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INSIDE

Legal Issues for the Lesbian, Gay, Bisexual, Transgender Community

GAY AND LESBIAN PARENTS IN KENTUCKY

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INTRODUCTION

As Kentucky and the nation discuss and debate same-sex marriage, many family law practitioners find themselves facing a more immediate issue. A growing number of Kentucky same-sex couples raise children together, and like their heterosexual counterparts, a significant percentage of these parents will find themselves litigating child custody and/or timesharing at some point. This article will address two issues important to these parents and Kentucky attorneys: the sexual orientation of parties in custody disputes generally and the procedural hurdles to making a custody determination upon the dissolution of a same-sex partnership. Both issues have seen significant recent developments in case law, and more may be on the way.

SEXUAL ORIENTATION OF A PARENT IN CUSTODY DETERMINATIONS

Gay and lesbian Kentuckians may find themselves in custody litigation in a variety of settings, and their sexual orientation should be not a dispositive factor in any of them. A gay or lesbian parent[1] may find his or her sexual orientation alleged to be relevant to determining custody in an action to dissolve his/her heterosexual marriage, in a dispute with a former same-sex partner, or in an action by a third party, such as a dependency, neglect, or abuse action or an action by a relative to be declared a *de facto* custodian. In any of these instances, recent Kentucky case law makes clear that the parent's sexual orientation cannot, on its own, form a legal basis for denying that parent custody of his or her child(ren).

In *Maxwell v. Maxwell*, 382 S.W.3d 892 (Ky.App. 2012), Robert and Angela Maxwell divorced after a 16-year marriage that produced three children. *Id.* at 892. At some point unspecified in the record, Angela entered into a committed relationship with another woman. Pending a final trial, the parties, by agreement, shared joint custody of the children and shared time with them equally, on a week-to-week basis. *Id.* The parties resolved all of their property issues outside of court but adjudicated the issues of custody and timesharing in a final hearing involving nine witnesses.[2] *Id.* at 893-94. Robert asked the court to award joint custody and name him the children's "primary residential custodian."[3] *Id.* at 894. Angela asked the court to award the parties joint custody and to continue the parties' previously agreed-to week-to-week timesharing. *Id.* After extensive testimony by the parties, their two older children, and other acquaintances and family members, the trial court awarded sole custody of the children to Robert, set a minimal visitation[4] schedule for Angela that fell below the guidelines set by local rules, and enjoined both parties from cohabiting with another adult outside of marriage during their time with the children. *Id.* at 895.

Angela appealed, and the Court of Appeals reversed, finding that the family court erred in relying exclusively or excessively on Angela's sexual orientation when making its custody determination. Using Angela's sexual orientation as the sole determinative factor violated her constitutional rights to due process and equal protection, as well as her fundamental right to parent. *Id.* at 899. Any custody determination must be made after evaluating all relevant factors, including those outlined in KRS 403.270(2).[5] The delineated factors are not an exclusive list. However, the court "shall not consider conduct of a proposed custodian that does not affect his relationship with the child." KRS 403.270(3). Moreover, the court must give equal weight to both parents. KRS 403.270(2). In *Maxwell*, the family court cited to the factors listed in KRS 403.270(2) but did not make specific findings as to any of them. Instead, the family court focused on Angela's same-sex relationship and determined that it was harmful to the children. *Id.* at 897. In so doing, the family court relied not upon specific testimony but upon prior case law suggesting that the court may consider the misconduct of a proposed custodian if the court concludes "that such misconduct has affected, or is likely to affect, the children adversely." *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1990).

