

Can A Father Get Sole Custody Of The Children?

February 9, 2012 | by Stephen Haller

Dear “Ask the Attorney”:

My wife and I had been “happily” married for more than 6 years and we have two small children. Out of the blue, she told me that she is in love with someone else – another woman! Obviously I want to get a divorce but want to know if I can file for sole custody of the children. I think the fact that she wants to move in with her girlfriend will be very confusing to them.

R.B.

Our guest blogger for today is Stephen P. Haller, Esq. Stephen is a Partner in the firm who, for 35 years, has practiced Family and Matrimonial law, helping clients in all areas of divorce and custody matters.

Dear R.B.,

The first thing you absolutely MUST realize is that the gender of the “other person” isn’t going to be relevant to a Court in deciding custody issues. Long gone are the times when Courts looked with prejudice on same-gender relationships. In fact, since the late 1970’s under cases law, adultery even of a heterosexual variety was deemed not to be a disqualifying factor when it came to custody of children. The sole guidepost for courts is the “best interests” of a child or children.

The way in which courts determine the best interests of children in the absence of an agreement by the parents is to have a thorough psychological examination completed on the parents, the children, as well as the “significant other” of each party. In addition, other collateral sources might be interviewed (relatives, friends, teachers, doctors, for example). Sometimes, parents agree on one person to act as a joint expert; sometimes there are separate experts retained. This gets costly, but may be warranted

under certain circumstances.

Your concept of “sole custody” also needs refinement. “Legal custody”, meaning the right of each parent to have significant if not equal influence on a child’s life, health, education, and welfare, is most ordinarily joint. Nothing in your question suggests any fact which would change the presumption in the law of joint custody. “Residential custody” – where the child would primarily live – would depend on identifying the children’s best interests, which parent was more available, whether there was an issue of parental fitness, or any disqualifying factor. Having a same gender companion is not, in and of itself, a disqualification. The final issue (mother cohabiting with the companion) is the same whether it is an opposite or same gender party. It is not common for a judge to have children living with an unmarried companion over the objection of the other parent absent some other problem or reason. After a divorce, that restriction is ordinarily lifted.

You should seek and obtain a detailed consultation with an attorney skilled in this area of the law so that all the facts can be explained to counsel and you can receive meaningful guidance and education. Only in this way can you make an informed decision.