

A Look at Custody Cases involving Queer Parents



Introduction

Custody matters across the Caribbean involving a parent who is queer traditionally went in favor of the one who was not. This demonstrated the role heteronormativity played and continues to play in the court's decision making. The court's position; however, has slowly been changing whereas one's sexual orientation is having less of a bearing on the outcome of custody proceedings. We will look at cases which inform the court's heteronormative position and those which reflect the changing attitude.



United Kingdom

Case law from the United Kingdom is persuasive in Jamaica as we follow the common law system. These cases over the decades demonstrated how heteronormativity plays a role in decisions regarding custody. Gay men are presented as dangerous to their children, while lesbian women are seen as less motherly.

In the 1991 custody appeal matter *C v C* (a minor) a lesbian mother who has been granted custody had to go through a retrial while temporary custody was given to the father. Her initial grant of custody was successfully appealed on the basis that her being a lesbian was an important factor that ought to be considered. Her lesbian identity was taken into account in the re-trial and she was granted custody. This case is one example where a lesbian mother is seen as less motherly.

In another case involving a gay father, the House of Lords held that a gay father had been unreasonable in withholding his consent for his son to be adopted by son's his mother and step-father. The House of Lords upheld the decision by the trial judge that the father's decision to withhold his consent was unreasonable on the basis that the child would be exposed to "his father's lifestyle".



Jamaica

In the 2009 criminal appeal *Oneil Hudson v. R*, the Court of Appeal in Jamaica agreed with the appellant's attorney that the judge should not have given any consideration to either the absence of the appellant from his children or his homosexual proclivity as having an impact on his being a good parent. The judge stated that the Constitution affords him a right to a sexual preference. Hudson won the appeal which resulted in a reduction in his sentence. While this case is not a custody matter, it is one example demonstrating the court's changing attitudes on homosexuality. It should be noted, this was decided prior to the expansion of constitutional rights protection with the introduction of the 2011 Charter.

A Look at Custody Cases involving Queer Parents



The Bahamas

In the 2007 case of *E v A*, a custody dispute arose during divorce proceedings, between the petitioner/mother and respondent/father. They previously separated after the man revealed he was gay. The custody proceedings concerned their 14- and 10-year-old daughters.

Since their separation, and up until the time of the hearing, parents had joint custody of the children. The father had access to the children on weekends, paying maintenance to the mother for the children on a monthly basis, as well as the entirety of their school fees, and taking care of their medical, dental and optical expenses.

The mother described him as a good father. Despite this, she wanted sole custody of the children over the supposed risk of harm that joint custody arrangement would have because of the presence of the father's 'friend', who had visited the house while the children were there.

The court was not persuaded that there was any evidence that the children had actually been exposed to the respondent and any 'friend' in any compromising situation.

The court opined that the petitioner was '... possibly basing her application for supervised access on ill-informed reactions to homosexuality, although she accepts that the respondent is a good father who has always shown love to his children'.

By leaving the joint custody arrangement undisturbed, the court confirmed that notwithstanding the father's sexual orientation, he was entitled to equal testament in relating to custody of his children.

Conclusion

These cases give some insight into how the court treated queer parents and how this position has evolved. They touch on the right to the protection of the family, which acknowledges the family as a fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. While the court traditionally took a heteronormative approach to custody, more recent cases show a shift in this position with the recognition that queer parents are entitled to the same rights as those who do not identify as queer.