The Court of Appeals found the family court's reliance on *Krug* misplaced. Ultimately, the court concluded "that being a member of a same-sex partnership alone does not meet the criterion for sexual misconduct." *Id.* at 898. Stated differently, "KRS 403.270(3) does not allow sexual orientation to be a determining factor unless there is a direct negative impact on the chil-

dren." *Id.* The court's use of the phrase "sexual orientation" in addition to "same-sex relationship" makes it clear that trial courts cannot hang a custody determination upon a parent's homosexuality, regardless of that parent's relationship status.[6]

Pivotally, the court also specified that the threat of teasing or bullying of the children on account of one parent's sexual orientation is not a basis for denying that parent custody. *Id.* at 899 (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984)). The court admonished Kentucky's family courts that the U.S. Constitution does not tolerate a custody determination based on the private biases of others. *Id.*

In both analyses – Angela's alleged "misconduct" in her committed relationship to another woman and the alleged harm to the children by potential teasing – the Court of Appeals' message was clear. "Harm to these children must have an evidentiary basis and cannot be assumed." *Id.* at 899. For the trial bench and for practitioners, this is key. Of course there will be cases in which the specific conduct of a parent who happens to be gay or lesbian warrants sole custody to another parent or party under the appropriate factors in KRS 403.270(2). But more often those factors will suggest – as they do in the majority of all custody cases – that the child's best interests require that he or she maintain a custodial relationship with both parents, regardless of their sexual orientations. Practitioners must make their case with specific, admissible evidence, and trial courts must determine custody in the children's best interest, as determined by the relevant factors, with factual findings supported by ample admissible evidence. After *Maxwell*, both bench and bar must do so without sole regard for one party's sexual orientation.

Note that while the court in this case only addressed custody, the visitation statute is one of several that employ the "best interests of the child" standard analyzed in the court's opinion. KRS 403.320(3). *See also Drury v. Drury*, 32 S.W.3d 521, 524 (Ky.App. 2000). Thus, the *Maxwell* analysis – that a parent's sexual orientation is not relevant absent proof of specific harm to the child – should apply to visitation and timesharing determination.

CUSTODY DISPUTES BETWEEN FORMER SAME-SEX PARTNERS

Less clear is the path to a child custody determination in a dispute between former same-sex partners. This is true regardless of whether the couple ever entered into a legal marriage, civil union, or other similar legal relationship. Of course, same-sex partners cannot presently marry in Kentucky. Ky. Const. § 233A; KRS 402.020(1)(d). Likewise, the prevailing view of judges and practitioners is that these provisions prevent Kentucky courts from dissolving same-sex marriages entered into in other jurisdictions. No published case law addresses this point, and a case testing the proposition was recently filed in Jefferson County.[7] However, that case involves no minor children, and even an appellate opinion addressing the court's ability to dissolve that marriage will leave unanswered questions about the legal rights of the spouses to custody of children born to either parent during the marriage.

Despite the availability of an out-of-state divorce for some married same-sex couples, child custody determinations for those couples will continue to be made in Kentucky. A handful of states and the District of Columbia retain jurisdiction over the same-sex marriages of non-residents for the limited purposes of dissolving those marriages, should such dissolution not be possible in the state of the parties' domicile.[8] However, even in those states the dissolving court probably lacks jurisdiction to enter a child custody order.

The Uniform Child Custody Jurisdiction and Enforcement Act (U.C.C.J.E.A.),[9] enacted by all fifty states and the District of Columbia, is the "exclusive jurisdictional basis for making a child custody determination." KRS 403.822(2). U.C.C.J.E.A. jurisdiction hinges upon the child's "home state," as defined by statute. Unless the parties are recent transplants, Kentucky will be deemed the child's home state for U.C.C.J.E.A. purposes. KRS 403.800(7). This grants Kentucky exclusive child custody jurisdiction. Kentucky likely cannot decline this jurisdiction under the strict standards articulated in KRS 403.822(b). Moreover, even if Kentucky could properly decline jurisdiction, the state of the couple's marriage lacks the significant connections to the family and the substantial evidence about the case necessary to acquire jurisdiction. KRS 403.822(b). *See Gullett v. Gullett*, 992 S.W.2d 866 (Ky.App. 1999) (unborn child's pre-natal presence in the state does not constitute "significant connection" for purposes of acquiring U.C.C.J.E.A. jurisdiction); Graham & Keller, West's Kentucky Practice, Domestic Relations § 14.27 (3d ed. 2008) (examples and discussion of "significant connection" and "substantial evidence").

