

Q&A

In Defense of Our Families

CATHCART'S PHOTO BY LISA ROSS
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Lambda Legal's Executive Director Kevin Cathcart and Joan Heifetz Hollinger, UC Berkeley law professor and renowned adoption expert, discuss recent parenting wins, *amicus* work and the future of LGBT family law.

JH: I wrote my first *amicus* brief in 1995, arguing on behalf of the child's interest in maintaining some kind of legally protective relationship with the nonbiological former partner of a biological mother. There were very few precedents that supported the argument we were making at the time. But the Wisconsin Supreme Court bought the argument, which was a huge victory because the court was willing to look at the case from the standpoint of the child's needs without regard to the absence of a biological connection or the lack of a marital tie.

KC: The expertise you bring to your *amicus* work in these cases is extremely important. Ignorance and prejudice are so often intertwined in the cases that we're fighting, so we need to shine light on the facts and reality and move the judges away from whatever



KEVIN M. CATHCART AND JOAN HEIFETZ HOLLINGER

perceived wisdom they think they have always had about lesbian or gay families. It's an interesting time to be having this conversation, because we just won the marriage case in Iowa. In that decision, the judge looked at the "experts" that the state brought forward and ruled that they didn't fall under the legal definition of experts and therefore he didn't admit their testimony. It's important that the courts make sure that what's being put forward from either side really qualifies as the kind of information that will help the fact finder make a decision in the case.

JH: This is especially important when we're talking about children. For all the legitimate ways people have historically criticized aspects of the marital relationship, marriage serves as an umbrella for protecting not just the relationship between the two married spouses but between them and their children. Children benefit from the legal stability and from the expectation of the emotional and psychological stability that comes along with legal marriage.

KC: Unfortunately, the vast majority of same-sex couples in this country do not have the option of getting married unless they leave the country. And most states do not yet recognize relationships if couples get married in Canada. We're going to be seeing battles for years about what happens when people from Massachusetts start moving in larger numbers. What happens if someone moves to a different state that has a different set of marriage or adoption laws? This is what

Lambda Legal's Oklahoma case was about.

JH: There's a long list of questions about children: providing medical care, getting third party benefits and securing legal identity. And all of those circumstances can be addressed so much more comfortably if both parents are married to each other.

KC: One of the problems that we face is that many people just don't like to go to lawyers. You have people in committed relationships with children, who know that they should do adoptions and who aren't barred by financial considerations, and yet they don't do it. And then children are more vulnerable because a legal relationship has not been solidified. The ability to be married and to have relationships recognized provides protection for children in those families.

JH: I do think that the courts are generally and increasingly drawn to the view that they are there in order to promote and protect the welfare of children. There is a momentum in the direction of protecting children's legal ties to individuals who have actually made a commitment to taking care of them. And yet, there is the *Lofton v. Kearney* decision from Florida. In *Lofton*, it's overwhelming clear, including to the judges who ultimately upheld the Florida law [denying gay people the right to adopt], that the foster parents in that case were doing heroic service as parental caregivers to children with very special and serious needs. The opinion upholding the Florida statute is allegedly based on the state's obligation to provide for the welfare of children. However, they construed the welfare of

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children as being linked to some notion of optimality — the best possible parents, not just “OK” parents in the court’s eyes. According to the court, the state could have any plausible reason for excluding someone under this standard, including sexual orientation. Many of us were appalled by that decision, but renewed by it at the same time, because outside of the 11th Circuit the momentum is in a very different direction.

KC: I agree that the momentum is in a different direction. But though Florida is the worst, it’s not alone. We see a lot more of these cases with the recent baby booms in the gay and lesbian communities. As more and more lesbian and gay couples raise children, you naturally end up with more people dealing with custody issues if they break up. It happens with straight people and it happens with gay people. But we’re much more vulnerable.

JH: Yes, the cases where relationships have ended are among the most heart-wrenching and the most difficult to deal with case-by-case, particularly in jurisdictions that do not have clear protection of these relationships. But even in the circumstances where families are not splitting apart, the consensual situations where everyone is happy and where you have a couple who jointly want to be recognized as legal parents — there is still a long way to go. Nonetheless, Lambda Legal had an enormous victory in the Oklahoma case. I participated in an earlier case before the Virginia Supreme Court, where the issue was also whether Virginia, which does not grant adoptions to unmarried couples,

would nonetheless be obligated to recognize adoptions granted to same-sex couples in other states with respect to children born in Virginia. The registrar’s decision not to issue a revised birth certificate to the new adoptive parents was eventually overturned by the Virginia Supreme Court, which was a very important victory upholding the principle of an adoption judgment being entitled to recognition everywhere.

KC: We’re now fighting that same issue in another state that is refusing to issue a new birth certificate to a child who was adopted by a gay couple from another state. So, I do believe there is a very positive trend as we move forward, but some states are still going to take a lot more work than others. I don’t want that to sound negative. It’s frustrating and we shouldn’t have to deal with families being torn apart, but if you compare this to 20 years ago, or even 10 years ago, we have so many more rights. There are so many more families who have protections today that weren’t possible in recent memory.

JH: In the long run, I have faith that reason and common sense and the rule of law will prevail. I am confident that the understanding that families should exist within the law rather than outside the law will eventually catch on, not just in courts and in legislatures, but in the public at large. I also think that within the next 10 or 20 years, you’ll be hearing from many of the children who have been born into gay and lesbian households. Those children will soon be adolescents and

in their 20s and 30s, and they will have a lot to say and a lot to contribute.

KC: Well, I agree with that completely. There are just more and more same-sex couples with children every day. More and more of America is going to be exposed to children growing up with same-sex parents — at school and in their neighborhoods — and that has a way of trickling into the court’s decisions. It’s curious how judges are educated. It’s not just what happens in the courtrooms. They live in the real world, as well. So, it’s extremely powerful when people from the academy, who are not representing a party but are representing unbiased knowledge and science, come forward with this information. It helps our work immensely. I think we’re going to be doing this work for many years to come, and there is going to be an ongoing role for people like you, Joan.

JH: Well, I’m not expecting to pull back any time soon.

KC: Neither is Lambda Legal. That’s why we’re going to win in the end, because no one is pulling back. **L**

For more information on parenting and adoption law, request Lambda Legal’s pamphlet *What You Need to Know to Protect Your Family*, available on our website www.lambdalegal.org.