Lesbian is equitable parent of her non-biological child

Best interests prevail, case law distinguished

ByTraci R. Gentilozzi

A lesbian is the equitable parent of the non-biological child she had with her same-sex partner and she is entitled to joint legal and physical custody of the child, a Kent County family law judge has ruled.

In *Stiles v. Flowers* (Miliw No. 14-87225,40 pages), Judge G. Patrick Hillary based his decision on the Child Custody Act's best interest of the child factors.

"I'm not making social policy," Hillary emphasized in his bench ruling. "I'm looking at the best interests of a child."

Hillary said several factors distinguished *Stiles* from *Van v. Zahorik*, 460 Mich. 320 (1999), the controlling authority on the equitable parent doctrine. In *Van*, the Michigan Supreme Court limited the equitable parent doctrine to the context of a legal marriage.

According to Hillary, some of the factors that set *Stiles* apart from *Van* were that the non-biological mother signed a co-parenting agreement, she cared for and supported the child, and she intended to adopt the child but could not under law that developed before the child was born.

Also, Hillary pointed out there was no risk the biological father might intervene later because the sperm donor was anonymous.

Grand Rapids lawyer Christine A. Yared, who represented the non-biological mother, called Hillary's ruling groundbreaking.

She said the decision shows that attorneys should not hesitate to take these kinds of cases.

"I've had clients tell me that another attorney told them they don't have a case," Yared said. "But attorneys should move forward with these cases."

In these matters, the best interest of the child must be emphasized, she said.

"The case should not merely be presented as a civil rights case or even a case about parental rights, but instead as a case about a specific child and that child's family."

The 'gold' standard

The plaintiff, the non-biological mother, and the defendant, the biological mother, were a same-sex couple. They had two children together through an anonymous sperm donor. The plaintiff legally adopted the first child.

But when the second child was born, the plaintiff could not adopt him. By that time, Michigan Attorney General Opinion 7160 said that unmarried couples, including same-sex couples, could not jointly adopt children.

The plaintiff and the defendant had signed a co-parenting agreement and prepared estate planning documents naming each other as guardians of the children. When the couple separated, they both had equal legal parental rights with the oldest child. However, the plaintiff did not have legal parental rights to the youngest child.

The plaintiff sued, claiming she should be declared the equitable parent of the youngest child.

Yared argued that *Van* unconstitutionally elevated marital status over the child's best interests.

She also emphasized that Michigan law defining marriage as being between a man and a woman did not apply. The parties were not seeking marriage rights and, in *Troxel v. Grandville*, 530 U.S. 57 (2000), the U.S. Supreme Court said the relationship between a parent and child flows from a fundamental liberty interest, Yared argued.

"Michigan courts are required to apply the best interest standard to all cases involving the custody of children and make an independent decision about the best interest of each child," Yared said.

"The beauty of the best interest of the child standard is that it allows family law judges who need to make decisions regarding a child's current life circumstances the opportunity to tailor results which are unique to that child's life," she said. "The best interest of the child is the gold standard."

Accordim? to Yared. the defendnnt Hid not appeal Hillary's ruling.

Grand Rapids lawyer Peter M. Kulas, who represented the defendant, said the law needs to reflect the changing times.

"Judge Hillary's opinion addresses a case that is a prime example of why Michigan law needs to evolve and adapt to protect the best interests of children, while also preserving families regardless of the gender of the parents," Kulas said.

'Van'distinguished

Hillary said it was not the fault of the parties or the child that the plaintiff's adoption was not allowed.

The judge also noted the child represented a segment of kids in divorce cases and in abuse and neglect matters who are "hurt" by the *Van* decision.

"[T]he children are abused and in the middle," he said. "I think the best interest of [the child] and the best interest of children in situations like [this] outweighs the possible concern of the impact upon our society and the institution of marriage."

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Hillary said he agreed with the dissents in *Van*, which was a 4-3 ruling.

"I find that when a parent has acted as a parent, as [the plaintiff] has, and that person meets the unique criteria in this case, that the equitable parent doctrine is going to apply," he said.

"It's the opinion of this Court, when considering all the factors of this case and the equity of this case along with the. best interests of [the child], this child, and [the plaintiff] as the equitable parent to [the child], she is [the child's] mother," Hillary said. Tell a story

Same-sex parents should always sign co-parenting agreements and estate planning documents, drafted by attorneys well-versed in sexual orientation law, Yared said.

And lawyers representing lesbian, gay, bisexual and transgender parents need to educate judges about how the parent interacts with the child and the child's experiences with that parent, Yared said.

"Some attorneys do not consider all title options for LGBT clients, especially in the family law and employment law areas," she noted.

It is important, to develop all the facts about the relationship between the child and the non-biological parent, Yared said.

"Developing those facts includes gathering documents, like when parents sign up a child at a doctor's office, school, day care or for extracurricular activities," she said. 'These forms include parent information ... usually they say father' and maybe that's crossed out. We showecj all these documents and more."

Attorneys also need to have an understanding of the client's same-sex relationship and the child's relationship with both parents, and should explain those relationships to the judge.

"You have to give examples," she emphasized. 'Talk about the relatives. Tell the judge the child has grown up with these grandparents, aunts, uncles and cousins. You have to describe the facts and not just say, "These children are being raised by gay parents.'"

Basically, attorneys need to tell a story, Yared said.

"While some judges might politically or religiously be against gay marriage and gay couples having children, there may be some facts brought to Ught that resonate with the judge," she said.

It is crucial not to make the case a gay rights or a parental rights issue, Yared said.

"Make it totally about the child and what's in the best interest of the child."

If you would like to comment on this story, email TraciR. Gentilozzi at traci.gentilozzi@mi.lawyersweekly.com.