Some states, such as Delaware, require parties entering into a marriage or civil union to consent to the dissolution of the marriage or union in that state.[10] Even in those states, though, the U.C.C.J.E.A. is the sole mechanism for acquiring child custody jurisdiction. *See* 13 Del. Code § 1920(b). The parties' consent to divorce jurisdiction does not alter the home-state analysis of the U.C.C.J.E.A., because personal jurisdiction over a child and/or his parents is "not necessary or sufficient to make a child custody determination." KRS 403.822(3).

Accordingly, former same-sex partners in Kentucky seeking a court order on custody and timesharing[11] will be litigating here and applying Kentucky law. A perfect storm of three state laws ensures that the parties will always be on unequal footing. The marriage prohibitions cited above, the lack of second-parent adoption,[12] and the outmoded provisions of our 1964 Uniform Paternity Act[13] ensure that one partner will legally be a non-parent to any children raised by the couple. Regardless of any psychological or emotional bonds the child forms with the partner of his or her legal parent, that person will be a non-parent for purposes of custody and timesharing.[14]

As non-parents, the first hurdle these litigants face is standing to seek custody. "Under our current statutory scheme, non-parents may attain standing to seek custody or visitation of a child only if they qualify as *de facto* custodians, if the parent has waived her superior right to custody, or the parent is conclusively determined to be unfit." *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky.App. 2013) (citing *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010)).[15] The claimant must also be "a person acting as a parent" as defined in the U.C.C.J.E.A. *Mullins*, 317 S.W.3d at 575. In this context, that means the person must have physical custody of the child or have had it for a period of six months[16] within the year immediately prior to the filing of the petition. *Id.*[17]

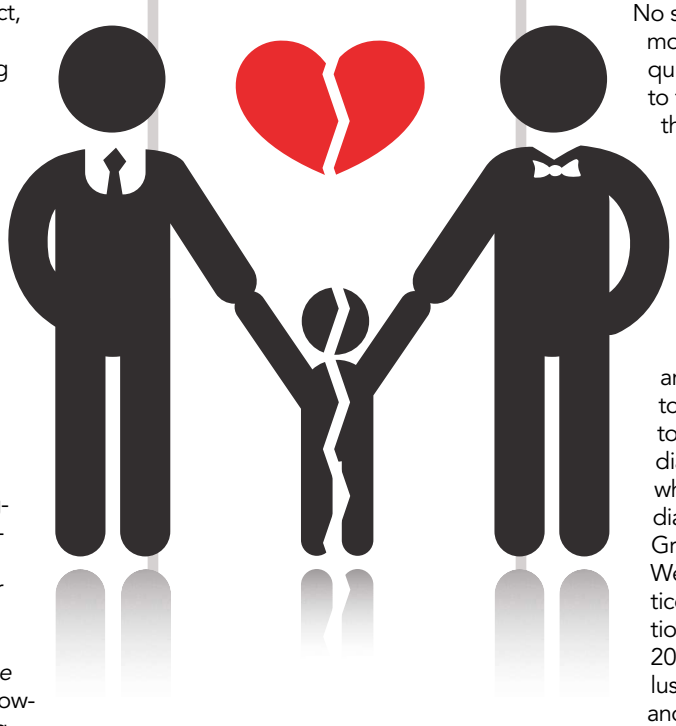
The same-sex partner of a child's legal parent is unlikely to meet the criteria to be declared *de facto* custodians. This is primarily because that statute requires that the claimant have acted in place of the child's legal parent(s) and not as a co-parent with the child's legal parent(s). *Mullins*, 317 S.W.3d at 574; *Brumfield v. Stinson*, 368 S.W.3d 116 (Ky.App. 2012). This is simply very unlikely to occur during any intact relationship.

