedure for a vote. Thus, it is unknown as to when, if ever, the proposed amendment will be voted upon.

Legalizing same sex marriages may help protect the rights of same sex partners when they part ways by conferring upon each party legal rights to their children. As this comment addressed, the issue of legal rights is critical when it comes to child custody and visitation rights of the non-biological parent. While many state courts are slowly but surely recognizing the changing definition of what constitutes a "family," it is unlikely that homosexual marriages will be legalized widely any time soon. Therefore, the
legal fictions currently used to recognize parental rights of non-biological parents are becoming increasingly important.

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