



NATIONAL CENTER FOR LESBIAN RIGHTS

Legal Recognition of Lesbian, Gay, Bisexual, and Transgender (LGBT) Parents in Texas

About NCLR

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

Disclaimer

This document provides a summary and discussion of relevant Texas law for attorneys who are representing LGBT parents in suits affecting the parent-child relationship, as well as for attorneys who are helping LGBT parents and their children protect their relationships. Our goal is to familiarize you with the unique legal issues that may arise for LGBT parents and to increase your understanding of current Texas 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 most common situations in which LGBT parents face actions for managing or possessory conservatorship (custody or visitation),¹ as well as affirmative steps that LGBT parents can take to protect their legal relationship with their children. First, a person who enters into a different-sex marriage and has children may later divorce after discovering that he or she is lesbian, gay, bisexual, or transgender. This situation is still quite common, and many LGBT people have children as a result of prior different-sex marriages. In such cases, the heterosexual or non-transgender 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. To ensure that trial courts 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

¹ For simplicity, this document refers to managing conservatorship as “custody” and to possessory conservatorship as “visitation.”

same-sex relationship involving children frequently raises unique legal issues that are not present in most custody disputes between heterosexual parents.

Finally, there are steps that non-biological and non-adoptive parents can take to protect their legal relationship to their children. Some counties in Texas have allowed same-sex couples to get a second parent adoption. This is a process by which a legal parent's partner can adopt the child without affecting the parental rights of the existing parent. An adoption is the best way to protect the rights of a non-biological parent. If an adoption is not possible, some parents may be able to get a joint custody order even if they are not legally recognized as parents. There are also private documents that can provide some protections for non-biological and non-adoptive parents, including medical care consent forms, wills, and parenting agreements.

NCLR can provide information and resources on issues related to sexual orientation and gender identity to attorneys defending the rights of LGBT people. If you have a case that involves issues affecting LGBT people, please do not hesitate to contact us for assistance.

LEGAL PARENTS WHO ARE LGBT SEEKING CUSTODY/VISITATION

A parent cannot be denied parental rights or managing or possessory conservatorship (custody or visitation) merely because he or she is lesbian, gay, bisexual, or transgender. Custody determinations are to be based on the best interests of the child, and there is a rebuttable presumption that joint custody between both parents is in the child's best interest. A court cannot deny custody to a parent merely because the court disapproves of the parent's sexual orientation or gender identity. *See, e.g., Allen v. Allen*, 647 S.W.2d 356 (Tex. App.-El Paso 1982) (holding that custody determinations should never be made in order to punish a parent, only to serve the best interests of the child).

It is important that you 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. 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.

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 and showing that a person's transgender status is not relevant to parental ability. 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.

Statutes:

Texas Family Code §§ 153.002, 153.134 provide that custody determinations are to be based on the best interests of the child.

Texas Family Code § 153.131(b): "It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child."

Cases:

Z.B.P. v. J.N.P., 109 S.W.3d 772 (Tex. App.-Fort Worth 2003).

A divorce decree granted the mother and father joint custody and required the parents and children to remain in Tarrant County. A year later, the father agreed to let the mother move with the children to another county temporarily, so long as she did not live with another woman and the children remained in the same schools. After the mother did not follow their informal agreement, the father sought primary residential custody. The trial court modified custody because the mother had violated their agreement, the long commute to school was harmful to the children, and the mother had caused the children to take on a parental role by projecting her anxieties onto them. The Court of Appeals upheld the modification because the mother's permanent move out of the county violated their agreement, and there was enough evidence to

support a finding that living with the father was in the children's best interests. This case underscores that parents should not enter into agreements saying they will not live with a same-sex partner, as courts may enforce such agreements even though a court could not impose such a requirement absent a showing of harm to the child.

Interest of McElheney, 705 S.W.2d 161 (Tex. App.-Texarkana 1985).

