

Grapevine

Newsletter of the Lesbian Mothers' Defence Funds/Canada
Toronto, Calgary, Vancouver and Montreal

Spring 1983

B.C. lesbian grandmother wins custody



In November 1982, in a landmark decision, a 38 year old lesbian was awarded custody of her two-and-a-half year old granddaughter. This victory is a milestone for lesbians country-wide, as it is the first time custody has been awarded to a homosexual who is not one of the child's natural parents.

After having temporary custody for almost 18 months under an agreement of unspecified duration which was signed by both natural parents, Marge, the grandmother (not her real name), brought the issue up for review with her daughter and son-in-law.

Marge's daughter fully supported her mother's application for permanent custody. She evaluated the stable, loving home of Marge and her lover of ten years as the most suitable atmosphere for her child to grow in. The child's father, however, was determined to seek custody himself.

The presiding judge, Philip Collings, of the British Columbia Family Court, stated early in his decision: "If all considerations to the child's interests were equal [the child] should go to [the father]." As the trial unfolded, it became clear that awarding custody to Marge would best facilitate a happy, healthy life for her.

The first ruling made by Judge Collings was that since the father had consented to Marge's temporary custody of the child for 18 months, the court would view the case as a custody dispute rather than a general application for custody.

As the judge held the presumption that the best interest of the child require that she go to her natural father, it became Marge's and her lawyer Brenda Kaine's task to refute this. Marge's lesbianism was one of the first issues to be ruled on. Four cases

were cited: B vs B (Ontario); Case vs Case (Saskatchewan); K vs K (Alberta); and D vs D (Ontario). All these cases "are unanimous in judging that homosexuality is not a bar to a claim for custody, but is a factor to be considered with all the others. In other words, it is a question of fact rather than law, how far the particular homosexual relationship in question relates to the best interests of the particular child," explained Judge Collings. "At the least a homosexual relationship is a minus factor for a custody claimant," he said.

Evidence from the Family Court Counsellor and the case of B vs B which indicated the sexual preference of the custodial parent doesn't dictate the sexual identity of the child was then cited. Collings held that "common sense dictates that a child is brought up with a view to the norms of the society in which she resides. Homosexuality is not a norm of our society -- it is abnormal. If it were an accepted norm we wouldn't be arguing about it." Although he judged that living without a role model of a normal heterosexual relationship held dangers, he felt the evidence didn't map out for him "the nature or extent of the dangers." In conclusion he decided to assess Marge's lesbianism in relation to the five factors outlined in Section 24(1) of the BC Family Relations Act. This decision was a key ingredient in ensuring the fair appraisal of Marge's parenting ability.

The assessment was as follows:

Factor 1: The health and emotional well-being of the child including any special needs for care and treatment.

The child was healthy but mildly asthmatic. The judge found it hard to predict which claimant would contribute more to the child's emotional well-being in the future.

Factor 2: Where appropriate, the views of the child.

Was not appropriate in the case.

Factor 3: The love, affection and similar ties that exist between the child and other persons.

It was recognized that, while the child had ties

The Lesbian Mothers' Defence Fund was set up in March 1978 to provide a permanent resource for mothers who are fighting for child custody. We can offer:

- Pre-legal advice and info on successful cases
- Referrals to sympathetic, expert lawyers
- Financial help in building a strong court case
- Personal and emotional support

to both claimants, the nature of those ties differed. The ties to Marge and her lover were "ties to the home." The judge pointed out here that Marge's lover had actually been "more of the mother figure, had done more of the down to earth, day to day things which really count for a child." He hoped and trusted that he was justified in relying on the stability of the relationship between Marge and her lover.

The ties to the father were noted as "those of a child to a visiting parent." It was also noted that the father shied away from personal contact with his daughter. Rather than spending time with her he took her to the movies or to visit friends. The judge saw "a reluctance to come to grips with her as a person, to realize what sharing your life with a growing child would mean."

Factor 4: Education and training for the child.

The judge felt it was obvious that the child "would turn out to be a totally different sort of adult being brought up by Marge rather than her father. He mentioned Marge's lesbianism, the effects of which he couldn't quantify but felt, even so, that he was "quite happy with the education and training" the child would receive in Marge's home. He expressed concern that the father had stated his ability to teach the child "how to cope on the street." He questioned the father's anticipation for the child.

Factor 5: The capacity of each person ... to exercise these rights and duties (of custody) adequately. (In other words, the capacity to provide a stable and supportive home for the child.)

The judge expressed "profound misgivings" about both of the claimants. He decided instead to look at what they each had learned from their histories and how they had presently established themselves.

