



by **Mary J. B. Eidelman, Esquire**

Gender takes little precedence when it comes to custodial rights — what’s most important is the biological relationship.

Pennsylvania law does not, as yet, recognize gay marriage. Whether or not that will change at any time in the future does not appear as yet, despite some dramatic shifts in the position of various states regarding the recognition of legal marriage between same sex couples. However, a legally recognized “family” is not dependent upon a legally recognized marriage. But does the gender of the parents play any role in the determination of custodial rights? The answer is “no.”

More and more gay couples are adopting minor children whether those children are the biological offspring of one of the partners or not biologically related to either partner. Pennsylvania, as well as many other states, has a paramount concern of legitimizing minor children through adoption, rather than concentrating on the sex of

Does Gender of the Parents Control Their Custodial Rights?

the parents. The gender of an adoptive parent has no real significance in many cases. The promotion of “family” is more important for the welfare of the minor child or children than the gender of the parents.

The custodial rights of parents, whether they are same sex or heterosexual, are determined in descending order of importance based upon the biological relationship of each parent with the child or children. Heterosexual biological parents of minor children stand on equal footing with respect to each other regarding their respective custodial rights of their minor biological children. In such cases, custodial rights are determined based upon “the best interests of the child.” No gender preference is permissible.

On the other hand, a non-biological parent, whether that parent is the same gender as the other or not, is given less status, such as in the case of a step-parent who has adopted the biological child of the other parent. The step-parent has the legal “standing” to enforce custodial rights by virtue of having adopted the non-biological child. Standing under the law is what entitles a parent to enforce custodial rights. Without standing, a “parent” needs to establish legal status of *in loco parentis* in order to have access to the Courts to enforce any custodial rights. (This concept will be explained in more detail below.)

Once a parent has standing, the Court looks to the biological relationship of each parent as opposed to any consideration of gender. The natural, biological parent’s custodial rights are

superior custodial rights to those of the non-biological parent, even where the non-biological parent has the same legal status as the other

legally adopted a child.

As can be seen from the analysis above, gender of the parents plays a rather insignificant role in deter-

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as a legally recognized parent. The same holds true for the preference of the custodial rights of the biological child of gay parents.

Where the non-biological parent has not adopted the biological child of the other parent, he or she has no automatic legal standing to enforce custodial rights. In such cases, the non-biological parent must establish “standing” by proving that they are *in loco parentis* to the child or children. This is established by the non-biological parent proving that he or she has exercised parental rights to the child with the consent of the biological parent, such as providing financial support, being involved in major decisions regarding the child, providing guidance and/or discipline to the child, being referred to as “Mom” or “Dad,” and performing other duties normally performed by a parent. The individual is not legally a parent of the child but will be recognized as a parent for the determination of their custodial rights. *In loco parentis* status is, as one would expect, given even less importance than the custodial rights of a non-biological parent who has

mining the custodial rights of each of the parents. It is the biological relationship that controls, even where the legal status of the parents is the same.

When both parents are female

Where the gay parents are female, the child could be born as a result of artificial insemination of one of the parties. That party is then, of course, the biological parent of the child and that relationship will govern the custodial rights even where the non-biological parent has legally adopted the child.

Although I have not personally been involved in

a situation where the gay parents are male and the child was born to a surrogate with one of the parties’ sperm, I presume the biological relationship will still control, even though the relationship is somewhat different than that of the female gay parent who is artificially inseminated. If there is no biological relationship between the gay parents and the minor child, no matter what the gender of the gay parents is, their custodial rights are equal and the “best interests of the child” is the applicable analysis.

Gender of the parents plays little, if any, role in the determination of a parent’s custodial rights. It is the relationship of the parent to the child that is important. A biological relationship of the parent to the child will always take precedence. If that is not a consideration, then the relationship that each gay parent has established with the child or children that provides for “the best interests” of that child or children is what will control for the determination of custodial rights.

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