

## **Co-Parenting Document** by Mona Greenbaum

Despite many recent advances in terms of gay and lesbian rights in Canada, our rights as lesbian parents are still lagging behind. Parenting is one of the final frontiers. The straight community has come a long way in terms of accepting gays and lesbians, but the idea of us having children is where many draw the line. A recent poll in Quebec saw only about 30% of Quebecois agreeing with the idea that we should have the right to have children. Whether people agree with it or not, we do. It is estimated that there are approximately 5-10 million gay and lesbian parents in the States, therefore it would seem likely that in Canada, with one tenth the population, we probably number about 500,000 to one million. If you also bring the great number of kids that we have into this statistic, then it becomes obvious that many, many Canadians are part of gay and lesbian headed families. Our issues are not to be ignored.

Despite this, our rights thus far are limited. It is well known that people have lost custody of their biological children because of their sexual orientation. According to most lawyers and legal resource people that you speak to, this should no longer be happening to us because we are supposedly protected by the Canadian Charter of Human Rights (i.e. we cannot be discriminated against on the basis of our sexual orientation). The fact is, however, that when there are other factors involved (as well as biased judges) being a lesbian or a gay man does not help your cause when custody battles are being fought. Nevertheless, many lesbians and gay men are completely out of the closet and do not lose custody of their children, even when it comes to a court battle.

The situation for co-parenting (i.e. a non-biological parent who is the partner of the biological parent) is more complicated. In the simplest case for lesbians, (I will not go into all the permutations and combinations that are possible for gay men), two lesbians who are in a couple, decide to have a child, through the use of a sperm bank. In Canada, by law, sperm donors are always unknown (i.e. if you use a Canadian sperm bank your child will never know the identity of the donor). Therefore there is only one recognized biological parent. The rights of the non-biological parent vary from province to province.

In November of 1999, an Alberta Court of Queen's Bench judge paved the way for a non-biological mother to adopt two children she had brought up with her lesbian partner. Mr. Justice Peter Martin ruled that the two Calgary women were "amply qualified" to become legal parents of the two sons, aged 12 and 5, that they had raised since birth. He said the move was also in the best interest of the children, which takes precedence in adoption cases. And this in conservative Alberta!

When it comes to recognizing the rights of same sex couples, however, no jurisdiction in North America has gone further than British Columbia (and they have good weather too!). In 1998, the province granted gay and lesbian couples the same privileges and responsibilities as heterosexuals for child support, custody and access. Same-sex adoptions are permitted in BC. Rachel and Isabelle previously of the LMA, whom some of you may know, moved to BC in late August and were thus eligible for co-parent

adoption by the end of February (you need only to be a resident for 6 months). Rachel tells me that all you have to do is fill in the forms. Wow! Basically this is legislation in action, not jurisprudence (a matter of a precedent having been set). Lesbian couples don't have to go to court each time they want to adopt. They just have to fill out a form.

In Ontario, co-parent adoption passed in May of 1995. But in this case it is a precedent that was set, not a law that was modified, meaning that subsequent families can be assured that they *will* succeed in getting a second parent adoption, but they still have to go to court to get it, *each time*. Ontario was the first province to do this. Four lesbian couples challenged the court together. A transcript of the proceedings can be found on the web at: <http://www.qrd.org/world/legal/lesbian.adoption>. Nova Scotia permitted it in May, 2001.

For Americans it varies depending on where you live and I would refer those interested to a good article from Alternative Parenting Magazine to get the state-by-state breakdown (July / August 2000 - it's part of the LMA library). In the Netherlands of course, it's legal. I've heard that a case has also passed in Israel. They're debating it in France. Scandinavians, from various countries can probably do it as well though I haven't tracked down the info thus far. For other countries you can probably forget about it.

In Quebec, in June of 1999, Bill 32 granted common-law status to gay and lesbian couples. The Federal law, C23, which passed a year later, also gave us the same rights and obligations as common-law heterosexual couples. Neither of these laws however, touches marriage or adoption.

Co-parent adoption is not yet feasible in Quebec. Some of us have obtained various legal agreements, either through the courts or through notaries, that recognize the non-biological parent to varying degrees. Why is this necessary? Firstly, the way our legal system works is that biological connections have a supreme importance. For instance, at this point in time, the parents and siblings of a lesbian biological mother (i.e the grandparents, uncles and aunts) have more legal right with respect to the children than does the non-biological mother. What this means is that if the bio mom becomes sick, unable to care for the children or dies and the child's biological family decides to take over, they will probably get custody of the child (or at least have quite extensive custodial rights) even if they were hardly involved in the child's upbringing and even if the non-bio mom has been present and actively parenting since the child's birth.

Apart from custody issues where else are we unprotected?

1) in the absence of a will, the non-biological mother's estate will automatically be passed on to her blood relatives (parents, siblings, cousins, etc) but not to her own children

2) the non-bio mom cannot make medical decisions for the child (i.e. sign documents) even in the case of an emergency

3) the non-bio mom cannot cross an international border with the child. She can be arrested for kidnapping. What is needed is a notarized document each time she wishes to cross the border with her kids. You have to get a new document each time (\$\$\$). People do get across, but all you need is one pain-in-the-ass customs official and you will be in big trouble. We can't get both mothers names either on the birth certificate or on the passport (which is what heterosexual couples do, especially now when women often don't take their husband's family name).