Marge, in his opinion, was the far better choice. Within the past few years she had finished her education, established a stable home and had her son living with her. In addition she had assumed respon-

sibility for her granddaughter and "made an excellent job of it." He summed Marge up as "a stable, mature person, well able to exercise the rights and duties of custody." The only shadow was "the possible effects of the homosexual household in the future." He had stated several times earlier that this was not a measurable entity.

In respect to the father he found him to be "transparently an easy-going, likable man." However, he also found him disorganized, not properly settled down and younger than his years (mid-twenties). His employment record was poor and his future possibilities unreliable. The father's support services were also poor. He was not seen as being personally fitted to cope with raising a child, in the sense of acting in view of a mother. Although the father started living with a woman during the trial, the judge felt that as she was the "bread-winner" this position would "cramp her style as a mother." The judge's "bottom line" was that an on-the-spot, in-house mother figure was needed. The father could not provide one.

In summation, the judge found that Marge had satisfactorily rebutted the presumption that a return of the child to her father was in her best interests. He did not order a review and it was his view that custody orders should be designed as permanent. The father was given reasonable access to the child, with liberty to apply to the courts in case of difficulty.

The case is being appealed. We hope a higher court will share our sense that Judge Collings thoroughly and responsibly weighed the evidence on both sides. We'll let *Grapevine* readers know of any further events in this case. For now, we're celebrating an important new vindication of our right to parent.

Mary, Vancouver LMDF
(with Jane, LMDF Toronto)

Reports from Canada's/ Québec's LMDFs: Calgary

Since the Fall 1982 issue of the *Grapevine* our pot-luck meetings, held on the first Sunday of each month, have stabilized around fifteen people, including children, but we're glad we continue to see new faces.

At our November pot-luck Lynn P. started a discussion on coming out. Our experiences ranged from poignant to hilarious; we discovered that some of us are "out" almost totally, some are very involved politically, some are timid -- we have one foot still in the closet. I sensed the intense involvement of everyone; this, we were saying, is what it's like to be gay and human, this is what has drawn us together, this is the magnet to which every other factor in our personal lives is drawn. This sharing time was definitely the high point of the evening.

Our December dance was open to gay women and men, and as it was close to Christmas, we had a great buffet, free to all who attended. One of the things people get a kick out of at our dances is Vicky, who dresses up and gives away free drinks until 9pm. She posed as a "flasher" at this dance; as she approached someone, she would open her trench coat and, guess what? -- free drinks in the inside pockets!

In January, our group signed a charter to be sent to the government which we hope will give us status as a non-profit society and enable us to apply for funding. We learned, too, that a feminist lawyer, Janet Keeping, of the Calgary Civil Liberties Research Group, has offered to help the LMDF Alberta. She is researching reported lesbian custody cases and articles for us and may do public meetings with our group. Our discussion for January involved parenting boy children. We talked about how we feel about boys, about fostering a healthy self-image in our boys as opposed to a "macho" image, and about the pressure society puts on boys to conform.

**In eastern Canada, call:
Lesbian Mothers' Defence Fund
(Toronto) 416/465-6822**

**L'Association des meres-
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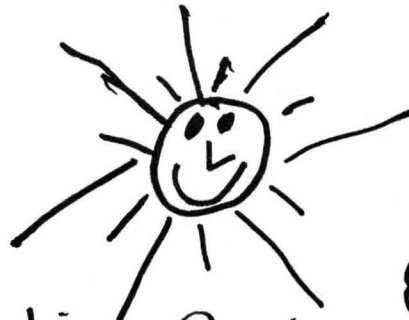
Kids' page - Art gallery

This is Me
looking Funny.



By Jolene, 6

Nathan 7



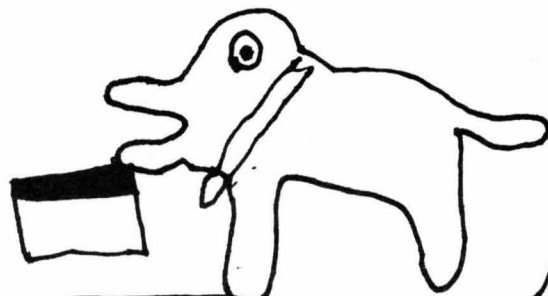
Martine
Ruddy

Caroline Cairns
Age 10



Age 7

Dog Love
Beef



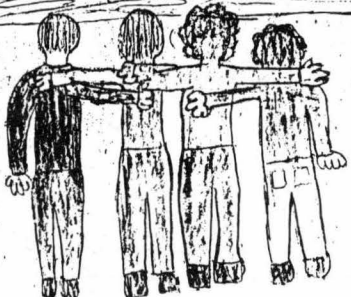
Velvet age 8



The people who live here and love here



MIKO, 3



MARK,
BERGEN NY

Drawn by Leanne. "Mom" is Marilyn. Lou and Marilyn are a lesbian couple living in Calgary. They have been together for almost 20 years. Marilyn attributes their long-lasting relationship to "pure stubbornness", but Lou says, "The tonic just flew by." Leanne is 11/2; Scott is 9.