The mother and father appealed the termination of their parental rights. The mother argued that the trial court had improperly allowed testimony about her sexual orientation. The court noted that parental rights may not be terminated merely because a parent is gay or lesbian. In this specific case, however, the court held that the mother had failed to preserve an objection to testimony about her sexual orientation.

Jenkins v. Jenkins, 2001 WL 507221 (Tex. App.-Dallas 2001) (not designated for publication).

The jury verdict named the mother as the sole custodian and granted limited visitation to the gay father. The trial court's final order significantly expanded the father's visitation. The appellate court reversed the trial court's expansion of the father's visitation, holding that the trial court had abused its discretion because there was no evidence that visitation beyond what the jury had ordered would be in the children's best interests. The appellate court noted that the 56 days of summer visitation ordered by the trial court was a very long period for such young children to be separated from their primary caretaker, that the father had failed to seek medical attention when one child had broken her arm, that he had allowed the children to play on a dangerous third floor balcony, and that the only expert witness to have interviewed the family members had concluded that the father had not been protective of the children and had placed his interests above theirs.

NON-LEGAL² PARENTS WHO ARE LGBT SEEKING CUSTODY/VISITATION

Non-legal parents may seek possessory or managing conservatorship (visitation or custody) if they have had “actual care, control, and possession” of the child for a period of at least six months ending not more than 90 days before the filing date. The statute does not define “care, control, and possession,” but courts have held that living with the child is not required. The six month period does not have to be continuous.

A non-legal parent seeking custody must also show that granting custody only to the legal parent would “significantly impair the child’s physical health or emotional development.” This showing is not necessary if the non-legal parent is only seeking visitation.

Because a suit must be filed within 90 days after the period of “care, control, and possession” has ended, it is vital that non-legal parents wishing to seek custody or visitation to file a Suit Affecting the Parent-Child Relationship as soon as possible.

Statutes:

Tex. Fam. Code § 102.003:³

- A suit affecting the parent-child relationship can be filed by “a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.” Tex. Fam. Code § 102.003(a)(9).
- A suit affecting the parent-child relationship can be filed by “a person with whom the child and the child’s guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child’s guardian, managing conservator, or parent is deceased at the time of the filing of the petition.” Tex. Fam. Code § 102.003(a)(11).
- “In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child’s principal residence during the relevant time preceding the date of commencement of the suit.” Tex. Fam. Code § 102.003(b).

Tex. Fam. Code § 153.131(a): A non-legal parent may only be granted custody if the court finds that granting sole custody to the legal parent (or joint custody to two legal parents) “would not be in the best interest of the child because the appointment would significantly impair the child’s physical health or emotional development.”

² This document uses the term “non-legal parent” to mean a person who functions as a child’s parent but who is not legally recognized as a parent.

³ Note that the timing requirements in Texas Family Code section 102.003 were amended in 1999, and many cases interpreting earlier versions of the statute are no longer relevant. Most notably, the statute now explicitly allows the six month period to be non-consecutive and requires the suit to be filed within 90 days.

Tex. Fam. Code § 153.0072: provides that parties may agree to use collaborative law procedures in suits affecting the parent-child relationship.

Cases:

Herbert v. Kokel, 2006 WL 2309581 (Tex. App.-Austin 2006).

After the non-biological father and the mother separated, he visited the child every day and provided care for the child during the workday for over a year. The non-biological father petitioned for visitation immediately after the mother stopped allowing him to visit the child. The court noted that his daily visits qualified as “actual care, control, and possession” under Family Code section 102.003(a)(9). Therefore, the non-biological father had standing because he had “actual care, control, and custody” for at least six months ending less than 90 days before he sought visitation.

Rupert v. McCurdy, 141 S.W. 3d 334 (Tex. App.-Dallas 2004).

