

Child Custody and Visitation Issues for Lesbian, Gay, Bisexual, and Transgender Parents in Florida



NATIONAL CENTER FOR LESBIAN RIGHTS

The **FAMILY PROTECTION PROJECT** improves access to family law services for low-income same-sex parent families, with a focus on increasing and improving services to families of color. The project provides free representation and legal information to low-income LGBT parents and their children; trains and supports attorneys providing free and low-cost services to these families; and works in coalition with organizations serving communities of color to provide culturally competent services to families of color.

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This resource is intended to provide general legal information. It is not intended to provide and should not be relied on for legal advice about individual cases. Because case law and statutes are subject to frequent change and differing interpretations, the National Center for Lesbian Rights cannot ensure the information in this resource is current. Do not rely on this information without conducting independent legal research.

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About NCLR

The National Center for Lesbian Rights (NCLR) is a non-profit legal organization with thirty years of experience and expertise in family law issues affecting LGBT people. We work to achieve fair and equal treatment of lesbian, gay, bisexual, and transgender (LGBT) parents by representing LGBT parents in impact litigation in state and federal courts and by providing legal information to attorneys and individuals. NCLR has an office in Florida and has litigated a number of cases on behalf of LGBT parents in Florida.

Disclaimer

This document provides a summary and discussion of relevant Florida law for attorneys who are representing LGBT parents in custody and visitation cases in Florida. Our goal is to familiarize you with the unique legal issues that may arise for LGBT parents and to increase your understanding of current Florida law in this area. Because every case is different and because the law relating to LGBT parents is often unsettled and may be subject to differing interpretations by different courts, you should not rely on the information in this resource without conducting independent legal research. This document is not intended to provide and should not be relied on for legal advice about a specific case.

LGBT Parents Face Unique Legal Issues

This document addresses the two main factual contexts in which LGBT parents face custody and visitation issues. First, a person who enters into a heterosexual marriage and has children may later divorce after discovering that he or she is gay, lesbian, bisexual or transgender. This situation is still quite common, and many LGBT people have children as a result of prior heterosexual marriages. These parents may face unique legal issues because of their sexual orientation and gender identity. In particular, the other parent may attempt to argue that the court should consider the sexual orientation or gender identity of the LGBT parent as a negative factor in determining custody. Under Florida law, however, this is not permitted. As Florida courts have made clear, a parent's sexual orientation is irrelevant to custody and visitation unless the parent's sexual orientation directly harms the child. To ensure that trial courts apply this precedent and do not allow subtle biases or misinformation to affect their resolution of a case, it may be necessary to present both legal arguments and expert testimony, as explained in more detail below.

Second, same-sex couples who are raising a child or children together may separate and then become involved in a dispute over custody or visitation. As explained further below, because it is often the case that only one of the partners is a legal parent, the dissolution of a same-sex relationship involving children frequently raises unique legal issues that are not present in most custody disputes between heterosexual parents. Representing an LGBT person who has been functioning as a child's parent but who is not recognized as a legal parent in a custody or visitation action is extremely challenging. Under current Florida law, there are no clearly established legal protections for such a client, and there are a number of appellate cases in which Florida courts have denied relief to individuals in this circumstance. There are some remaining legal theories that may be successful depending on the facts in a particular case, and it is probable that the law in this area will improve as more courts hear these cases and become more familiar with same-sex parent families. Nonetheless, attorneys representing a non-legal same-sex parent should be aware – and should communicate to their clients – that while current Florida law on non-legal LGBT parents is not entirely settled, most existing precedent is not favorable. Accordingly, practitioners should make every effort to settle the case and to avoid litigation except as a last resort.

LEGAL PARENTS WHO ARE LGBT SEEKING CUSTODY/VISITATION

1. LESBIAN, GAY, AND BISEXUAL PARENTS SEEKING CUSTODY/VISITATION.

Under settled Florida law, the sexual orientation of an LGB parent is irrelevant to custody and visitation unless – as is true for any other factor – the parent’s sexual orientation directly harms the child. There must be proof of a likelihood of harm, and the mere possibility of negative impact on the child is not enough.

Statutes:

F.S.A. § 61.13(3) allows a court to evaluate “all of the factors affecting the welfare and interests of the minor child” in determining custody, and gives a non-exclusive list of factors the court may consider. F.S.A. § 61.13(3)(f) allows the court to consider the “moral fitness of the parents.” Cases addressing the effect of the parent’s sexual orientation in a custody determination have analyzed it under this factor and have concluded that, standing alone, the mere fact that parent is lesbian or gay should not be weighed negatively under this factor.

Florida Case Law:

The Florida Supreme Court has held that the “moral fitness” of a parent is relevant only insofar as it has “direct bearing on the welfare of the child.” *Dinkel v. Dinkel*, 322 So.2d 22, 23 (Fla. 1975) (upholding a trial court’s award of custody to the mother, who had committed adultery, because the proper test was whether or not the adultery had a “direct bearing on the welfare of the child,” which was a question for the trier of fact). Although the Florida Supreme Court has not expressly addressed the relevance of sexual orientation in a child custody determination, the intermediate appellate courts have followed *Dinkel* and thus have held that a parent’s sexual orientation is not relevant to child custody unless there is direct evidence of harm to the child. Trial courts in all districts are bound by these appellate decisions.¹

- In *Maradie v. Maradie*, 680 So.2d 538, 541-42 (Fla. 1st DCA 1996), the First District held that the trial court erred by purporting to take judicial notice that a “homosexual environment is not a traditional home environment, and can adversely affect a child” because there were no sources before the court to establish this “fact” and this statement was not a “‘fact’ that [was] ‘generally

¹ As most trial courts will be aware, trial courts are bound by these appellate decisions even if they are located in other districts.

known' within the meaning of the [judicial notice] statute." In considering "moral fitness," the Court explained, "the court should focus on whether the parent's behavior has a direct impact on the welfare of the child," and a connection between the actions of the parent and the harm must be supported by "proof of the likelihood of prospective harm" because the "mere possibility" of harm is insufficient." *Id.* at 542-43 (citing *Dinkel v. Dinkel*, 322 So.2d 22, 23 (Fla. 1975)).