Unfitness is similarly unlikely to help the same-sex partner of the child's legal parent attain standing to pursue custody or visitation. Only in extreme cases will the proposed custodian have the proof necessary to allege unfitness, and even then he or she will have to overcome logi-

cal questions about his or her role in the parent's unfit life. Moreover, in cases of true unfitness, the parties are likely to find themselves litigating in dependency, neglect, and abuse court rather than resolving their private differences as to child rearing.

So, to acquire standing to pursue custody and timesharing, the non-parent will most likely need to prove that the biological or adoptive parent has waived his or her superior right to custody. Crucially, the biological or adoptive parent need not waive the entirety of his or her parental rights. *Mullins*, 317 S.W.3d at 579. Unlike the *de facto* claim, facts showing the co-parenting and cooperation of the parties actually enhance rather than preclude a waiver claim. The party seeking standing must prove that the biological or adoptive parent waived his or her "right to be the sole decision-maker regarding [the] child and the right to sole physical possession of the child." *Id.*

The Supreme Court's opinion in *Mullins* is a road map of the proof required. The parties' attempts to convey legal rights upon the non-parent during their relationship – such as signing a co-parenting agreement, seeking a joint custody order, or nominating one another as the child's guardian in an estate plan – will be relevant to show the legal parent's intent waive his or her custody rights. *Id.* at 581 Day-to-day facts about the child's life - such as financial support, a hyphenated last name, or calling the non-parent "momma" – are also relevant and admissible. *Id.* at 580. Ultimately, the trial court will look for evidence that the child considers the non-parent his or her parent *and* that the child's legal parent played an active, integral role in forming this relationship.



Once the former partner of the child's legal parent has established standing to seek custody, the court must then determine custody and timesharing/visitation in accordance with the child's best interest. As outlined above, this must be done without undue regard for either party's sexual orientation. Note that even this exhaustive process does not make the non-parent a legal parent of the child. For instance, the child will not inherit from the non-parent custodian under the laws of intestacy. However, the non-parent is able to maintain a parenting relationship with the child by exercising custody and timesharing.

Mullins also did not address the possibility of a child support obligation between former same-sex partners. In *Truman v. Lillard*, *supra*, the party seeking standing offered to pay child support to the child's legal parent, but she failed to prove waiver as discussed above, so that issue did not reach the Court of Appeals. The family court's authority to order the non-parent partner to pay child support to the legal parent is not at all clear. No statutory or common-law authority requires a non-parent to financially support the legal children of another, absent perhaps an enforceable contract to do so. Perversely, the legal parent has a duty to support his or her child and can be ordered to pay child support to the child's custodian, regardless of whether that custodian is a parent. *See* Graham & Keller, West's Kentucky Practice, Domestic Relations § 14.27 (3d ed. 2008). This further illustrates the inequity and frustration caused by a system of laws that continues to treat one partner as "parent" and one as non-parent custodian.

CONCLUSION

Recent developments in case law have made it easier for trial courts to respect and maintain the parent-child relationship for gay and lesbian parents in child custody litigation. However, those changes do not permit both members of a same-sex couple to be legal parents of a child they raise together. Serious legislative reform will be needed to make that happen. Until that occurs, family law practitioners and judges must tread carefully through several chapters of KRS to preserve these children's emotional and psychological bonds with both their legal parent and that parent's same-sex partner. B&B

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[1] Note that no published case law addresses a custody determination involving a parent who explicitly identifies as bisexual. The court in *Maxwell* spoke of the constitutional impressibility of making a determination solely on the basis of "sexual orientation." *Id.* at 888-89. Black's Law Dictionary defines "sexual orientation" as "A person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality, or bisexuality." Black's Law Dictionary 653 (3d. pocket ed. 2006). A self-identified bisexual parent should be able to successfully argue the irrelevance of his or her sexual orientation in making a custody determination.

[2] The Opinion is silent as to the issue of child support.

