THE EFFECTS OF ONE PARENT LIVING A HOMOSEXUAL LIFESTYLE FOLLOWING A HETEROSEXUAL RELATIONSHIP IN CUSTODY AND VISITATION DETERMINATIONS OF A MINOR CHILD

I. OVERVIEW

It is without doubt that determining the custody and visitation of a child from divorce is one of the most unpredictable and imprecise issues facing family law lawyers today. Over the last few centuries, society has struggled with the proper means through which to determine the legal and physical custody of children in the context of a divorce. Despite societies’ progress and advancements, it seems as though the law cannot keep up with the changing needs of a dynamic society. Older methods may have worked for a certain period of time, due to society’s stereotypes and decided gender roles, but we have now progressed to a point where those methods are no longer sufficient.

The sexual orientation of a minor child’s biological parents, who were previously married or in a relationship, has no place in the courts when determining custody and visitation. Oftentimes, the homosexual parent is placed at a huge disadvantage in custody and parenting determinations because of their sexuality. This disadvantage presents itself in forcing the homosexual parent to overcome a burden of proving that their sexuality does not negatively affect the minor child, while their heterosexual counterparts face no such hurdle. The majority of courts implement the “best interests” and “nexus” tests when evaluating parenting and custody, they reason, to eliminate sexual orientation presumptions in these matters.

However, these tests actually cause heightened scrutiny of the lives of homosexual parents, even when there is no evidence of harm, either causally related to their sexuality or not. Heterosexual parents are never evaluated based on their sexual orientation; therefore, homosexual parents should not be forced to defend their sexuality to a court when their heterosexual counterparts are faced with no similar burden. Parental sexual orientation does not determine parental fitness and, as such, should not

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be the focus of visitation and custody determinations. The sole focus should be the best interests of the children and the ability of each parent to meet the unique needs of each child, regardless of their sexual preference.

Part I of this article will detail the history of visitation and custody determinations through the “best interests” and “nexus” tests, as illustrated through family law journal articles as well as various applicable cases. Part II of this article will discuss what a homosexual parent faces when vying for custody or visitation against a heterosexual parent. This analysis will include speculative harm, affection between homosexual couples, and keeping the best interests of the children at the forefront of custody determinations. Part III of this article will offer an analysis of the difficulty homosexual parents face due to lagging family law, and will propose a modification to the “best interests” and “nexus” tests for the future. Part IV of this article will conclude with a summary.

II. HISTORY AND BACKGROUND

A. The “Best Interests” Test

The “best interests” test replaced the “tender years doctrine,” a presumption that the mother is best suited to care for minor children because they are “softer and more natural nurturers.” The “best interests” test is utilized by the court for its ability to avoid generalized assumptions and stereotypes of gender roles and making more individualized determinations based on the specific facts and intricacies of each case before the court. The “best interests” test considers several factors that relate to each parent’s capabilities and, simultaneously, takes into account the needs of the minor child, including disabilities or handicaps, siblings, schooling, extracurricular activities, and the preferences of the child. Such parental factors include alcohol and/or drug use, domestic abuse and/or violence, physical and mental health issues, occupations, geographic location, daily schedule, among others, of each parent. From a big picture perspective, the overall lifestyle of the primary parent must serve the best interests and needs of each unique child and cause the least amount of disruption as possible.

The difficulty of the test, however, is in its applicability. Each state’s factors may differ from another state’s, and many state statutes give little or no guidance to the courts on the amount of weight that should be applied to each factor. Therefore, judges are granted wide latitude in determining how much weight may be placed on each factor in an individual case. The uncertainty of the “best interests” test is especially prevalent when determining custody or visitation of minor children after the deterioration of a heterosexual relationship in which one parent begins a homosexual lifestyle. “Consideration of a potential parent’s sexual orientation is just as inappropriate as consideration of the parent’s sex in that it probably will lead to the same assumptions of a person’s ability to parent based on their likelihood of fitting ‘typical’ parental roles.”

B. The “Nexus” Test: Homosexuality Per Se Is Not a Bar to Custody

The “nexus” test is applied by a number of states, the nexus test prohibits the consideration of a parent’s sexual orientation unless and until it is shown that it could have a negative effect on the minor child. This works to ensure that a parent’s sexual orientation is not unjustifiably considered by the court in making custody or visitation determinations. When there is an absence of harm to the child by the parent’s sexual orientation, a court may

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3. Id.