- In *Packard v. Packard*, 697 So.2d 1292, 1293 (Fla. 1st DCA 1997), the First District reversed a trial court's grant of custody to the father where the trial court's sole reasoning was that the father would "provide a more traditional family environment for the children." The court remanded for clarification and noted that in considering the mother's sexual orientation, the court's "primary consideration should be on what conduct is involved and whether the conduct has had or is reasonably likely to have an adverse impact on the child." *Id.*
- In *Jacoby v. Jacoby*, 763 So.2d 410, 413 (Fla. 2d DCA 2000), the Second District reversed the trial court's grant of residential custody to the father because the trial court had improperly relied on the possibility of third parties' bias against the mother's sexual orientation. The Second District adopted the holding in *Maradie* that sexual orientation is relevant only if the parent's conduct has a direct effect on the children. *Id.* The court found the trial court's statements concerning the negative impact of the mother's sexual orientation on the children to be "conclusory or unsupported by the evidence," concluding that the trial court had "penalized the mother for her sexual orientation without evidence that it harmed the children."² *Id.*

Relevant Federal Case Law:

- In *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court struck down statutes criminalizing same-sex intimacy and held that individuals have a constitutionally protected privacy right to enter into an intimate relationship with a person of the same gender. Although Florida courts have not directly addressed this issue, it is likely that *Lawrence* would prevent a court from restricting a parent's custody or visitation based solely on the parent's involvement in a

² In a later case, *Sinclair v. Sinclair*, 804 So.2d 589, 591 (Fla. 2d DCA 2002), the Second District upheld a grant of custody to the paternal grandmother over the mother, who was in a same-sex relationship. As noted by the concurrence, however, the court had "carefully explored" the possibility that her sexual orientation had been the basis of the trial court's decision and concluded that it was not. *Id.* at 594 (Whatley, J., concurring).

constitutionally protected relationship with a person of the same gender,³ just as Florida courts prevent courts from restricting custody or visitation based on a parent's religion. *See Rogers v. Rogers*, 490 So.2d 1017, 1018-19 (Fla. 1st DCA 1986) (holding that while religion may be considered as a factor in determining custody, the court cannot condition a grant of custody on curtailment of the parent's religious activities or beliefs).

Practical Tips and Strategies:

- Except in very rare circumstances, opposing counsel should not be permitted to seek information through discovery or direct examination at trial about the details of your client's intimate relationship with a same-sex partner. These questions are invasive of your client's privacy and irrelevant to the child custody issues before the court so long as any such conduct occurred in private and outside the presence of the child or children. With regard to affectionate but non-sexual conduct such as hugging or kissing, counsel should be prepared to rebut any suggestion that the court should hold same-sex parents to a different standard than heterosexual parents. *I.e.*, a parent in a same-sex relationship should not be denied custody or have restricted visitation merely for being open about their sexual orientation or for engaging in non-sexual affectionate behavior that would be considered appropriate between heterosexual partners.

- When representing a lesbian, gay, or bisexual client in a custody dispute, attorneys may wish to present evidence from experts to demonstrate that sexual orientation is not relevant to the ability to parent. While this should not be necessary in every case, presenting such expert testimony may be critical if the other parent is alleging that your client's sexual orientation is harmful to the child or if the judge appears to have questions or concerns about your client's sexual orientation.

- Do not agree to restrictions prohibiting a parent from living with a same-sex partner or prohibiting a same-sex partner from being present during visitation. Even if your client is not currently in a relationship, he or she may someday wish to be in one, and it is more difficult to challenge these restrictions after they have been in place.

³ This is different from the issue presented in *Lofton v. Sect. of the Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), which held that *Lawrence* did not require invalidation of Florida's ban on adoption by gay people because adoption is wholly statutory, and there is no fundamental right to adopt. In contrast, a parent's right to care and custody of a child is a fundamental right that cannot be abridged absent a compelling reason, such as direct harm to a child.

→ If, despite your best efforts, a trial court makes a custody or visitation determination based on your client's sexual orientation or transgender status, please contact NCLR for assistance.

2. TRANSGENDER PARENTS SEEKING CUSTODY/VISITATION.

Although Florida courts have not addressed the issue directly, under the Florida Supreme Court's holding in *Dinkel*, a parent's transgender status should have no bearing on custody or visitation absent a showing of direct harm to the child.

Florida Case Law:

- The only appellate decision involving a transgender parent in Florida, *Kantaras v. Kantaras*, 884 So.2d 155, 161 (Fla. 2d DCA 2004), did not hold or suggest that the father's transgender status should be viewed as a negative factor. Rather, the court remanded for a re-determination of custody in light of the appellate court's holding that the marriage between the father and the biological mother was invalid.
- Under the general rule in *Dinkel*, whether a parent is transgender should be deemed irrelevant unless there is evidence of direct harm to the child.

Practical Tips and Strategies:

- Because transgender issues are unfamiliar to most courts, it is essential that an attorney representing a transgender client be prepared to anticipate and address misinformation and negative stereotypes about transgender people. This is best done through expert testimony explaining transsexualism as a medical condition (including current medical knowledge and practice regarding the diagnosis and treatment of transsexual persons) and showing that a person's transgender status is not relevant to parental ability.⁴
- Attorneys should be prepared to explain why it is not appropriate for a court to require that a transgender person hide their transgender status as a condition on custody or visitation.
- For detailed information about how to find qualified expert witnesses on transgender parents and about how to present transgender issues to a court, please contact NCLR for assistance. We have litigated many such cases, both in Florida and in other states, and can provide you with sample briefs and questions for experts.

⁴ If you are interested in obtaining a summary of an expert report finding that gender identity is not relevant to parenting, contact NCLR at 415.392.6257.

NON-LEGAL⁵ LGBT PARENTS SEEKING CUSTODY/VISITATION

1. LEGAL CHALLENGES FACED BY NON-LEGAL LGBT PARENTS SEEKING CUSTODY/VISITATION.

Same-sex parents in Florida often face unique legal issues that are not faced by most heterosexual parents. These differences primarily derive from the fact that, under current Florida law, both partners in a same-sex couple cannot establish a legally recognized parental relationship to the couple's child. When heterosexual couples have children, both partners are usually biologically related to the child, which creates a presumption of legal parentage. In addition, while heterosexual couples may use assisted reproduction to have children, most of these couples are married and will be recognized as legal parents for that reason, even if they are not both biologically related to the child. Finally, heterosexual married couples in Florida may also become legal parents through adoption.

