
LESBIAN MOTHER SURVIVORS OF DOMESTIC ABUSE: A PLEA FOR LEGAL CLARITY

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I. INTRODUCTION

“I’ll take the kids and you’ll never see them again.” This threat is a parent’s worst nightmare. And this kind of threat is all too common in parenting relationships riddled with domestic abuse.¹ So, what would keep someone suffering under such duress from reporting these threats to the police? Uncertainty. Not just any uncertainty, but the type of insecurity that comes with being a lesbian in a world where the norm is heterosexuality.² The type of uncertainty that comes with knowing that you may be able to argue that you have rights to your child in court, but that you could also lose the most important people in your life—your children.³

Intimate partner violence in lesbian relationships is not rare,⁴ but studies regarding the relationship between such violence in the context of lesbian families are sparse.⁵ While same sex marriage lawsuits are pending in every state,⁶ it is important to remember that domestic abuse hap-

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1. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 241 (1999).

2. See, e.g., Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 617 (2001) (defining the term “heterosexism” as an “overt or tacit bias against non-heterosexuals based on . . . the omnipresence of heterosexuality”).

3. See *infra* Part III.

4. Joan C. McClennen, *Domestic Violence Between Same-Gender Partners: Recent Findings and Future Research*, 20 J. INTERPERSONAL VIOLENCE 149, 150 (2005) (noting that “[f]indings from existing research reveal many similarities between same-gender and opposite-gender [intimate partner violence]” including rates of violence); see also Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 287–88 (2006).

5. Ramona F. Oswald et al., *Lesbian Mothers’ Counseling Experiences in the Context of Intimate Partner Violence*, 34 PSYCHOL. WOMEN Q. 286, 286 (2010).

6. Rex Wockner, *Where Is Same Sex Marriage Legal?*, WOCKNER (Sept. 15, 2014), www.wockner.blogspot.com (“In the remaining 17 states that lack marriage equality, lawsuits have been filed but have not yet seen rulings.”).

pens in gay and lesbian marriages, too.⁷ Without marital rights, the rights of same sex parents are less clear.⁸ In this realm of family, without clear, legally defined rights, lies a method for torture no mother should have to endure: the threat that one's legal rights will be terminated.

In that vein, lesbian mothers who bore children within an unhealthy lesbian relationship suffer silently, fearing that reporting the abuse will only strengthen her abuser's resolve to terminate her parental rights.⁹ Or, where the survivor bore the child in a previous heterosexual relationship and her parental rights are clear through a biological relationship to her child, the lesbian parent may still fear that the heterosexism inherent in our legal system will limit her access to her child in favor of the child's father.¹⁰

Threats involving children need not occur in either type of relationship. If the law clearly defined the rights of co-lesbian mothers through the parental presumption gained through marriage, survivors would know—with certainty—whether the threats of the lesbian parent abuser were empty ones that carry no legal weight, or, more likely, how to appropriately navigate separation from the abuser under the law. Additionally, as same sex couples gain legal rights, the prevailing norms of heterosexism in society will change—hopefully encouraging more lesbian parent survivors with children from previous heterosexual relationships to speak up about the abuse at home. This Article provides one more reason same sex couples need clear marital rights under the law—to prevent domestic abuse.

Accordingly, this Article will first address the common issue of domestic abuse in same sex couples, including same sex lesbian couples with children. Next, this Article will demonstrate how and why the relationship between same sex parents, particularly lesbian parents, is unclear in the absence of a marital relationship. Finally, this Article will argue that same sex marriage rights are crucial to protecting both mothers and children in lesbian relationships from domestic abuse, as a clear presumption of parental rights will both fight prevailing heterosexist legal norms and provide a path to separation that survivors of abuse so desperately need.

II. SAME SEX INTIMATE PARTNER VIOLENCE

Domestic abuse is not a heterosexual phenomenon; partners in same sex relationships also experience abuse.¹¹ It is harder to gather the exact data on the frequency of intimate partner violence in same sex

7. McClennen, *supra* note 4, at 150.

8. *See infra* Part III.

9. Goodmark, *supra* note 1, at 241, 253 (noting that “[b]atterers use children to hurt their former partners” and that “[f]athers who batter are likely to use legal action to threaten or harass their former partners [and] are twice as likely to seek sole physical custody of their children as non-violent fathers”).

10. *See infra* Part III.A.