4. Id. at 433-434.

5. Id.

6. Id. at 432.

7. Id.

8. Belleau, supra note 1 at 383.

9. Id.

10. Id. at 386.


not consider the sexual orientation any further. But, when a parent places his or her sexual relationship ahead of the child’s interests, or if it causes any sort of detriment to the child, the parent’s sexual orientation seems to be open for consideration by the court, but only, most appropriately, through the “nexus” test. However, it is clear from the following cases that the stigma of homosexuality, and the effects it may have on a child, and homosexuality itself are sufficient to render a parent unfit, in the eyes of the court, to his or her minor children, regardless of any evidence of present harm it has actually caused.

In Jacoby v. Jacoby, the mother of two young daughters told her husband she was a lesbian and the parties agreed to separate with a prearranged custody agreement. Despite the mother’s excellent parenting skills, the circuit court granted primary physical custody to the father. Reasoning, by paraphrasing the psychologist’s testimony, that there is a

“strong stigma attached to homosexuality and that while being reared in a homosexual environment does not appear to alter sexual preference, it does affect social interaction and that it is likely that the children’s peers or their parents will have negative words or thoughts about this.”

Still, other states believe that a parent’s sexual orientation is evidence of parental unfitness, despite any showing of harm stemming from their sexual preference. In Bottoms v. Bottoms, although the trial court awarded custody to the grandmother instead of the lesbian mother, the court claimed their decision was based on the mother’s overall unfitness, and that her sexual orientation itself did not necessarily render her unfit. The court cited few instances it argued were clear and convincing evidence of the mother’s parental unfitness, such as being a high school drop out, occasions of leaving the child with the maternal grandmother, contracting a venereal disease, and having a bad temper she already sought counseling for.

However, the judge’s decision from the bench was solely predicated on the mother’s “illegal” and “immoral” conduct of being a lesbian, which “constitutes a felony under the Commonwealth’s criminal laws.” On appeal, the court overturned the trial court’s decision and concluded that the evidence failed to prove that the mother was an unfit parent, or that her lesbian relationship had a “deleterious” effect on her son, but, in fact, the evidence showed that “the mother ‘is and has been a fit and nurturing parent who has adequately provided and cared for her son.’ ”

The trial court’s decision, however, was affirmed at the Supreme Court level, which echoed the trial court’s argument by stating, “we have held, however, that a lesbian mother is not per se an unfit parent,” and continued by citing the criminality of her lesbianism. The supreme court further reasoned that it was likely that “living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s

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13 HARALAMBIE, supra note 13.
14 Id.
15 Id.
17 Id.
18 Id. at 413.
19 HARALAMBIE, supra note 11.
21 Id. at 104-106.
22 Id. at 107.
23 Id. at 107.
24 Id. at 108.
relationships with his ‘peers and with the community at large.’”25 Here, both the trial court and the Supreme Court failed to demonstrate how the mother’s conduct, aside from being a homosexual, was sufficient to rebut a parental presumption, as well as articulate how the mother’s homosexual lifestyle presently caused her to be an unfit parent.26

In Nadler v. Superior Court of Sacramento County from 1967, a petition for writ of mandate was brought to the Supreme Court to compel the Superior Court to hear further testimony on the issue of “the effect of mother’s homosexual conduct upon the well-being of her daughter.”27 This followed the Superior Court’s action to remove the minor child from the mother’s custody and instead award custody to the child’s father based on the mother’s sexual orientation.28 The Superior Court reasoned that the mother’s sexuality itself rendered her an unfit parent and it would be in the best interest and welfare of the child to be placed with her father.29

The Supreme Court properly overturned the Superior Court and held that the Superior Court “failed in its duty to appropriately exercise discretion with by holding as a matter of law that the petitioner was an unfit mother on the basis that she is a homosexual.”30 It reasoned that, although the courts have wide discretion in custody determinations, the best interests of the child must remain at the forefront of the matter, while “the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interest of the child.”31