None of these options are open to same-sex couples. Same-sex couples cannot biologically procreate a child without using assisted reproduction. Accordingly, only one partner in the couple can become a legal parent based on his or her biological connection to the child. Likewise, same-sex couples in Florida cannot marry and thus cannot gain parental rights based on marriage. Finally, current Florida law bars adoption by lesbian, gay and bisexual people, thereby closing that route to legal parentage as well.⁶

In some instances, a same-sex couple may have completed a second-parent adoption or otherwise secured a legally recognized relationship between the child and both parents in another jurisdiction prior to moving to Florida. In that event, Florida law will recognize the adoption (or any other judgment establishing legal parentage), including for purposes of awarding custody or visitation. This is required both the Full Faith and Credit Clause of the federal constitution and by longstanding statutory and case law, which has long made it clear that Florida must honor valid adoption decrees and parentage judgments from other states. A same-sex parent who has established his or her legal parentage in another jurisdiction is thus on sound legal footing in Florida and should be given all of the legal rights and

⁵ This document uses the term “non-legal parent” to mean a person who functions as a parent of a child but who is not legally recognized as the parent of a child. Florida courts use the terms “third party” or “non-parent” or the phrase “non-biological and non-adoptive parent” to mean any person who is not legally recognized as a parent.

⁶ The current Florida adoption laws do not clearly bar second-parent adoptions.

responsibilities as any other legal parent.⁷ In practice, some trial courts may be unfamiliar with this body of law; thus, an attorney representing a client in this situation may need to brief this issue for the court.

Unless a same-sex couple has obtained an adoption decree or a parentage judgment from another jurisdiction, however, the non-legally recognized parent is at a significant disadvantage in seeking custody or visitation. This legal imbalance is often very damaging to any children involved, because it may prevent the court from basing custody and visitation on the best interests of the child. In some instances, it may even result in the child being completely separated from a loving and committed parental figure with whom the child is deeply bonded but who lacks any legally cognizable basis for seeking custody or visitation with the child. As Florida law in this area evolves, we hope that Florida will follow the lead of the vast majority of other states that protect children from the trauma of losing a bonded parent-child relationship with a person who has functioned as a child's parent but does not qualify as a legal parent under the relevant statutes and case law. Currently, however, although the law is still developing and is far from entirely settled, most existing Florida precedent on this issue is negative.

Because the current law is so uncertain and challenging, attorneys representing non-legal parents should do everything within their power to settle cases without resorting to litigation. There is a great need for increased judicial education and awareness to enable courts to understand the harmful impact on children of losing a bonded parental relationship and the need to apply equitable and common law principles to protect children with same-sex parents. In the meantime, however, practitioners representing non-legal parents should proceed with great caution and should strongly encourage their clients to preserve an amicable relationship with the legal parent and to reach an out-of-court settlement.

In most cases, same-sex couples who separate after having children are able to put the best interests of their children first and to work out an agreed-upon plan for sharing custody and continuing to parent their children together. In some cases, however, the relationship between a separating couple becomes so hostile or embittered that the legal parent seeks to sever the other parent's relationship with the child (or children) altogether. These cases are tragic for the children involved and may cause permanent emotional damage, in addition to depriving the child of the practical and financial benefit of having two committed parents. As an attorney representing a non-legal parent in such a case, if all efforts to reach a

⁷ Additionally, a custody or visitation decree from another state must be honored by Florida courts even if the parent would not be entitled to custody or visitation under Florida law, so long as the court in the other state had jurisdiction. 28 U.S.C. § 1738A(a) (“The appropriate authorities of every State shall enforce according to its terms. . . any custody determination or visitation determination made. . . by a court of another State.”).

settlement with the legal parent fail, you may be forced to take legal action on behalf of your client. In that event, the following section provides an overview of various legal claims and theories that should be considered.

2. NON-LEGAL PARENTS DO NOT HAVE A STATUTORY BASIS TO SEEK CUSTODY/VISITATION.

For legal parents, the right to seek custody and visitation is established by statute. The Legislature has also enacted statutes permitting grandparents to seek visitation under certain circumstances,⁸ although the Florida Supreme Court has struck down several sections of this statute as unconstitutional.⁹ Other statutes permit people who are not parents to seek custody or visitation in dependency and guardianship proceedings when a parent is incapacitated or unfit.¹⁰ While there are no statutes in Florida that expressly permit a non-legal parent to seek custody or visitation in the absence of parental unfitness or incapacity, it is well settled that Florida courts retain inherent jurisdiction over the custody and welfare of minor children. *See, e.g., Richardson v. Richardson*, 766 So.2d 1036, 1043 (2000) (holding that “in all custody cases, trial courts have broad continuing jurisdiction to ensure the protection of children within the court's jurisdiction and over matters related to the well-being of a child”). Accordingly, attorneys representing non-legal same-sex parents can and should advance non-statutory arguments to establish a right to custody or visitation.

3. POSSIBLE LEGAL CLAIMS ON BEHALF OF NON-LEGAL PARENTS.

While the law in this area is decidedly mixed, Florida courts have granted custody or visitation to non-legal parents in many cases. Often, the precise legal theory or basis for the court's ruling is unstated or unclear; however, some of the theories that attorneys representing non-legal parents should consider are described below.

A. Protecting a Child from Detriment or Demonstrable Harm.

Many Florida cases have held that courts may award custody or visitation to a so-called “non-parent” to prevent detriment or demonstrable harm to a child. This is a less demanding finding than a showing of parental unfitness. *Richardson v. Richardson*, 766

⁸ *See* F.S.A. § 61.13(2); F.S.A. § 409.256(4)(a)13; F.S.A. § 752.01.

⁹ *See Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996); *Von Eiff v. Azicri*, 720 So.2d 510, 511 (Fla. 1998); *Richardson v. Richardson*, 766 So.2d 1036, 1038-39 (Fla. 2000). Decisions by the Florida Court of Appeals have invalidated the remaining sections of the statute.

¹⁰ *See* F.S.A. § 39.501 et seq. (dependency); F.S.A. § 63.012 et seq. (adoption); F.S.A. § 39.6221 (permanent guardianship when parents are unfit); F.S.A. § 744.3046 (nomination of a preneed guardian by the legal parents). Additionally, F.S.A. § 751.01 et seq. allows relatives to seek temporary custody with the consent of a parent or if the parent is unfit.