11. McClennen, *supra* note 4, at 150.

couples, as compared to heterosexual couples, for various reasons, including the lack of a willingness to report the abuse, a fear of putting same sex couples in a “negative” light in the face of a burgeoning civil rights movement, and inadequate police and judicial responses to such abuse.¹² Domestic abuse is about power and control and, unfortunately, is not limited to any particular grouping of individuals. Domestic abuse occurs frequently in our society at large: to the young through dating violence, to the married, to the unmarried, to opposite sex couples, and to same sex couples.¹³ Regardless of the exact numbers, though, abuse happens in all forms of partnership relationships, and has a negative impact on children in those households.¹⁴

It is not novel to note that those committing domestic abuse against their partner often use children, and the threat to remove children from the home of the non-abusive parent, to further torture their partner. Time and time again, victims of abuse, who are also parents, recount that the abusive partner threatened to take the children away forever.¹⁵ But, when a lesbian parent is uncertain about her legal rights to her child, this type of threat is maddening and can induce her into staying in an abusive relationship even longer.¹⁶

III. ADVERSITY FACED BY LESBIAN MOTHERS

A. Abuse Against Lesbians with Children from Previous Heterosexual Relationships

Mothers who bore a child in a heterosexual relationship and later became intimate with a lesbian partner traditionally faced prejudice from the courts due to their sexual orientation.¹⁷ And, although many states now provide by law that sexual orientation is not a legitimate factor to be considered when granting child custody,¹⁸ the best interest of the child test, which is the standard test applied to custody disputes, is so mallea-

12. See generally Krisana M. Hodges, Comment, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 L. & SEXUALITY 311 (1999); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Maya Shwayder, *A Same-Sex Domestic Violence Epidemic Is Silent*, THE ATLANTIC, Nov. 5, 2013, <http://www.theatlantic.com/health/archive/2013/11/a-same-sex-domestic-violence-epidemic-is-silent/281131/>.

13. U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

14. Goodmark, *supra* note 1, at 242.

15. *Id.* at 241.

16. Jennifer L. Hardesty et al., *Lesbian/Bisexual Mothers and Intimate Partner Violence: Help Seeking in the Context of Social and Legal Vulnerability*, 17 VIOLENCE AGAINST WOMEN 28, 42 (2011); Oswald et al., *supra* note 5, at 287.

17. Kate Kendall, *Lesbian and Gay Parents in Child Custody and Visitation Disputes*, HUM. RTS., Summer 2003, at 8.

18. *Id.*

ble that it is often difficult to prove that unspoken prejudices, indeed, played a role in a particular custody decision.¹⁹

When parental rights are unclear, the abused mother may even be more afraid of losing her parental rights to the father or the State, rather than losing her rights to her lesbian abuser.²⁰ In one study, researchers found that even when a lesbian mother was the legal custodian of her child (through a prior heterosexual relationship) and her current lesbian partner had no legal rights to her child, the lesbian mother reported fear of exposing the domestic abuse in their relationship because she might lose her child.²¹ This type of insecurity is based in a fear of the use of law to promote heterosexual norms.²² In some jurisdictions where a provision of child custody prohibits a divorced partner from living with a non-spouse, and same sex couples cannot marry, the practical effect of such a rule is to prohibit lesbian and gay parents “from ever being involved in a long term relationship that is the equivalent of marriage.”²³ If same sex relationships are recognized with equal force of law through same sex marriage rights, however, family law would be less grounded in heterosexist norms.²⁴

B. Violence Against Lesbians with Children Born During the Abusive Relationship

When two lesbian women decide to become pregnant, a host of legal issues are involved. Prior to second parent adoptions, lesbian mothers were often in a sort of legal limbo, where they had contracted with one another (if lucky) and a sperm donor to establish parenting rights.²⁵ If they failed to contract with each other, the court could choose to use equitable theories to solidify the relationship, such as *de facto* parenthood or equitable estoppel,²⁶ but the law of equity is generally a last resort for

19. Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 15–19 (2008); see also Laura A. Turbe, Comment, *Florida’s Inconsistent Use of the Best Interests of the Child Standard*, 33 STETSON L. REV. 369 (2003) (commenting that Florida statutes both permitting same sex couples to provide foster care to children, yet denying them the ability to adopt is an inconsistent application of the best interests of the child standard). A Florida appellate court has ruled that the statute prohibiting all same sex individuals from adopting children is unconstitutional. Fla. Dept. of Children & Families v. *In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

20. Hardesty et al., *supra* note 16, at 41–42.

21. *Id.*

22. *Id.* (describing the influence of heterosexist legal insecurity on lesbian/bisexual mothers’ help-seeking processes).

