Spring 1998

Writing Rules Does Not Right Wrongs

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WRITING RULES DOES NOT RIGHT WRONGS

by ODEANA R. NEAL*

I believe the work that lawyers, legal academics, and judges do is important. Our work allows us to devise legal theories, develop litigation strategies and determine outcomes that can make a tremendous difference in people's lives. As a result, I applaud the insight and creativity of Judge Beck and Professors Glennon and Goldfarb. Their work demonstrates how law can be used to protect gay men, lesbians, bisexuals, their relationships and their families.

Nevertheless, I write a cautionary tale. Those of us in the legal profession must take care that we do not overly depend on the degree to which law can transform a culture or society. While it is no new story that law and society interact with and affect one another, a set of legal rules not endorsed by a majority of the population—and particularly legal rules that a majority of the population is determined to thwart—cannot transform a society. We lawyers, legal academics, and judges then, should continue to do those things we do best, but we must do it knowing that if we are ahead of the curve of our communities on any issue, our work may not have the sweeping effects we sometimes imagine it will. Indeed, our efforts may create a backlash against our goals.[1]

To illustrate this point, I look to the use of the "nexus" test some state courts use when deciding child custody disputes. In the circumstances I will discuss, a child's biological parents have lived together with the child in a marital or nonmarital relationship which is apparently heterosexual. During the course of the parents' relationship or sometime after the relationship has dissolved, one of the partners discovers or acknowledges his or her homosexuality or bisexuality. After dissolution of the parents' relationship, child custody and visitation decisions must be made. If the parents are not able to agree to a visitation schedule or agree upon who will receive physical or legal custody of any children, any unresolved matters will be decided by a court. This Essay will examine the role the sexual orientation of the nonheterosexual parent should play in determining the custody of the child.[2]

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* Associate Professor, University of Baltimore School of Law. I would like to thank Preston Frazier for his ideas, Michael A. Dean for his extraordinary research assistance, Audrey McFarlane for her suggestions, and Venita E. George for her patience.

1. *See* Odeana R. Neal, *The Limits of Legal Discourse*, 40 N.Y.L. SCH. L. REV. 679 (1996) (arguing that gay and lesbian civil rights movement must learn from failures and successes of African-American civil rights movement).

2. This issue is often phrased in a slightly different manner: What role should sexual orientation play in making child custody determinations? Since sexual orientation seems to make a difference in outcome only if a parent is homosexual or bisexual, however, I think it should be made clear that not all sexual orientations are at issue in child custody decisions.

Customarily, one of three different standards is used by a court in determining the relevance of a parent's sexual orientation on child custody disputes: (1) homosexuality is used as a negative factor against awarding custody to a parent; (2) homosexuality can be considered a factor only to the degree that it can be shown to have an effect on the child's welfare; or (3) a parent's sexuality may not be considered at all in child custody disputes. Although gay and lesbian civil rights advocates have urged courts to take the position that sexual orientation should be irrelevant in making child custody decisions, none have done so. The majority of state courts which have addressed the issue have adopted the nexus test, that is, they have determined that sexual orientation may be taken into consideration when there is a nexus shown between the welfare of the child and the parent's sexual orientation.[3] A small minority of courts have determined that a parent's sexual orientation should be deemed a negative factor in deciding custody disputes.[4]

Although the nexus test has the patina of being liberatory, it really is not much different than the use of nonheterosexuality as a negative factor. It is not very difficult to make arguments, at least in some circumstances, that a parent's homosexuality or bisexuality is a positive factor in determining child custody. For example, a gay or lesbian child might benefit from being in the custody of a parent whose orientation is the same. A gay parent, particularly one living in a committed relationship with a same-sex partner, might be able to better teach a child to overcome sex-role stereotypes.