The non-biological father lived with the mother and the child for three years. After they broke up, the non-biological father visited the child occasionally for five months before seeking visitation. The court held that “occasional” visits were not enough to establish “actual care, control, and possession” required for standing under Family Code section 102.003(a)(9). Because the non-biological father had not lived with the child for five months before filing a petition for visitation, it had been more than 90 days since he had “actual care, control, and possession” of the child. Therefore, the court held that he did not have standing to seek custody or visitation.

Coons-Anderson v. Anderson, 104 S.W.3d 630 (Tex. App.-Dallas 2003).

A same-sex couple in Florida had a child together using alternative insemination. After the relationship ended, the non-biological mother had “periodic visitation” with the child for a year. The court held that the non-biological mother’s visits with the child did not qualify as “actual care, control, and possession” of the child as required under Texas Family Code section 102.003(a)(9) to establish standing. Therefore, it had been a year since she had care, control, and possession when she filed the suit seeking visitation. The court also held that although a person *in loco parentis* has a common law right to seek visitation, *in loco parentis* is temporary, and the non-biological mother was not *in loco parentis* at the time the suit was filed.

Doncer v. Dickerson, 81 S.W.3d 349 (Tex. App.-El Paso 2002).

The father and stepmother had shared custody approximately 50/50 with the mother for two years before the father’s death. After the father’s death, the stepmother sought visitation. When determining whether a non-legal parent has standing to seek custody or visitation, Family Code section 102.003(b) requires the court to consider the child’s “principal residence.” The court held that a home where the child lived slightly less than half of the time can be his or her “principal residence.” Therefore, the stepmother could seek visitation because her home had been the child’s principal residence.

Texas Dept. of Prot. & Reg. Servs. v. Sherry, 46 S.W. 3d 857 (Tex. 2001).

The biological mother’s former boyfriend sought custody after the mother died. The boyfriend had lived with the mother and the child for three years, but the child had been in temporary foster care for four months before the boyfriend filed suit. The court held that the requirement that the petitioner “ha[d] resided” with the child and the parent meant actually living together. Therefore, the boyfriend did not have standing because by the time he filed for custody, it had been four months since he had actually lived with the child.

PROTECTING PARENTAL RELATIONSHIPS

1. Adoptions

An adoption is the safest and most secure method of protecting the legal relationship between a child and a non-biological parent. An adoption ensures that the parent will be recognized as a legal parent with all the rights and responsibilities that flow from parentage, and a final adoption order may not be directly or collaterally attacked in Texas or any other state. The other protections explained below provide only some of the rights of legal parentage.

The same-sex partner of a biological or adoptive parent can establish legal parentage by getting a second parent adoption. This is a process by which a legal parent's partner can adopt the child without affecting the parental rights of the existing parent. Although there is no Texas appellate authority directly deciding this issue, trial courts in many Texas counties⁴ have found that these adoptions are authorized by Texas adoption statutes. Many other states with adoption statutes similar to those in Texas have held that second parent adoptions are permissible.

Because some courts may not be familiar with this process, it is important to consult with an attorney who has experience with these adoptions if at all possible. If you are unable to find such an attorney, please contact NCLR.

Also, a parent who adopts a child other than the child of his or her federally-recognized spouse may be entitled to a dollar-for-dollar federal tax credit for all of the costs associated with the adoption, including attorney's fees. This credit allows an adopting parent to subtract the costs of an adoption directly from the amount of tax that the parent owes, up to a dollar limit set annually.

Statutes:

Tex. Fam. Code § 162.001 sets out the requirements for adoption.

Tex. Fam. Code § 162.012(a): provides that “the validity of an adoption order is not subject to attack after six months after the date the order was signed.”

Cases:

Goodson v. Castellanos, 214 S.W. 3d 741 (Tex. App.-Austin 2007).

A female same-sex couple decided to adopt a child together. One of them adopted a child from Kazakhstan, and the other partner later adopted in Texas. The original adoptive parent challenged the validity of the second adoption a year later after the couple broke up. The court held that the adoption was not void because the trial court had subject matter jurisdiction and Texas Family Code section 162.012 prohibits such collateral attacks on adoptions.