So.2d 1036, 1039 (Fla. 2000). Many of these cases involve situations in which the child's legal parent has some deficiency in his or her ability to parent. In others, however, courts have also relied at least in part on the negative impact on a child of being separated from a person who has functioned as the child's parent. Accordingly, where a child has developed a parent-child bond with a non-legal parent (especially one of many years' duration), the non-legal parent may be able to establish standing to seek custody or visitation by showing that severing that bond would be detrimental to the child.

- *Simmons v. Pinkney*, 587 So.2d 522 (Fla. 4th DCA 1991) upheld an award of custody to a child's foster parent based in part on a determination that placing custody with the legal father would be detrimental because the child had lived with the foster mother for almost thirteen years and had "developed a strong emotional and social bond" to her.
- *Sinclair v. Sinclair*, 804 So.2d 589, 591 (Fla. 2d DCA 2002) upheld a grant of custody to the grandmother rather than to the legal mother, based in part on the trial court's finding that the grandmother had been the children's caretaker for several years and that a change in custody would be detrimental.¹¹
- In *In re Pearlman*, 15 Fam. L. Rep. 1355 (Fla. Cir. Ct. 1989) (Unpublished), Judge Robert C. Scott in Broward county vacated an adoption by the maternal grandparents and granted custody to the former same-sex partner of the child's deceased mother. The child had been conceived by artificial insemination during the women's relationship. The grandparents sought and were awarded custody after the biological mother's death and later adopted the child without notice to the non-biological mother. The trial court found that the non-biological mother was the child's psychological and *de facto* parent and that her liberty interest was violated when the child was adopted without her consent. The court also found that even if the adoption were not vacated, it would be detrimental to the child's "physical and emotional well being" for her to remain with the grandparents because the child had developed behavioral problems due to her separation from the non-biological mother.

Cases granting custody to a non-legal parent based on the detriment or demonstrable harm test are strongly supported by other cases that do not specifically apply a detriment test

¹¹ Although the mother in *Sinclair* was in a same-sex relationship, the holding did not rely on this factor (and the concurrence expressly noted that the mother's sexual orientation was not a factor). Rather, *Sinclair* stands for the proposition that where a person has assumed parental responsibility for a child for a period of time, the court may take that factor into account in determining whether placing custody with the parent would be detrimental.

but that have recognized that children may form strong familial bonds with non-legal parents that should not be severed. *See, e.g., Browning v. Favreau*, 60 So.2d 186, 186 (Fla. 1952); *Shepard v. Shepard*, 87 So.2d 807, 808 (Fla. 1956); *Justice v. Van Eepoel*, 132 So.2d 407, 408-09 (Fla. 1961); *Berhow v. Crow*, 423 So.2d 371, 372-73 (Fla. 1st DCA 1982); *Marsh v. Marsh*, 105 So.2d 507, 508 (Fla. 2d DCA 1958); *Eades v. Dorio*, 113 So.2d 232 (Fla. 2d DCA 1959); *Forman v. Forman*, 315 So.2d 9, 9-10 (Fla. 3d DCA 1975); *Gorman v. Gorman*, 400 So.2d 75 (Fla. 5th DCA 1981).¹²

B. Psychological/*De Facto* Parents.

The terms “psychological parent” and “de facto parent” are used interchangeably and refer to persons who have assumed a parental role in a child’s life, but who do not qualify as a legal parent. In a few cases, Florida courts have recognized the equitable doctrine of “psychological” or “*de facto*” parentage, but other cases have declined to apply this doctrine to non-legal LGBT parents. The Florida Supreme Court has not squarely held whether a psychological or *de facto* parent may seek custody or visitation over the objections of a legal parent.

- *Music v. Rachford*, 654 So.2d 1234, 1235 (Fla. 1st DCA 1995) rejected the argument of the former same-sex partner of the biological mother that because she was a *de facto* parent, she had the same standing as a parent.
- In *Kazmierazak v. Query*, 736 So.2d 106, 110 (Fla. 4th DCA 1999), the court noted that the Fourth District had previously recognized psychological or *de facto* parents but held they do not have equivalent rights to parents. *Kazmierazak* cast doubt on the earlier case *Wills v. Wills*, 399 So.2d 1130 (Fla. 4th DCA 1981), which allowed temporary visitation by a former stepmother found to be a psychological parent because it was in the child’s best interest and no “substantial interest” would be adversely affected.
- In *Swain v. Swain*, 567 So.2d 1058, 1058 (Fla. 5th DCA 1990), the court reversed an order requiring a former stepfather to pay child support, noting that “[t]here is no such thing recognized in law” as a duty to support based on “psychological father” status. It is unclear whether the court rejected the entire concept of psychological parent status or just the duty to support based on this status.
- In *In re Pearlman*, 15 Fam. L. Rep. 1355 (Fla. Cir. Ct. 1989) (Unpublished), Judge Robert C. Scott in Broward county vacated an adoption by the maternal grandparents and granted custody to the former same-sex partner of the child’s

¹² For a description of these cases, see the Case Appendix.

deceased mother. The trial court found that the non-biological mother was the child's psychological and *de facto* parent and that her liberty interest was violated when the child was adopted without her consent.

C. *In Loco Parentis* Status.

In loco parentis means “[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.” *K.A.S. v. R.E.T.*, 914 So.2d 1056, 1062, fn.4 (Fla. 2d DCA 2005) (quoting Black's Law Dictionary 803 (8th ed. 2004)). While a person *in loco parentis* to a child has a duty of support, *Swain v. Swain*, 567 So.2d 1058 (Fla. 5th DCA 1990), the Florida Supreme Court has not squarely addressed whether a person *in loco parentis* may seek custody or visitation over the objections of a legal parent.

- Several decisions by the Florida Court of Appeals have held that stepparents who are *in loco parentis* status do not have an ongoing duty of support after their marriage to the child's parent ends.¹³ Counsel seeking to use the *in loco parentis* doctrine to seek custody or visitation should consider distinguishing these cases, which involve attempts to impose parental duties on unwilling persons, from cases in which a person who has been *in loco parentis* wishes to maintain a parental relationship with a child.
- The Fourth District rejected a lesbian non-biological parent's argument that she was *in loco parentis*, holding that *in loco parentis* applies only within the context of a marriage. *Kazmierazak v. Query*, 736 So.2d 106, 109-110 (Fl. 4th DCA 1999).¹⁴

¹³ See *Albert v. Albert*, 415 So.2d 818, 820 (Fla. 2d DCA 1982); *Taylor v. Taylor*, 279 So.2d 364, 366 (Fla. 4th DCA 1973); *Hippen v. Hippen*, 491 So.2d 1304, 1305 (Fla. 1st DCA 1986); *Portuondo v. Portuondo*, 570 So.2d 1338, 1342 (Fla. 3d DCA 1990).