23. Kendell, *supra* note 17, at 22 (quoting Downey v. Muffley, 767 N.E.2d 1014, 1021 (Ind. Ct. App. 2002)) (internal quotation marks omitted).

24. R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 900 (2008) (recognizing that the state bears an “affirmative role in shaping group and individual identity . . . through its laws and policies”).

25. Fiser & Garrett, *supra* note 19, at 22–25.

26. See, e.g., *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

those seeking to enforce parental rights.²⁷ Even a contractual legal relationship is fragile, however, especially when the judge can refuse to enforce the agreement.²⁸ Also, the relationship between the parties can be further complicated when both mothers are biologically related to the child (one through egg donation, and the other by birthing the child).²⁹ Many attorneys, thus, choose to further protect the parenting relationship through second parent adoptions.³⁰ If the second parent adoption is granted, it is a solid legal option, as “both mothers are equal parents in the eyes of the law.”³¹ Second parent adoptions, however, are not available in all jurisdictions; they are prohibited by statute in two states, Mississippi and Utah,³² and unavailable through state court rulings in six others.³³ Additionally, although adoptions are more stable, the process of obtaining an adoption can be costly and emotionally draining, and many jurisdictions grant such adoptions at an unpredictable rate at best.³⁴

The current legal landscape, in many jurisdictions, allows for a much more stable parenting relationship through same sex marriage. If the lesbian parents are married before one mother becomes pregnant, the other mother is presumed to be the parent under established family law.³⁵ This is the best scenario for the lesbian parents, as they could avoid having to go through a costly adoption process.³⁶ Even if the child is born to the couple prior to obtaining the marriage license, it would be much easier to adopt the child as a second parent after the marriage license is obtained, assuming the sperm donor father has already relinquished his parental

27. Karla Mansur, *De Facto Parent Status & Protecting Your Parental Rights Through Co-Parent Adoption*, MANSUR'S LAW BLOG (Apr. 10, 2013), mansurlaw.com/blog/2013/04/de-facto-parent-status-protecting-your-parental-rights-through-co-parent-adoption/ (“If there is a breakdown in the relationship and the non-birth parent wishes to remain in the child’s life against the wishes of the birth parent the only remedy left is to file a **Petition in Equity** and seek **De Facto Parent** status.” (emphasis in original)).

28. See generally Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913 (2007).

29. See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

30. Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31, 33 (1995).

31. *Id.*

32. MISS. CODE ANN. § 93-17-3(5) (2014); UTAH CODE ANN. § 78B-6-117(2) (West 2014).

33. Including Alabama, Kentucky, Nebraska, North Carolina, Ohio, and Wisconsin. See *Adoption by LGBT Parents*, NAT'L CENTER FOR LESBIAN RTS., http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (last visited Sept. 23, 2014) (citing *In re Adoption of K.R.S.*, 109 So. 3d 176, 177 (Ala. Civ. App. 2012)); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 836 (Ky. Ct. App. 2008); *In re Adoption of Luke*, 640 N.W.2d 374, 377 (Neb. 2002); *Boseman v. Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010) (allowing the non-parent to seek custody, but not a second parent adoption); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994)).

34. Michelangelo Signorile, *Jason Hannah and Joe Riggs, Texas Gay Fathers, Denied Legal Parenthood of Twin Sons*, HUFFPOST GAY VOICES (June 19, 2014), http://www.huffingtonpost.com/2014/06/18/jason-hanna-and-joe-riggs_n_5506720.html (explaining that under Texas law the court does not “have to grant [the] second-parent adoption because [Texas law does not] recognize our marriage It’s up to the judge’s discretion on whether or not to grant it”).

35. Berner, *supra* note 30, at 38.

36. See *id.*

rights, because adoption of a child by legally married spouses is traditionally preferred under family law.³⁷