⁴ Counties that have granted second parent adoptions include Bexar, Travis, Dallas, and Galveston. An adoption petition does not necessarily need to be brought in the county where the child resides if all parties agree. Tex. Fam. Code § 103.001(b); *In Interest of S.D.*, 980 S.W.2d 758, 759 (Tex.App.-San Antonio 1998); *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 200 (Tex.App.-Texarkana 2000).

Hobbs v. Van Stavern, 2006 WL 3095439 (Tex. App.-Houston 2006).

The court held that the biological mother could not collaterally attack her same-sex partner's adoption of the child three years later because Texas statute prohibits such collateral attacks on adoptions.

2. Joint Custody Order (Suit Affecting the Parent-Child Relationship)

A same-sex couple can seek a joint custody order to protect the rights of the non-legal parent. An order giving a non-legal parent custody gives him or her standing to seek custody or visitation later if the couple breaks up, or if the legal parent dies or is unable to care for the child. The non-legal parent can petition for joint custody by filing a Suit Affecting the Parent-Child Relationship if he or she meets the standing requirements in Texas Family Code § 102.003(a).⁵

It is important to note that a custody order does not grant all the rights and responsibilities of parentage. For instance, the child may not be entitled to government benefits such as Social Security Survivor's insurance. If possible, an adoption is the best way to protect the relationship between a child and his or her non-legal parent.

Case:

In re Smith, --- S.W.3d ----, No. 09-08-268 CV, 2008 WL 3522346 (Tex. App.-Beaumont 2008) [not yet released for publication].

A same-sex couple who had twins through alternative insemination jointly petitioned to be appointed managing conservators when the children were 4 months old. The biological mother later challenged the order appointing them as joint managing conservators. The appellate court held that the non-biological mother did not have standing to bring the original petition because she had not yet had care, custody, and control of the children for at least six months as required under Texas Family Code § 102.003(a)(9). The court further held that the fact that the biological mother was a joint petitioner was not sufficient, and the non-biological mother was required to separately establish her own standing.

3. Other Protections

There are other steps that LGBT parents can take to protect their family relationships. These steps are especially important for same-sex couples who have not been able to obtain a second parent adoption.

Parenting Agreement. A co-parenting agreement cannot create legal parentage on its own, even if that is what the agreement says. Courts in some states have found that these kinds of agreements can be enforced under some circumstances, although there are no published cases in Texas addressing this question. Talking through these issues carefully beforehand can help minimize disputes and disagreements in the future. Also, a court could look at these agreements of evidence of the intent to parent together. You may want to include information with regard to parenting, child support, plans for a second-parent adoption, and what they will do about custody and visitation in case the relationship were to end.

⁵ To protect the order from a later attack based on subject matter jurisdiction, it is important that the non-legal parent meet the standing requirements of this section at the time the petition is filed.

Authorization of Consent to Medical Treatment of Minor. A legal parent, guardian, or managing conservator can authorize another adult to consent to medical care for their child. When both parents in a same-sex couple are not legally recognized as parents, the legal parent can authorize the other parent to consent to care for the child. This form can be important to ensure that the non-legal parent can consent to emergency medical treatment for the child if the legal parent is not available. The couple should give a copy of the authorization to their child's doctor and carry a copy with them at all times. For lesbian couples who are about to have children, it is very important to complete this document before the birth mother goes into the hospital. While this form may not be legally binding, hospitals will often honor the authorization.

Nomination of Guardian. If there is only one legal parent, he or she can nominate her same-sex partner as a guardian in a last will and testament or in a separate declaration. Tex. Probate Code § 676. A nomination of a guardian assigns the care and custody of a child to another responsible adult if the child's legal parent dies or becomes physically or psychologically unable to care for the child. Nominated guardians are still subject to a best interests review by a court, but most courts will give great deference to a clear nomination of guardianship in cases where there is no other legally recognized parent.

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 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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