¹⁴ In fact, courts have applied the *in loco parentis* doctrine to persons other than married stepparents. See, e.g., *Abreu v. Amaro*, 534 So.2d 771, 772 (Fla. 3d DCA 1988) (upholding trial court's finding that a child's aunt stood *in loco parentis*).

D. Agreements Granting Custody/Visitation Rights to Non-Legal Parents.

The Florida Supreme Court has not addressed the validity of agreements granting custody or visitation rights to non-legal parents. The First and Fifth Districts have held that agreements providing for visitation by a non-legal parent are unenforceable as such. In light of these precedents, rather than asking a court to enforce such an agreement, counsel for a non-legal parent should consider presenting the agreement as evidence that the legal parent has waived his or her right to exclusive custody. For more information on the waiver argument, see section 4A below.

- *Wakeman v. Dixon*, 921 So.2d 669, 669 (Fla. 1st DCA 2006) held that an agreement between a lesbian couple providing for visitation by the non-biological mother was unenforceable. Other Florida courts, however, have recognized that parental rights, like constitutional rights, can be waived. See *In re N.Z.B.*, 779 So.2d 508 (Fla. 2d DCA 2000) (holding that the father could withdraw his consent to the grandparents' custody because he had not waived his constitutional rights to direct the care and custody of the children) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *Harrier v. Warmke*, 876 So.2d 603 (Fla. 2d DCA 2004) ("Thus, the custody agreement, which did not include a waiver of parental rights, was not by itself effective to give the [grandparents] rights to the minor child superior to those of the Mother."). Moreover, *Troxel v. Granville*, 530 U.S. 57 (2000) does not preclude waiver of parental rights by agreement. *Troxel* did not require a finding that parents are unfit before custody and visitation rights may be granted to non-legal parents, but rather required "special factors" to be present. *Id.* at 68-69.
- *Ward v. Hysell*, 777 So.2d 1206, 1206-07 (Fla. 3d DCA 2001) held that the trial court had jurisdiction to award custody to the grandparents pursuant to an agreement between the father and the grandparents. The court, however, affirmed the trial court's grant of custody to the grandparents without prejudice to the father to determine the validity of the agreement.
- In *Taylor v. Kennedy*, 649 So.2d 270, 271-72 (Fla. 5th DCA 1995), the Fifth District issued a writ of prohibition against enforcement of an agreement between the mother and stepfather granting him visitation rights and requiring him to provide financial support.

E. Guardianship/Dependency.

Under current Florida law, any person may initiate a child dependency action and petition to become a child's guardian¹⁵ by alleging that a legal parent is unfit or incapable of adequately caring for a child. See F.S.A. §§ 39.501, 39.507(10) (initiation of dependency actions); F.S.A. § 39.6221 (permanent guardianship when parents are unfit). In most cases when a same-sex couple separates, however, both partners are fit and competent parents, and there will be no basis for initiating a dependency or guardianship action. Attorneys representing non-legal parents should not use this potential remedy unless there is an objective, bona fide basis for alleging unfitness or inability to properly care for the child.

- The Fifth District rejected an argument by the former same-sex partner of the biological mother that she had standing to seek visitation under chapter 39 (dependency) on the grounds that the mother had abused or neglected the child by cutting off all contact between her and the child. *D.E. v. R.D.B.*, 929 So.2d 1164, 1164 (Fla. 5th DCA 2006) (“A parent’s decision to deprive a child of contact with someone who has no legal custody or visitation rights . . . is an inadequate ground upon which to base an adjudication of dependency.”).

4. OVERCOMING LEGAL PARENTS’ CONSTITUTIONAL ARGUMENTS.

Parents have a fundamental right to determine the care and custody of their children. Counsel for non-legal parents may need to argue why granting custody or visitation to a non-legal parent over the objections of a fit legal parent does not violate the legal parent’s right to familial privacy. Counsel can argue that a parent has waived his or her rights or that cutting off all contact with the non-legal parent would be detrimental to the child.

A. Encouragement or Waiver by a Legal Parent.

When a legal parent agrees to allow a non-legal parent to seek custody or visitation or encourages and fosters a parent-child relationship between the child and the non-legal parent, counsel may argue that the legal parent has waived his or her right to object based on familial privacy.

- *Wakeman v. Dixon*, 921 So.2d 669, 669 (Fla. 1st DCA 2006) held that an agreement between a lesbian couple providing for visitation by the non-biological

¹⁵ Additionally, anyone may petition to become the guardian of a child when the legal parents are incapacitated. F.S.A. §§ 744.3021, 744.331 (guardianship of a minor when the parents are incapacitated); see also F.S.A. § 744.3046 (nomination of a preneed guardian by the legal parents).

mother was unenforceable. Other Florida courts, however, have recognized that parental rights, like constitutional rights, can be waived. See *In re N.Z.B.*, 779 So.2d 508 (Fla. 2d DCA 2000) (holding that the father could withdraw his consent to the grandparents' custody because he had not waived his constitutional rights to direct the care and custody of the children) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *Harrier v. Warmke*, 876 So.2d 603 (Fla. 2d DCA 2004) ("Thus, the custody agreement, which did not include a waiver of parental rights, was not by itself effective to give the [grandparents] rights to the minor child superior to those of the Mother.").

- The non-legal parent may also argue that she also has a constitutionally protected interest in her parental relationship with the child. In *Berhow v. Crow*, 423 So.2d 371, 372-73 (Fla. 1st DCA 1982), for instance, the First District held that foster parents who had raised a child from infancy at the mother's request and with the father's acquiescence had standing to challenge an adoption by the child's maternal grandparents based on their "liberty interest in preserving their familial relationship" with the child.¹⁶ "The exact *type* of relationship is unessential to a determination of whether a fundamental liberty interest in a parent-child relationship was demonstrated. Rather, it is the nature of the relationship that determines whether one's interests are 'sufficient.'" *Id.* at 373-374.