IV. PLEA FOR CLARITY FROM THE SUPREME COURT ON SAME SEX MARRIAGE

The time is ripe to clarify same sex parenting relationships with a presumption of parenthood through marriage, and to legally legitimize same sex relationships on a national scale. Although this same Supreme Court dodged the issue of same sex marriage recently in *United States v. Windsor* in part by stating that marriage is a state issue,³⁸ the famous *Loving v. Virginia* case demonstrates that when both equal protection and fundamental rights are at stake, the Supreme Court must get involved . . . eventually.³⁹ While unlikely that the Supreme Court will find that sexual orientation is a protected class,⁴⁰ it could note either that the fundamental right of marriage is being denied to an entire group of citizens or that there is no rational basis named by any state to merit this exclusion. Indeed the Sixth Circuit Court of Appeals heard a marriage case in the summer of 2014,⁴¹ the Seventh Circuit ruled in favor of marriage equality on September 4, 2014,⁴² and the Ninth Circuit ruled in favor of marriage equality on October 7, 2014.⁴³ While the Supreme Court refused certiorari in seven cases on October 6, 2014,⁴⁴ the issue of same sex marriage will carry forward to future Supreme Court terms. And, “[w]hatever one thinks should happen in the final analysis with same-sex marriage, there is a real human cost to the Court’s decision not to decide what should happen to marriages”⁴⁵ For instance, in Arkansas, a lower state court ruled that the constitutional ban on same sex marriage was unconstitutional,⁴⁶ and many couples proceeded to get married.⁴⁷

37. Alona R. Croteau, Comment, *Voices in the Dark: Second Parent Adoptions When the Law Is Silent*, 50 LOY. L. REV. 675, 681 (2004).

38. 133 S. Ct. 2675, 2691 (2013).

39. 388 U.S. 1 (1967). The irony of the fact that the *Windsor* Court cited the *Loving* decision in the exact same line where it noted that marriage is the “province of the States” is not lost on me. *Windsor*, 133 S. Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

40. The Second Circuit Court of Appeals in *Windsor v. United States*, applied quasi-suspect classification to “homosexuals” as a group. 699 F.3d 169, 181–82 (2012), *aff’d*, 133 S. Ct. 2675 (2013).

41. Erik Eckholm, *One Court, Three Judges and Four States with Gay Marriage Cases*, N.Y. TIMES, Aug. 6, 2014, http://www.nytimes.com/2014/08/07/us/one-court-three-judges-and-four-states-with-gay-marriage-cases.html?_r=0. The oral arguments in *DeBoer v. Snyder*, *Obergefell v. Himes*, *Bourke v. Beshear*, and *Tanco v. Haslam* are available on the Sixth Circuit website at http://www.ca6.uscourts.gov/internet/court_audio/audSearch.htm.

42. *Baskin v. Bogan*, Nos. 14–2386, 14–2387, 14–2388, 14–2526, 2014 WL 4359059 (7th Cir. Sept. 4, 2014).

43. *Latta v. Otter*, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014).

44. *See, e.g., Bogan v. Baskin*, No. 14–277, 2014 WL 4425162 (U.S. Oct. 6, 2014).

45. Robin Wilson, *Symposium: The Human Costs of Staying Out of the Marriage Debate*, SCOTUSBLOG (Oct. 7, 2014, 3:56 PM), <http://www.scotusblog.com/2014/10/symposium-the-human-costs-of-staying-out-of-the-marriage-debate/>.

46. *Id.*; *Wright v. Arkansas*, No. CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014).

47. *Gay Couples Marry in Arkansas as Many Clerks Sit Out*, NBC NEWS (May 12, 2014) (noting that “more than 200 gay couples obtained Arkansas marriage licenses” the Monday following the deci-

However, the State Supreme Court later issued an opinion noting that the provisions preventing clerks from issuing licenses was still on the books and, as such, marriage licenses should no longer be provided to same sex couples.⁴⁸ Thus, those couples who married in the space between the lower court decision and the judicial stay are in a space of legal limbo, where the federal government will recognize their marriages, but the state government will not.⁴⁹ This type of legal uncertainty could have been resolved by the Supreme Court and, hopefully, in the future will be.

V. CONCLUSION

The legal acceptance of lesbian marital relationships could make it easier for lesbian parents to speak up about the violence they face at home. Lesbian moms may have less fear of losing their child to the biological father if they understand that their current lesbian relationship is not disfavored by law. Furthermore, if both lesbian mothers are the legal parents to the child and the rights of both parents are clear, the mother suffering from abuse will better understand how to navigate her legal options under domestic violence law as a parental survivor of abuse.

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sion in *Wright v. Arkansas*), <http://www.nbcnews.com/news/us-news/gay-couples-marry-arkansas-many-clerks-sit-out-n103756>.

48. *Smith v. Wright*, 2014 Ark. 222 (2014).

49. Wilson, *supra* note 47; Jill Disis, *ACLU Seeks Federal Recognition of Indiana Same Sex Marriages*, INDYSTAR (July 11, 2014, 12:48 PM), <http://www.indystar.com/story/news/crime/2014/07/11/acu-asks-federal-recognition-sex-marriages/12527997/>.