The simple fact of the matter, however, is that the nexus between a parent's homosexuality or bisexuality is *never* determined to have a positive effect on a child's welfare, just as a parent's heterosexual orientation is *never* determined to have a negative impact on a child's best interests. Even in those instances where a gay or lesbian parent is awarded custody, this occurs because a court has determined that the parent's sexual orientation has not negatively affected a child, rather than because the parent's orientation has

3. *See* J.B.F. v. J.M.F., No. 2960263, 1997 WL 564476 (Ala. Civ. App. Sept. 12, 1997); S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); *In re* Marriage of Birdsall, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988); *In re* Marriage of R.S., 677 N.E.2d 1297 (Ill. App. Ct. 1996); Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983); White v. Thompson, 569 So. 2d 1181 (Miss. 1990); Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); Anonymous v. Anonymous, 503 N.Y.S.2d 466 (App. Div. 1986); Pulliam v. Smith, 476 S.E.2d 446 (N.C. Ct. App. 1996); Whaley v. Whaley, 399 N.E.2d 1270 (Ohio Ct. App. 1978); Fox v. Fox, 904 P.2d 66 (Okla. 1995); A. v. A., 514 P.2d 358 (Or. Ct. App. 1973); Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992); Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987); Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994); Tucker v. Tucker, 910 P.2d 1209 (Utah 1996); Nickerson v. Nickerson, 605 A.2d 1331 (Vt. 1992); Schuster v. Schuster, 585 P.2d 130 (Wash. 1978); M.S.P. v. P.E.P., 358 S.E.2d 442 (W. Va. 1987).

4. *See* Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (upholding trial court's change in custody from lesbian mother to heterosexual father, because, *inter alia*, "homosexuality is generally socially unacceptable" and because "it was contrary to the court's sense of morality to expose the children to a homosexual lifestyle"); S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980) (declaring that because of possible social stigma, mother's lesbianism was itself enough to determine that best interest of child would be met if custody were awarded to father).

had a positive effect. In other words, a parent's homosexuality has relevance only when it is deemed harmful to a child. As a result, trial courts are able to, and do, continue to use a parent's homosexuality as a negative factor, even though governing appellate court decisions would appear to forbid this.[5] Any liberatory qualities attached to this test can be easily undermined.

So is the answer to use a test which would forbid taking a parent's sexual orientation into account at all? I do not believe that it is truly possible to employ such a test. Even if a court does not, at least ostensibly, take a parent's homosexuality or bisexuality into account, the parent's sexual orientation may play a significant role in how the court views the parent's character or behavior. For example, a court may determine that a parent should not have custody of a child because the parent maintains a nonmarital, live-in relationship with a member of the same sex. Of course, it is impossible for that parent to engage in a *marital* relationship with someone of the same sex, but the court will declare that it would view *any* non-marital cohabitation of a parent negatively. A court may equate the parent's homosexuality or bisexuality with criminal sodomy, even if there has been no showing that the parent has engaged in any sexual activity with a member of the same sex and even if the state does not outlaw same-sex sexual practice. Further, a parent's political involvement in gay causes may be viewed as a distraction from the parent's ability to properly care for a child.

The problem, then, is not with the legal test employed to determine the role of sexual orientation in deciding child custody disputes. Rather, the problem lies in the hearts and minds of those employing the tests. In other words, the *real* issue is not discrimination against lesbians, gay men and bisexuals, but the homophobia that creates the discrimination. That homophobia cannot be successfully combatted with judicial precedent.

This is not to suggest that lawyers, judges, and academics interested in creating a nondiscriminatory legal climate should throw down their pens (or stop punching away at their computer keyboards) until homophobia and its vestiges have dissipated—it is possible that they never will. But what it does suggest is the need to educate and re-educate the general population from which judges are drawn about the truth and the fiction of nonheterosexual lives. We need to work toward the election and appointment of gay and lesbian judges and judges who "get it" when it comes to the relevance and irrelevance of sexual orientation in decision-making. We also need to continue to strive toward making statutory changes because those changes, at least theoretically, reflect the thinking and support of the general population. It is only when judges and legislators are considered not to have done their jobs—when they discriminate against gay men, lesbians and their families—that we

5. For example, Ohio appellate courts had declared as early as 1987 that a parent's sexual orientation should not, by itself, determine the outcome of child custody disputes. *See* Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987). Nevertheless, in 1997, the Court of Appeals of Ohio reversed a trial court's modification of custody because the trial court "appeared to have focused solely on appellant's sexual orientation." Inscoe v. Inscoe, No. 95CA12, 1997 WL 346199, at *13 (Ohio App. 4 Dist. June 18, 1997).

lawyers and legal academics and judges can truly consider that our work has been done.