B. When Necessary To Protect a Child from Detriment.

The Florida Supreme Court has held that, because legal parents have a constitutionally protected right to custody of their children, a court may grant custody or visitation to a grandparent or other third party only when necessary to prevent harm to a child.

- In *Von Eiff v. Azicri*, 720 So.2d 510, 511 (Fla. 1998) the Court held that a statute allowing a grandparent to petition for visitation after the death of a parent violated parents' fundamental privacy rights. The Court noted that in order to meet strict scrutiny, the state would have to act to prevent "demonstrable harm to a child." *Id.* at 516; see also *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996); *Richardson v. Richardson*, 766 So.2d 1036, 1038-39 (Fla. 2000); *Sinclair v. Sinclair*, 804 So.2d 589, 591 (Fla. 2d DCA 2002).

¹⁶ The court also vacated the adoption, holding that it was an abuse of discretion not to require the foster parents' consent to the adoption because the foster parents and the child functioned as a family, even though Florida statute only provided that a court "may require consent of any person lawfully entitled to the custody of a minor." *Id.* at 374 (citing F.S.A. § 63.062(2)(a)).

One response to these cases, as noted above, is to argue that a legal parent who has expressly agreed to share parenting rights with a second person has waived his or her constitutional right to exclusive custody and control of the child. A second response is to argue that severing an established parent-child bond is detrimental to the child, regardless of whether or not the parent is a legal parent. From the child's perspective, the loss of a parental bond is damaging, and the courts properly can intervene to protect the child from harm by awarding custody or visitation to a person who has functioned as the child's parent.

5. SPECIFIC CONCERNS FOR TRANSGENDER PARENTS.

Some transgender persons have biological children prior to undergoing sex-reassignment and living as the other gender. In these cases, the transgender person is a legal parent and should continue to have all the legal rights and responsibilities of legal parentage.

In other cases, however, a transgender person may become a parent *after* undergoing sex-reassignment by entering into a marriage and having children through adoption or assisted reproduction. In these cases, the person's parental status may be challenged if the validity of the marriage is challenged.

The only appellate decision in Florida addressing transgender people and marriage is *Kantaras v. Kantaras*, 884 So.2d 155, 161 (Fla. 2d DCA 2004). In that case, the Second District held that because the Florida Legislature has not passed a law permitting transgender people to obtain new birth certificates, courts do not have the authority to recognize a transgender person's post-transition gender for purposes of marriage. The parties in *Kantaras* were a woman and a transsexual man who married and had two children – one through adoption and one through assisted reproduction. After declaring the marriage invalid, the Second District remanded for a re-determination of custody since the trial court had based its custody determination in part on a finding that the marriage was valid. The case settled before custody was decided on remand. Nonetheless, as a general rule, under longstanding Florida law, even if a marriage turns out to be invalid, a finding of invalidity does not affect the parent-child relationship. *See, e.g., Jones v. Jones*, 119 Fla. 824 (1935).

Attorneys representing transgender clients in contested divorce and custody cases in which the other spouse challenges the validity of the marriage should *not* concede that this deprives the transgender parent of his or her parental rights. Regardless of whether the marriage is found to be valid, any children of the marriage should not have their existing parent-child bonds destabilized or unsettled, nor should they lose the protection of having two legal parents responsible for their care and support.

Case Appendix

LEGAL PARENTS WHO ARE LGBT

- In *Maradie v. Maradie*, 680 So.2d 538, 541-42 (Fla. 1st DCA 1996), the First District held that the trial court erred by purporting to take judicial notice that a “homosexual environment is not a traditional home environment, and can adversely affect a child” because there were no sources before the court to establish this “fact” and this statement was not a “‘fact’ that [was] ‘generally known’ within the meaning of the [judicial notice] statute.” In considering “moral fitness,” the Court explained, “the court should focus on whether the parent’s behavior has a direct impact on the welfare of the child,” and a connection between the actions of the parent and the harm must be supported by “proof of the likelihood of prospective harm” because the “mere possibility” of harm is insufficient.” *Id.* at 542-43 (citing *Dinkel v. Dinkel*, 322 So.2d 22, 23 (Fla. 1975)).
- In *Packard v. Packard*, 697 So.2d 1292, 1293 (Fla. 1st DCA 1997), the First District reversed a trial court’s grant of custody to the father where the trial court’s sole reasoning was that the father would “provide a more traditional family environment for the children.” The court remanded for clarification and noted that in considering the mother’s sexual orientation, the court’s “primary consideration should be on what conduct is involved and whether the conduct has had or is reasonably likely to have an adverse impact on the child.” *Id.*
- In *Jacoby v. Jacoby*, 763 So.2d 410, 413 (Fla. 2d DCA 2000), the Second District reversed the trial court’s grant of residential custody to the father because the trial court had improperly relied on the possibility of third parties’ bias against the mother’s sexual orientation. The Second District adopted the holding in *Maradie* that sexual orientation is relevant only if the parent’s conduct has a direct effect on the children. *Id.* The court found the trial court’s statements concerning the negative impact of the mother’s sexual orientation on the children to be “conclusory or unsupported by the evidence,” concluding that the trial court had “penalized the mother for her sexual orientation without evidence that it harmed the children.”¹ *Id.*

¹ In a later case, *Sinclair v. Sinclair*, 804 So.2d 589, 591 (Fla. 2d DCA 2002), the Second District upheld a grant of custody to the paternal grandmother over the mother, who was in a same-sex relationship. As noted by the concurrence, however, the court had “carefully explored” the possibility that her sexual orientation had been the basis of the trial court’s decision and concluded that it was not. *Id.* at 594 (Whatley, J., concurring).

- *Kantaras v. Kantaras*, 884 So.2d 155, 161 (Fla. 2d DCA 2004), did not hold or suggest that the father’s transgender status should be viewed as a negative factor. Rather, the court remanded for a re-determination of custody in light of the appellate court’s holding that the marriage between the father and the biological mother was invalid.
- In *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court struck down statutes criminalizing same-sex intimacy and held that individuals have a constitutionally protected privacy right to enter into an intimate relationship with a person of the same gender. Although Florida courts have not directly addressed this issue, it is likely that *Lawrence* would prevent a court from restricting a parent’s custody or visitation based solely on the parent’s involvement in a constitutionally protected relationship with a person of the same gender,² just as Florida courts prevent courts from restricting custody or visitation based on a parent’s religion. See *Rogers v. Rogers*, 490 So.2d 1017, 1018-19 (Fla. 1st DCA 1986) (holding that while religion may be considered as a factor in determining custody, the court cannot condition a grant of custody on curtailment of the parent’s religious activities or beliefs).