Reviews

Lesbian Mother Litigation Manual

The *Lesbian Mother Litigation Manual* is a unique resource for lawyers and useful reading for the client -- the lesbian mother who is being (or is afraid she someday will be) challenged for custody of her children because of her sexual orientation.

The Manual was written by US lawyer Donna Hitchens as a guide for other lawyers and represents the experience of the San Francisco-based Lesbian Rights Project in representing clients in custody battles in the courts over two years.

Despite the fact that it is based on the American experience and much of the advice offered on procedural points is inapplicable here, it offers a good discussion of substantive legal issues, strategy and use of mental health "experts" in this type of litigation which can be used by Canadian lawyers. Many lawyers, even those who specialize in family law, have not represented lesbian clients in custody cases and are unprepared for the issues which will arise. Hitchens points out at page one that our society is homophobic, and the judge sitting on any custody case is likely to feel personally that a lesbian is not a fit mother, despite legal decisions in many states (and Canada) which have held that lesbianism per se is not a basis on which custody can be denied to a mother.

This personal feeling may also be shared by psychiatrists, social workers, and mediators who are involved in the litigation. The lesson Hitchens draws from this is not that the lesbian mother and her attorney should be afraid, but rather that they must be prepared to conduct a trial which is an educational exercise every step of the way, and which confronts and disproves the negative myths about lesbians as mothers in general, and the individual client in particular.

What are these myths? Hitchens identifies those which have emerged in numerous custody cases. "Lesbians are mentally ill, unpredictable and irresponsible." "Lesbians are sexually perverted, molest children and engage in sexual activity in front of children." "The children of lesbians will grow up to be homosexual and will be confused in their own gender identity." "The children of lesbians will be socially stigmatized as a result of living in a lesbian household."

Given the pervasiveness of these stereotypes, the educational task which a lesbian mother and her lawyer have is formidable, and the Manual points out that the lawyer must rely even more heavily than in other custody cases upon "experts" -- psychiatrists, psychologists and social workers. Care must be taken to select experts to give evidence on your client's behalf who are knowledgeable about lesbian parenting and to prepare them to communicate effectively with a judge.

Hitchens offers detailed advice for every step of litigation:

- * Checklists to assess the strengths and weaknesses of a lesbian mother's case
- * A sensitive and sensible discussion of the pros and cons of admitting or denying lesbianism in the litigation
- * A realistic look at questions which should be considered early in litigation, such as "Should the

mother live with her partner during litigation?" and "Is the mother willing to present male role models for the children?".

- * Strategies for negotiating a satisfactory settlement before trial.
- * How to prepare your client for the questions she will face from a court-appointed social worker about her sexual orientation and its effect on her children
- * Should you ask that the children be represented by a lawyer?
- * Specific questions for the father in the pre-trial discovery process
- * What types of witnesses will be most useful in demonstrating to the court the positive relationship your client has with her children?
- * Why and how an attorney representing a lesbian mother should conduct the case with an eye to laying the groundwork for appeal

Most of the procedural suggestions offered are based on US rules of practice which are quite different from those in place in Ontario or other Canadian provinces. For example, the Manual includes a comprehensive "trial brief", a document submitted to the judge at the outset of the trial which contains lengthy legal argument and supporting case law and a summary of psychiatric research, surveys and articles on lesbians, their parenting ability and their children. The trial brief seems a practical way of getting a lot of information before a court quickly and inexpensively, but it is not a practice yet accepted in Canadian courts. The differences which exist in procedure may suggest to Canadian practitioners changes which should be encouraged in our courts.

The Manual should be read by any lawyer representing a lesbian mother in a custody dispute. To get a copy send \$25 US to the Lesbian Rights Project, 1370 Mission St., 4th Floor, San Francisco, California 94103, USA.

Ellen Murray, LLB.
Toronto

I read and learned a lot from the *Lesbian Mother Litigation Manual* as a non-lawyer. I'm a lesbian mother of a two year old son, and I have just left my marriage. I don't anticipate a custody fight with my husband.

It's refreshing that the judicial system seems to be becoming a little less harsh on the whole issue of gay and lesbian parental rights. This, of course, is being helped by the number of gays and lesbians in that system itself. These people will do the most, along with us, to lift the shroud of prejudice that is holding us back.

The essential message of the Manual is that the battle is not over yet. Yes, this is true. However, we shall overcome.

This is a *must* for anyone thinking about the custody issue, or for anyone who is just plain interested, because interesting reading it is!

Eileen, for the LMDF (Toronto)

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