4) non-bio moms can't sign school documents (though it probably depends on the administrators) or any other institutional type form

5) non-bio moms are not assured any rights at all if the couple separates. The bio mom can deny not only partial custody but even limited visitation if she wishes to do so and the non-bio mom will probably lose in court.

6) conversely, non-bio moms have no responsibilities toward the children if the couple separates. You've heard of dead-beat dads who are wanted by the law for not paying child support? Well dead-beat lesbian non-bio mamas are legally off the hook.

The documents that we have so far, protect us in that they show the original intent of the lesbian couple with respect to their children. If problems do arise, a judge can look at these documents and see what was the original intention of the biological mother and "her partner" (non-bio moms are seldom recognized as parents). If there is a biological father in the picture, no matter how insignificant his role may have been in terms of parenting, a judge will probably give him quite a lot of rights, if he can prove that he is not harmful to the children. But at least the non-bio mom might be seen as significant to the child's welfare and apparently judges often make decisions that are in the best interest of the children and therefore if a non-bio mom can be proven to have played a significant role in the child's life, than she will probably be able to obtain some rights (if she has a good lawyer and falls upon a non-bigoted judge). This is why these documents do have some value.

All this to say that the legal documents that have been obtained thus far, by the more cautious amongst us, are important but are not air-tight. A lot rests upon the good will of others and our own good luck. What is really needed here in Quebec is the precedent of a co-parent adoption to be set. What stands in the way?

Well for one thing, here in Quebec, unlike the other provinces, we have a different set of laws. All the other provinces have Common Law (not to be confused with the term common-law which is a couple status). Here in Quebec we have the Civil Code. Without getting into legalese, what I have learned through the past few years of wrangling with our legal system, is that although we are supposedly not discriminated against in the Civil Code as gays and lesbians, in terms of co-parenting we, of course, are. Although a non-bio mom can easily adopt the biological children of her partner, she can only do this if the bio mom renounces her own parental rights. There is somewhere in the Civil Code the idea that there can only be one mother and one father at a time. Of course

this is quite discriminatory, as in lesbian couples there are always two mothers and sometimes even more. The situation gets quite complicated, as you can imagine. Think of the case of a lesbian who has kids through a previous heterosexual relationship, then comes out as a lesbian, meets a woman who eventually takes up a parenting role (as the non-bio mom) for a number of years and then that couple breaks up and both partners get new partners. Add to this the fact that the bio dad himself may get a new partner and these two as well may take an active interest in parenting. I've counted 6 parents so far. How much of this should be legally recognized? Definitely guidelines need to be set to reflect current realities. On the other hand I don't think that I would necessarily tell an outsider about this imagined 6-parent scenario. It's not the norm for most of us and it may be a little difficult to digest for the uninitiated, even though if all this happened over an 18 year period it is very well possible that all these people could be parents and all have played a stable, significant and loving role in the child's life. As they say, it takes a village to raise a child.....

Actually the same type of considerations apply to what is currently called blended or reconstituted heterosexual families and the law does not give status to new spouses (step-parents) if both biological parents are alive and reasonably normal. Maybe the legal system has to grow up and begin to reflect all of our realities (both straight and gay) rather than an assumed nuclear model that applies to so few of us anyway in this day and age.

If a co-parent adoption would pass in our own province it would set an important precedent and would immediately solve the problem for other families in Quebec which have come to be through the use of sperm banks. It will be a small step however. Many of our families are not so simple. The next step will be the case where a friend was asked to be a sperm donor and willingly renounces his parental rights. It would seem that this as well would easily follow suit. After this, the cases of biological fathers with varying degrees of involvement will have to be considered. I wonder if it wouldn't be feasible to have some sort of legal protection for the non-biological mother which at the same time would not necessarily threaten the rights nor responsibilities of the biological father. Once co-parent adoption becomes well-accepted and understood amongst judges, the value of granting rights and responsibilities to non-biological parents in various family settings, *without necessarily granting an adoption persay*, should become more acceptable.

As well, there is the case of traditional adoption of a child through an adoption agency (e.g. Batshaw Youth and Family Services) where both women should be allowed to legally adopt, not just one, which is currently the case. This too, could follow easily. International adoption is more complicated however, as it always reflects the laws of both the child's birth country and his / her country of adoption, thus there is no great hope there.

For many women as well, legal recognition of our status as parents will have an important psychological / emotional aspect. We ourselves know that we are parents as do our children, but like it or not we do live in a society and for many, to be legally

recognized will be a validation of our families. Asking for a co-parent adoption or, in general, requesting rights for non-biological parents who are intimately involved in day-to-day parenting, can only be regarded as preventative measures that are in the best interest of our children. Needless to say, we have a few legal battles ahead of us.