² This is different from the issue presented in *Lofton v. Sect. of the Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), which held that *Lawrence* did not require invalidation of Florida’s ban on adoption by gay people because adoption is wholly statutory, and there is no fundamental right to adopt. In contrast, a parent’s right to care and custody of a child is a fundamental right that cannot be abridged absent a compelling reason, such as direct harm to a child.

NON-LEGAL LGBT PARENTS

Florida Supreme Court:

- *Pittman v. Pittman*, 14 So.2d 671, 671 (Fla. 1943) reversed a grant of custody to the father, who planned to place the child in the care of a paternal aunt, and instead granted custody to the maternal grandparents, who had raised the child from infancy. The father supported granting custody to the paternal aunt while the mother petitioned for the maternal grandparents to have custody. *Id.* The appellate court noted that it seemed from the record that neither parent was a “fit guardian,” but there is no indication that the trial court found either parent unfit. *Id.* at 672.
- In *Browning v. Favreau*, 60 So.2d 186, 186 (Fla. 1952), the Court reversed the trial court’s grant of custody to the father where the stepfather had petitioned to adopt the child after the mother’s death.³ The Court reasoned that in light of the record and the fact that the daughter resided with the stepfather and her mother prior to the mother’s death, the trial court’s order granting custody to the father was incorrect. *Id.*
- *Cone v. Cone*, 62 So.2d 907, 909-10 (Fla. 1953), *overruled in part by Richardson v. Richardson*, 766 So.2d 1036, 1043, fn. 9 (Fla. 2000) reversed the trial court’s award of custody to the father where the children were in the actual custody of the grandmother because it was in the children’s best interests to remain with the grandmother. *Richardson* explicitly overruled *Cone* to the extent that it granted custody of the minor children to the grandmother without a showing that awarding custody to the parent would be detrimental to the child.
- In *Shepard v. Shepard*, 87 So.2d 807, 808 (Fla. 1956), the Court upheld a grant of custody to the paternal grandparents where the children were flourishing in the grandparents’ care and the mother and father were “unstable” and “not so dependable.”
- *Grant v. Corbitt*, 95 So.2d 25 (Fla. 1957) affirmed an award of permanent custody to the paternal aunt over the mother where the 15-year-old child had run away from the mother’s home to live with the aunt.

³ However, the court reversed without prejudice to the father’s right to assert defenses related to the adoption.

- *State ex rel. Sparks v. Reeves*, 97 So.2d 18, 21 (Fla. 1957) upheld an order allowing the children to remain in the custody of the grandparents until the father could demonstrate he was adequately prepared to care for them.
- *Justice v. Van Eepoel*, 132 So.2d 407, 408-09 (Fla. 1961) upheld the trial court’s grant of custody to the aunt and uncle over the mother where the children, aged 12 and 15, were living with the aunt and uncle and expressed a strong desire to stay with the aunt and uncle. The Court noted, “in addition to the parental right, a chancellor must take into consideration the natural ties and affections formed by children out of their past relationships” as well as other considerations affecting the welfare of the children. *Id.* at 409.

Appellate Courts:

First District

- In *Berhow v. Crow*, 423 So.2d 371, 372-73 (Fla. 1st DCA 1982), the First District held that foster parents who had raised a child from infancy at the mother’s request and with the father’s acquiescence had standing to challenge an adoption by the child’s maternal grandparents based on their “liberty interest in preserving their familial relationship” with the child.⁴ “The exact *type* of relationship is unessential to a determination of whether a fundamental liberty interest in a parent-child relationship was demonstrated. Rather, it is the nature of the relationship that determines whether one’s interests are ‘sufficient.’” *Id.* at 373-374.
- The First District upheld a grant of custody to the grandmother, who had raised the child from infancy in *Brannan v. Brannan*, 284 So.2d 701, 703 (Fla. 1st DCA 1973) (citing *Cone v. Cone*, 62 So.2d 907 (Fla. 1953)).
- *Music v. Rachford*, 654 So.2d 1234, 1235 (Fla. 1st DCA 1995) rejected the argument of the former same-sex partner of the biological mother that because she was a *de facto* parent, she had the same standing as a parent.
- *Wakeman v. Dixon*, 921 So.2d 669, 669 (Fla. 1st DCA 2006) held that an agreement between a lesbian couple providing for visitation by the non-biological mother was unenforceable. Other Florida courts, however, have recognized that

⁴ The court also vacated the adoption, holding that it was an abuse of discretion not to require the foster parents’ consent to the adoption because the foster parents and the child functioned as a family, even though Florida statute only provided that a court “may require consent of any person lawfully entitled to the custody of a minor.” *Id.* at 374 (citing F.S.A. § 63.062(2)(a)).

parental rights, like constitutional rights, can be waived. See *In re N.Z.B.*, 779 So.2d 508 (Fla. 2d DCA 2000) (holding that the father could withdraw his consent to the grandparents' custody because he had not waived his constitutional rights to direct the care and custody of the children) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *Harrier v. Warmke*, 876 So.2d 603 (Fla. 2d DCA 2004) ("Thus, the custody agreement, which did not include a waiver of parental rights, was not by itself effective to give the [grandparents] rights to the minor child superior to those of the Mother."). Moreover, *Troxel v. Granville*, 530 U.S. 57 (2000) does not preclude waiver of parental rights by agreement. *Troxel* did not require a finding that parents are unfit before custody and visitation rights may be granted to non-legal parents, but rather required "special factors" to be present. *Id.* at 68-69.

