Family Law and the KeyStonewall State:

The Evolution of LGBT Family Law in the United States and Pennsylvania

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There was a time in Pennsylvania when the family law landscape for lesbian, gay, bisexual and transgender litigants was so bleak that most LGBT parents stayed away from the court system. The hysteria over the AIDS crisis, particularly in the decade between 1985 and 1995, resulted in restrictions being placed on the visitation rights of many HIV-infected parents. Indeed, the discrimination was so pronounced that an LGBT parent was considered morally deficient, and those who fought for the right to see their children risked being labeled parentally unfit.

When I graduated from law school 25 years ago, there were no reported appellate cases in Pennsylvania on whether lesbian and gay non-biological parents had third-party standing in child custody proceedings. As a member of the Women's Law Project's Working Group on the Legal Rights of Lesbian and Gay Parents, I recall the precarious fight for second-parent adoption, a proceeding that allowed a lesbian mother's partner to adopt her biological or adoptive child — without the necessity of a voluntary termination of parental rights. Back then, domestic violence protection was unavailable to LGBT victims, and there was no mechanism in the law to impose a child support obligation on former domestic partners.

Over the past generation, family lawyers in Pennsylvania have seen a transformation in the law as it affects LGBT clients. In 1999, Pennsylvania joined a minority of states that permit the practice of second-parent adoption (In re Adoption of R.B.F.). In 2001, the Pennsylvania Supreme Court accorded a former lesbian partner in loco parentis status to pursue custody rights of a child she helped to raise from birth (T.B. v. L.R.M.). And in 2002, in a case of first impression, the Pennsylvania Superior Court became the first appellate court in the country to impose a child support obligation on a former domestic partner (L.S.K. v. H.A.N.).

But for sheer symbolic impact, nothing compares to the 2010 decision of the Pennsylvania Superior Court in M.A.T. v. G.S.T. That decision overturned one of the most discriminatory cases in the history of Pennsylvania family law, Constant A. v. Paul. C.A., decided in 1985.

In Constant A., a lesbian mother's application to expand her partial custody rights was denied by a Northampton County judge. The mother lived in Boston with her same-sex partner, and all she wanted was for her children to visit her during the summer to walk the Freedom Tail and tour the historic sites of New England. Despite the fact that the mother had an enduring and committed relationship with her same-sex partner, an excellent employment record, and was a respected member of her community, the trial court concluded that her sexual orientation reflected a "moral deficiency."

The Superior Court affirmed the trial court's decision to deny the mother's application, and in a notorious footnote, stated, "Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society."

Constant A. created a rebuttable presumption against the gay or lesbian parent, placing a burden on them to demonstrate that their sexual orientation would not cause their children to suffer detriment or harm, meaning that they would have to prove a negative. The now-retired Judge Phyllis W. Beck wrote a compelling dissent in Constant A., but it took the Pennsylvania Superior Court 25 years to overrule the majority decision.

In the M.A.T. case, decided by an en banc panel, the Superior Court reversed a Dauphin County trial court's decision to award primary custody to a father over the objection of his former spouse, a lesbian mother. The mother argued for an equally shared arrangement — a schedule that was also recommended by a jointly retained custody evaluator, whose findings were uncontroverted. The trial court had held that it was "inconceivable" that a child could be exposed to a homosexual relationship "and not suffer some emotional disturbance, perhaps severe."

In reversing the trial court's decision and imposing the 50-50 custody schedule recommended by the independent custody evaluator, the Superior Court concluded that a gay or lesbian parent in Pennsylvania bears no special evidentiary presumption in a child custody case. Constant A. — the Dred Scott of Pennsylvania family law — was finally overturned, after a quarter of a century.

Section 1704 of Pennsylvania's Domestic Relations Code defines marriage as between one man and one woman. Based on the "strong and longstanding public policy of this Commonwealth," a same-sex marriage entered into in Massachusetts, Connecticut, Iowa, New Hampshire, Vermont or New York — where same-sex marriage has been legalized either by the state legislature or by state supreme court ruling — or in a foreign jurisdiction such as Canada, is void in Pennsylvania. But efforts to amend Pennsylvania's state constitution to define marriage as between one man and one woman have failed on at least three occasions, in 2006, 2008 and 2009.

