lgny News

Lesbian Visitation Battle Lays Bare Tenuous State of NYS Gay Family Law

By Paul Schindler

Lee Sharmat and Lisa Lippiello, who shared a home in Park Slope for three years as life partners, seemed to be a poster couple for the increased visibility of gay and lesbian partners in New York's public life and for the striking trend in the past decade toward such couples raising children together.

Sharmat, a New York City public school teacher, and Lippiello, a police lieutenant who retired last fall after 16 years on the force, had both long been out in their jobs and the pair cut a noticeable figure in the city's lesbian social life. Both are athletes, and they participated in a variety of sporting events sponsored by Team New York, the group that sends athletes to the quadrennial Gay Games, as well as ones held at the June Pride celebrations. As a periodic *LGNY* contributor writing about the social scene, Sharmat chronicled numerous milestones in the couple's relationship — their "wedding" in a June, 1999 commitment ceremony in Rhinebeck, the birth of Lisa's biological child in April, 2000, and the couple's introduction of the child to many in the lesbian and gay community over the following year. Photographs of both women and of the child appeared repeatedly in the newspaper.

By mid-2001, however, the golden "marriage" apparently was on the rocks. For several months, beginning in April, Lippiello and the child were only part-time residents of the couple's Park Slope home. Sometime between July and September — the exact date appears to be a matter of dispute — Lippiello moved out, and from then until November, Sharmat says her visitations with the child were limited "usually [to] times convenient to" Lippiello. By November, visitation had become "sporadic and unscheduled," and was eventually ended altogether. In December, Sharmat filed suit in New York State Family Court seeking an order allowing immediate visitation and a plan for permanent visitation rights. That case remains in front of the court.

Sharmat and Lippiello's lives have now become a case study in how the slowly emerging face of gay and lesbian family law creates pitfalls for couples who decide to split up. Like their heterosexual counterparts, gay and lesbian exes, of course, bear all manner of emotional scars in the wake of love gone sour, and, as much as blame and property, children are often at the fulcrum of those tensions. An examination of Sharmat and Lippiello's competing legal claims points up just how unsettled questions of gay family law in New York remain. The case also serves as a reminder of how small the world of actively engaged gay and lesbian public figures can be. Lippiello's new partner, who has taken on a parenting role for the child, works for the Lambda Legal Defense and Education Fund, which in apparent recognition of the potential for conflict, has recused itself from even commenting on a case that goes to the heart of it legal advocacy agenda.

Lambda is the not the only party remaining mum in this case. Though *LGNY* has access to court papers filed on both sides in this case, Lippiello and her partner have declined to comment for this story. In fact, according to Sharmat, Lippiello's attorneys filed a motion to have both Sharmat and *LGNY* gagged in connection with this story's publication, though the judge in the case agreed to hear such arguments only with respect to Sharmat, not this newspaper.

In line with their divergent goals, the affidavits filed by Sharmat and Lippiello paint starkly different pictures of the relationship shared by the two and, in particular, about the nature of Sharmat's relationship to the child. Sharmat's account of the relationship is considerably more detailed. The pair met around Valentine's Day in 1997 and a year later they began living together. In August of 1998, they jointly purchased an apartment in Park Slope and in March 1999 they registered as New York City domestic partners. On July 17 of that year, the coupled "married" in a commitment ceremony that Sharmat's stepfather, Ben Fein, paid for in upstate Rhinebeck.

None of these particulars, most of them spelled out in Sharmat's affidavit, is challenged or even addressed in Lippiello's filing. Their widely disparate accounts of the decision to have a child and how that child was raised, however, are an altogether different matter.

In her filing, Sharmat recalls that on the couple's fourth date, presumably in early 1997, "We had an in depth conversation about both of our desires to have children and raise a family together. Had one of us not wanted to have children we both made clear that we would not have pursued the relationship. We mutually decided that when we were ready to have children, [Lippiello] would physically

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in the case of *Maby H.* and in the case of *J.C.*, to grant individuals (in the latter case a lesbian) who were not the natural parent of a child the right to seek visitation after each broke up with a partner who was the natural parent. In the *J.C.* case, the court found for the lesbian ex-parent after applying the "Wisconsin Test" accepted by the New Jersey Supreme Court, which among other factors examines whether the natural parent originally encouraged a parent-like role for the ex-partner and whether a bonded, parental relationship developed. Sharmat asserts that she meets all the criteria required by the "Wisconsin Test."