Second District

- *Marsh v. Marsh*, 105 So.2d 507, 508 (Fla. 2d DCA 1958) upheld the trial court's grant of custody to the paternal aunt and uncle over the mother's objections, applying the best interests of the child standard. The paternal aunt and uncle already had actual custody, the father was deceased, and the mother, who was mentally ill, had petitioned for a maternal aunt and uncle to have custody. *Id.*
- In *Eades v. Dorio*, 113 So.2d 232 (Fla. 2d DCA 1959) the court affirmed an award of custody to the grandmother over the father.
- *DeGroot v. Fuller*, 210 So.2d 244, 246 (Fla. 2d DCA 1968) relied on *Cone v. Cone*, 62 So.2d 907 (Fla. 1953) to uphold a grant of custody to an aunt and uncle over the father.
- *Fischer v. Fischer*, 544 So.2d 1079, 1079 (Fla. 2d DCA 1989) noted that cases from the Second District and other Districts had considered the question of whether a court can award visitation to a non-legal parent "under somewhat extraordinary circumstances."
- *Sinclair v. Sinclair*, 804 So.2d 589, 591 (Fla. 2d DCA 2002) upheld a grant of custody to the grandmother rather than to the legal mother, based in part on the trial court's finding that the grandmother had been the children's caretaker for several years and that a change in custody would be detrimental.⁵

⁵ Although the mother in *Sinclair* was in a same-sex relationship, the holding did not rely on this factor (and the concurrence expressly noted that the mother's sexual orientation was not a factor). Rather, *Sinclair* stands for the proposition that where a person has assumed parental responsibility for a child for a period of time, the court may take that factor into account in determining whether granting custody to the parent would be detrimental.

- *Kantaras v. Kantaras*, 884 So.2d 155, 161 (Fla. 2d DCA 2004). In that case, the Second District held that because the Florida Legislature has not passed a law permitting transgender people to obtain new birth certificates, courts do not have the authority to recognize a transgender person's post-transition gender for purposes of marriage. The parties in *Kantaras* were a woman and a transsexual man who married and had two children – one through adoption and one through assisted reproduction. After declaring the marriage invalid, the Second District remanded for a re-determination of custody since the trial court had based its custody determination in part on a finding that the marriage was valid. The case settled before custody was decided on remand. Nonetheless, as a general rule, under longstanding Florida law even if a marriage turns out to be invalid, a finding of invalidity does not affect the parent-child relationship. See, e.g., *Jones v. Jones*, 119 Fla. 824 (1935).

Third District

- The Third District upheld a grant of shared custody between the mother and the maternal grandparents over the father's objection in *Forman v. Forman*, 315 So.2d 9, 9-10 (Fla. 3d DCA 1975).
- *Ward v. Hysell*, 777 So.2d 1206, 1206-07 (Fla. 3d DCA 2001) held that the trial court had jurisdiction to award custody to the grandparents pursuant to an agreement between the father and the grandparents. The court, however, affirmed the trial court's grant of custody to the grandparents without prejudice to the father to determine the validity of the agreement.

Fourth District

- *Heffernan v. Goldman*, 256 So.2d 522, 523 (Fla. 4th DCA 1971) affirmed a grant of custody to the stepmother over the mother after the father's death where the children had resided with the father and stepmother for 10 years, noting "[i]t is not contrary to law to award custody of minor children to one other than the natural parent when to do so would be for the best interest and welfare of the children."
- *Wills v. Wills*, 399 So.2d 1130, 1131 (Fla. 4th DCA 1981) affirmed a temporary order of visitation by a former stepmother found to be a psychological parent because it was in the child's best interest and no "substantial interest" would be adversely affected.
- *Golstein v. Golstein*, 442 So.2d 330, 330 (Fla. 4th DCA 1983) held that the court had jurisdiction to consider the former stepfather's petition for custody.

- *Simmons v. Pinkney*, 587 So.2d 522 (Fla. 4th DCA 1991) upheld an award of custody to a child's foster parent based in part on a determination that placing custody with the legal father would be detrimental because the child had lived with the foster mother for almost thirteen years and had "developed a strong emotional and social bond" to her.
- In *Kazmierazak v. Query*, 736 So.2d 106, 110 (Fla. 4th DCA 1999), the court noted that the Fourth District had previously recognized psychological or *de facto* parents but held they do not have equivalent rights to parents. The court also rejected a lesbian non-biological parent's argument that she was *in loco parentis*, holding that *in loco parentis* applies only within the context of a marriage. *Id.* at 109-110. *Kazmierazak* cast doubt on the earlier case *Wills v. Wills*, 399 So.2d 1130 (Fla. 4th DCA 1981), which allowed temporary visitation by a former stepmother found to be a psychological parent because it was in the child's best interest and no "substantial interest" would be adversely affected.

Fifth District

- The Fifth District applied the best interests of the child standard and upheld a grant of custody to the stepmother over the biological father where the father had been absent, physically abusive, and frequently intoxicated, and the child had believed the stepmother to be his natural mother for the first 10 years of life. *Gorman v. Gorman*, 400 So.2d 75, 78 (Fla. 5th DCA 1981) ("[T]his case demonstrates that in a given case a child can be better loved and cared for by a 'stranger' than by its own fit natural parent.")
- In *Swain v. Swain*, 567 So.2d 1058, 1058 (Fla. 5th DCA 1990), the court reversed an order requiring a former stepfather to pay child support, noting that "[t]here is no such thing recognized in law" as a duty to support based on "psychological father" status. It is unclear whether the court rejected the entire concept of psychological parent status or just the duty to support based on this status.
- In *Taylor v. Kennedy*, 649 So.2d 270, 271-72 (Fla. 5th DCA 1995), the Fifth District issued a writ of prohibition against enforcement of an agreement between the mother and stepfather granting him visitation rights and requiring him to provide financial support.
- The Fifth District rejected an argument by the former same-sex partner of the biological mother that she had standing to seek visitation under chapter 39 (dependency) on the grounds that the mother had abused or neglected the child by cutting off all contact between her and the child. *D.E. v. R.D.B.*, 929 So.2d

1164, 1164 (Fla. 5th DCA 2006) (“A parent’s decision to deprive a child of contact with someone who has no legal custody or visitation rights . . . is an inadequate ground upon which to base an adjudication of dependency.”).

Trial Court:

- In *In re Pearlman*, 15 Fam. L. Rep. 1355 (Fla. Cir. Ct. 1989) (Unpublished), Judge Robert C. Scott in Broward county vacated an adoption by the maternal grandparents and granted custody to the former same-sex partner of the child’s deceased mother. The child had been conceived by artificial insemination during the women’s relationship. The grandparents sought and were awarded custody after the biological mother’s death and later adopted the child without notice to the non-biological mother. The trial court found that the non-biological mother was the child’s psychological and *de facto* parent and that her liberty interest was violated when the child was adopted without her consent. The court also found that even if the adoption were not vacated, it would be detrimental to the child’s “physical and emotional well being” for her to remain with the grandparents because the child had developed behavioral problems due to her separation from the non-biological mother.