While Pennsylvania family lawyers wait for a decision on same-sex marriage, they continue to fight for the interstate dissolution of civil unions and same-sex marriages entered in other states by Pennsylvania residents. In other words, what happens when same-sex couples from Pennsylvania enter into New Jersey civil unions, but later decide to dissolve those legal relationships in Pennsylvania, not New Jersey? Will the courthouse doors be open for these LGBT litigants? So far, the results have been mixed.

In 2010, a Berks County trial court ruled that it lacked subject matter jurisdiction to dissolve a same-sex marriage entered in Massachusetts. Pennsylvania's Office of the Attorney General intervened in that case, which was dismissed ultimately (Kern v. Taney). And a similar result occurred just this year in Philadelphia County, when a lesbian petitioner sought to have her Vermont civil union dissolved, in a case that wasn't opposed by her former partner. But in that case (Guerin v. Alleva), the judge held that while the family court lacked subject matter jurisdiction, the trial division of the First Judicial District could hear these cases for interstate dissolution, and had in the past granted similar applications for relief.

It is all but inevitable that the issue of same-sex marriage will eventually come before the U.S. Supreme Court, but in the meantime, major cases are being decided by appellate courts across the country enforcing the notion that LGBT discrimination is as legally repugnant as racial, religious, ethnic or gender-based discrimination.

Even President Obama's views on same-sex marriage are evolving, according to a recent article in The New York Times. As a candidate for the state senate in Illinois in 1996, Obama stated unequivocally that he favored the legalization of same-sex marriage and that he would fight efforts to prohibit such marriages. But when he ran for president in 2008, Obama backtracked, stating that he believed marriage to be union of one man and one woman. With the repeal of "Don't Ask, Don't Tell" and the Obama administration's decision not to defend the constitutionality of the Defense of Marriage Act, many family lawyers are optimistic that the law is moving in the right direction.

When will the issue of same-sex marriage be decided on a national level? It probably won't happen for many years, even while LGBT victories mount at the state level. If one looks at similar movements in American history for marriage equality, it is clear that the road to justice is a long one.

When the U.S. Supreme Court ruled in Loving v. Virginia in 1967 that statutory bans on interracial marriage were unconstitutional, over two-thirds of the states had already abolished anti-miscegenation laws. California was the first state to end racial-based discrimination in marriage in 1948 in Perez v. Sharp. In other words, 19 years elapsed between California's ruling in Perez and the U.S. Supreme Court's ruling in Loving.

To take another example, when the U.S. Supreme Court decided Bowers v. Hardwick in 1986 — upholding the constitutionality of a Georgia sodomy law that criminalized such acts between consenting adults — it took 17 years to overrule Bowers in Lawrence v. Texas, which was decided in 2003. Lawrence was decided by a vote of 6-3, striking down Texas's sodomy law, with five of the justices holding that it violated due process guarantees, and a sixth justice, the now-retired Sandra Day O'Connor, finding that the Texas statute violated equal protection guarantees. By the time Lawrence was decided in 2003, only 12 other states still had laws similar to the one in Texas criminalizing homosexual sodomy.

Within the last month, New York lawmakers made their state the sixth to allow for same-sex marriage, and the Wyoming Supreme Court granted the interstate dissolution of a same-sex marriage entered in Canada, despite Wyoming statutory authority that defines marriage as a civil contract between a male and a female person, just like in Pennsylvania (Christiansen v. Christiansen). Because the Wyoming residents were in need of a judicial remedy, the courthouse doors were left open to them, notwithstanding the public policy debate on same-sex marriage.

There will undoubtedly be setbacks on the road to marriage equality. And while LGBT family law is progressing rapidly as it aligns with modern social reality, this doesn't mean that discrimination based on sexual orientation will vanish — or that the civil rights struggle of the LGBT community will end — once the freedom to marry movement achieves its objective.

By way of one example only, last year's article in The Legal by Amara S. Chaudhry, the director of the Mazzoni Center in Philadelphia, highlights the uphill struggle in Pennsylvania to end employment discrimination against LGBT workers. But if one looks at Pennsylvania family law just a generation ago, a tremendous amount of progress has been made to uphold the legal rights of LGBT parents. Family lawyers continue to monitor these developments closely, as the legal definitions of family and parent continue to evolve. •

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