[3] The dubiousness of this designation after *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), and the implementation of the Family Court Rules of Practice and Procedure is outside the scope of this article but worth noting.

[4] When parties share joint custody, each of them has "timesharing" with the children; when one party has sole custody, the other party has "visitation" with the children. *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008).

[5] The "best interest of the child" standard applies in numerous other statutes. *See, e.g.*, KRS 403.320 (visitation); KRS 199.520 (adoption); KRS 620.140 (disposition of dependency, neglect, and abuse cases); KRS 625.090 (involuntary termination of parental rights). In some instances, such as in termination of parental rights, other factors are listed. Whether they are additional or alternative is not clear. More often, the phrase appears on its own.

[6] For transgender parents, the impact is not as clear. *M.B. v. D.W.*, 236 S.W.3d 31 (Ky.App. 2007) (upholding father's gender transition as basis for

finding emotional injury to children and terminating his parental rights), is only five years old and has not been addressed on this issue in any other published opinion. Moreover, the *Maxwell* court spoke only of "sexual orientation," a concept that is distinct from "gender identity," a term developed in anti-discrimination legislation and litigation.

[7] Andrew Wolfson, *First 'Gay Divorce' Attempted in Kentucky*, Louisville Courrier-Journal, Nov. 2, 2013, http://www.courier-journal.com/article/20131102/NEWS10/311020032.

[8] At the time of this writing, they are: California, Cal. Fam. Code § 2320(b); Delaware, Del. Code Ann. tit. 13, § 216; Minnesota, Minn. Stat. § 518.07; Vermont, Vt. Stat. Ann. tit. 15, § 592(b)-(c); Washington D.C., D.C. Code § 16-902(b). Canada has as similar rule. *Civil Marriage* Act, SC 2005, c 33, s 7. Some states with civil unions or domestic partnerships maintain a similar rule. They are: Colorado, Colo. Rev. Stat. § 14-15-115; Illinois, 750 Ill. Comp. Stat. 75/45; Vermont, Vt. Stat. Ann. tit. 15 § 1206(b).

[9] KRS 403.800 *et seq.*

[10] Del. Code Ann. tit. 13 § 216; *see also* 750 Ill. Comp. Stat. 75/45 (applies to civil unions).

[11] The U.C.C.J.E.A. determines jurisdiction for visitation as well as custody. KRS 403.800(3) and (4).

[12] *See S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky.App. 2008), a thorough discussion of which is outside the scope of this article.

[13] KRS Chapter 406. Kentucky is one of only five states not to have adopted any iteration of the modern Uniform Parentage Act. *Id.* at *Table of Jurisdictions.*

[14] This is further exacerbated by the gender-specific language of KRS 213.046 *et seq.*, which operates to prevent the issuance of a Kentucky birth certificate to two parents of the same gender.

[15] As the Court of Appeals clarified, "the *in loco parentis* doctrine is no longer applicable in these matters," having been superseded by the *de facto* custodian statute. *Id.* at 868.

[16] The application of this six-month rule is currently before the Kentucky Supreme Court in *Coffey v. Wethington*, 2012-CI-721-DE. The court heard oral arguments on Nov. 13, 2013, on the construction of 403.800(13). The Court of Appeals ruled that the all persons relying on this provision to seek custody of a child must have had physical custody of that child for six months prior to filing a petition. The appellants in this case urge that the more natural reading of the statute requires the petitioner to *either* have physical custody at the time of filing *or* have had it for six months within the past year but lost it prior to filing. Interested readers should look for an opinion in 2014.

[17] KRS 403.800(13). This six-month rule exemplifies the difficulty in calling one partner a non-parent. Consider, for example, a committed same-sex couple splitting after 10 years together, with three children ages six years, three years, and three months. Suppose all three children have the same adoptive parent, and suppose that parent frustrates the non-parent's access to the children immediately upon their break-up, depriving the non-parent of physical custody of the children. The non-parent would have standing to pursue custody and timesharing of the two older children but not the youngest.