Eras disputes the reasoning of his opposing counsel, maintaining that *Alison D.* explicitly considered equitable estoppel and rejected it. In his view, *Maby H.* and *J.C.* are legal outlyers that "all but ignored the precedent of *Alison D.*" Eras argues that other more recent cases in New York, and an important recent U.S. Supreme Court ruling, all reinforce the rights of natural parents as a "fundamental liberty interest."

Quarto and Shanahan specifically challenge the primacy of *Alison D.*, seeing it not as definitive, but rather as just one step in a historical evolution of gay family law. Their memorandum notes that Judith Kaye, a judge who dissented in that case, is now Chief Justice of the state's highest court, the Court of Appeals, and that public attitudes toward gay families have evolved considerably in the past decade.

The Sharmat-Lippiello dispute, while still the main attraction in this story, has also spawned several sideshows. Curthoys, the sperm donor, has filed papers indicating his intention to seek custody of the child based on his view that Lippiello's behavior has not conformed to the agreement they reached when he decided to help her and Sharmat start their family. And Sharmat's step-father, Fein, is also suing Lippiello for fraud, breach of contract, and unjust enrichment based on gifts and assistance he gave for the commitment ceremony and in connection with the sperm insemination on the understanding that he would be the child's grandfather.

One party that is not getting involved in the case is the group that probably has more expertise on these matters than anyone, Lambda Legal Defense, a long time advocate for greater gay and lesbian parenting rights and the formalization of those rights. According to Sharmat's attorneys, Lambda was on the losing side of the *Alison D.* case that denied an lesbian ex-partner visitation rights for the child she helped raise, but helped another lesbian win such rights in *J.C.* Quarto says that when she contacted Lambda for assistance, Susan Sommer, an attorney there, told her the group was "conflicted out," presumably by the fact that Lippiello's new partner, Colleen Sullivan, is also a Lambda attorney. When *LGNY* contacted Sommer about this matter her response was "no comment."

Despite its recusal from the case, this dispute raises issues that go to the core of the legal agenda that Lambda and other gay civil rights advocates have forged with regard to building strong parental rights for gay and lesbian partners. Lambda has staked out strong positions, not only on the underlying issues, but also on the way conflicts related to gay families should be resolved. In a 1999 publication entitled *Protecting Families*, Lambda in cooperation with four other leading gay advocacy groups outlined a series of principles that they ask members of the LGBT community to honor in settling disputes. Near the end of its list of recommendations, the Lambda report states, "We emphatically urge those who are confronted with lawsuits not to resort to arguing that a person who has had a parental or significant relationship with the child but who is not a biological or legal parent cannot ask for visitation or custody because of 'standing.'"

An examination of the legal arguments supporting Lippiello's case makes clear that the horse is out of the barn on that issue. And, indeed, many of the baleful consequences that the Lambda report warned of seem to be at play in this case. A woman who says she had an 18-month parental relationship with an infant child has no access to that child. The natural father who entered a lesbian couple's life in order to help them have a child is now battling the natural mother for custody. And it remains to be seen whether the resolution of this painful dispute will make any contribution to making sure that courts in New York State give greater respect to the sanctity of gay and lesbian families.

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carry the children and I would share in raising our children and in financially supporting the family."

Lippiello's account is markedly different: "It was my intention to get pregnant and to raise a child. [Sharmat] offered to assist me in the raising of my child. It was my intention to raise the child with [Sharmat']s assistance."

Sharmat marshals a variety of details both about the way in which Lippiello's pregnancy came about and about the way in which the couple talked about it to the outside world to counter her ex-partner's account. First, there was the matter of finding a sperm donor. Sharmat describes the father, Joe Curthoys, as "a family friend of mine," and said that the couple's agreement with him and his wife "explicitly acknowledges that Lippiello and I would jointly raise any child resulting from the insemination. It was vital to Curthoys in deciding to donate his sperm to us that [we] had a committed partnership and would create a stable and loving family life for any children born from his sperm."

Sharmat also argues that the couple made clear in a wide variety of other ways that they were jointing planning a family.

"From the beginning of [Lippiello's] pregnancy, she held me out as the parent of our child-to-be, including on our invitations to the baby shower and baby naming ceremony, in her involvement with my family, and in relationships with friends. My stepfather was held out to the world by [Lippiello] as [the child's] grandfather, a role he gladly fulfilled. We were in all respects a family."

The pair jointly attended a "Lesbian Mom's group," made wills that named Sharmat or her parents as the child's guardian, and had joint bank accounts and life insurance policies in each other's names. Sharmat was known to the child as "Ema," the Hebrew name for Mother.

"I participated in all financial and child-rearing obligations for [the child] and jointly decided every issue involving [the child]," according to her affidavit.

Lippiello's account was more succinct.

"After the birth of [the child], [Sharmat's] role in the raising of the child can be defined as a parent helper," her affidavit reads. As an example, Lippiello goes on to say, "Out of 17 visits, she attended the pediatrician's office once," an assertion Sharmat heatedly contested in an interview.

Sharmat also disputed contentions by Lippiello that, "She felt that it was too much trouble for her to hold the baby or to be with the baby. She complained that she could not tolerate the baby's long crying spells when [the child] was much younger... [Sharmat] never paid money toward the child' day care."

Regarding the use of "Ema" in referring to Sharmat, Lippiello says that name was chosen because "I did not want her to be called anything derivative of 'mommy.'" Lippiello claims that the name Ema meant nothing more than that, but she now complains that Sharmat continues to try to have the child call her that in a way that "undermine[s] my parental authority." Lippiello insists that the child now call Sharmat "Lee."

In spite of Lippiello's argument that Sharmat played only a secondary role in care giving, the couple moved forward in early 2001 with plans for Sharmat to legally adopt the child. That effort, which Sharmat says was due to be finalized last August, was instead withdrawn that month. Lippiello contends that she had been discussing abandoning the effort for months but not done so "in the event that I changed my mind."

The adoption process points up evidence that supports Sharmat's claims about how the couple presented themselves and their relationship with the child to the outside world. Patti A. Gross is a social worker who was assigned to evaluate the home environment in the early stages of the adoption proceedings. In what Sharmat terms a "very positive" report, Gross wrote, "Lee and Lisa planned this child together. They both expect to have a life-long relationship and involvement with [the child] and each other. Lee considers herself [the child's] parent and is viewed as such in all ways but legally."

The heart of Sharmat's legal claims for visitation rights rests on the best interests of the child. Accordingly, Lippiello's affidavit portrays the child as indifferent to Sharmat these days, always eager to return to her birth mother's care.

Describing those occasions on which she did allow visitation, Lippiello asserts that "[The child] cried, reached for me and did not go willingly to [Sharmat]. At the end of the visits, the child reached out for me or ran to me, clung to me, and did not acknowledge [Sharmat].

Should the court find that Sharmat has standing to bring her visitation rights claim — which by no means is a settled matter — the strength of the bond between her and the child will be the decisive factor in the settling the case. Lippiello's attorney, Ira L. Eras, from Warren & Warren in Brooklyn, argues that a 1991 case, *Alison D.*, definitively answered, in the negative, the question of whether a same sex partner has standing to bring a visitation claim regarding the natural child of an ex-partner. Eras also argues, however, that even if Sharmat can demonstrate that she has standing, the bond she developed with a child in the first year and a half of life would not justify ruling that visitation was in the child's best interests.

Sharmat's attorneys dispute both of these pillars of Lippiello's case.

In a legal memorandum filed on Sharmat's behalf, attorneys Roslyn A. Quarto and Thomas D. Shanahan (who has on occasion served as a legal counsel to *LGNY*) argue that the *Alison D.* ruling failed to consider the doctrine of equitable estoppel, under which their client argues that Lippiello encouraged a parental relationship between Sharmat and the child and held Sharmat out as the child's parent and as such is now *estopped* from claiming that Sharmat has no standing to seek visitation.

According to Quarto and Shanahan, equitable estoppel was the critical factor that more recently led New York courts,

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