III. SEXUAL ORIENTATION AS A FACTOR IN DETERMINING CUSTODY OR VISITATION

A. Speculative Harm is Not Sufficient to Show an Adverse Effect on the Child

Many sources agree that a parent’s sexual orientation should not be considered until it has been found to cause harm to the child.32 However, others maintain that, despite awarding custody or visitation to a gay or lesbian parent because it is in the best interest of the child, the child may suffer due to the involuntary nature of the parent’s sexual preference.33 Such arguments include awkward or embarrassing encounters with friends or teachers, difficulty in religious settings, or subjects of “taunts, ridicule, or ostracism” due to being raised by a homosexual parent.34

In M.A.T. v. G.S.T, the heterosexual couple divorced after adopting one daughter during their marriage, and the mother telling the father she had been in carrying on a homosexual relationship.35 The parents jointly retained a third party custody evaluator to amicably resolve the outstanding issue.36 The trial court granted joint physical custody with a proposed parenting schedule for an 18-month transition period, in accordance with the third party custody evaluation.37 However, following the transition period, the trial court ultimately awarded primary custody to the father and visitation to the mother with no reasons stated.38 The mother later filed a petition for modification, in which she was denied.39 At the evidentiary hearing, the father opined that the daughter would benefit from this order, even though the custody evaluator reaffirmed her joint custody recommendations for the best interest of the daughter.40

While the trial court judge acknowledged minor changes in circumstances due to the mother’s lifestyle, he erroneously supported his denial by vaguely referencing his “many years on the bench, [his] own personal experiences as parent, a grandparent a foster parent.”41 The judge reasoned, first, that although he respected the custody evaluator’s professional opinion, he personally believed that “the best interests of a school-aged child is served in a primary physical custodial relationship,” but refused to elaborate on why he stood by these convictions.42

The judge further reasoned that the mother “failed to meet her burden of proof to establish her entitlement to custody,” and she “never offered testimony to the effect that her homosexual relationship would not have an adverse effect on [Daughter].”43 The trial court then concluded that, “when weighing [Daughter’s] best

25 Bottoms at 108.
26 Id.
28 Id.
29 Id.
30 Id. at 354.
31 Id.
32 Haralambie, supra note 11.
33 Id.
34 Id.
36 Id. at ¶3.
37 Id. ¶4.
38 Id.
39 Id. ¶5.
40 M.A.T. at ¶5.
41 Id.
42 Id.
43 Id. at ¶6.
interests between the two households we believe those interests are better served by placing her in a traditional heterosexual environment." The Superior Court ultimately reversed the trial court’s decision and appropriately overruled prior case law the trial court relied on when they erroneously presumed custody against the homosexual parent.45

In In re Marriage of Wiarda, the mother appealed the trial court’s granting of custody of the former couple’s two minor children to the father following their divorce.46 The mother argued that, in reaching that determination, the trial court improperly relied on her homosexual relationship.47 The trial court began by reiterating the best interests of the child. It continued by asserting the importance of determining “which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding.”48

On appeal, the Court admitted that it was a “close call” as to who should be granted primary custody. It reasoned that the mother’s new homosexual relationship did not have “a calming effect upon either of the children or upon the difficult problems of the breakup of this marriage.”49 The Court of Appeals affirmed, with modification to visitation, and attempted to justify the trial court’s decision by stating that the mother’s new relationship would have been detrimental to the children regardless if her new companion was a man or woman, and that the majority of the disruption following the divorce was largely caused by the mother’s own doing.50

Conversely, the father in Massey-Holt v. Holt argued that his former wife’s relocation constituted changed circumstances that warranted a modification of their initial custody arrangements.51 The father argued his concerns over the amount of time the child spent with the nanny; however, it was later indicated that the nanny was actually the mother’s new girlfriend. The trial court awarded the father primary residential custody at modification and the mother appealed.

The Court of Appeals found the father’s concerns were without merit and the father admitted the mother’s new relationship was his primary argument in proposing changed circumstances.52 The court elaborated that father’s concerns over “nonspecific, speculative potential effects” and “the possibility [the children] might be teased at school someday” were not enough to establish “a negative effect” on the children.53 The Court of Appeals reversed and reinstated the trial court’s initial decision designating the mother as the primary residential parent.54

B. Affection Between and Cohabitation of Homosexual Couples May Be Sufficient to Show an Adverse Effect on the Child

Some courts have illustrated that mere displays of affection towards or between, or cohabitation of, a homosexual parent and his or her partner are sufficient to preclude an award of custody or visitation.55 Most arguments are grounded in the personal biases and beliefs of the judges and courts, while others generally hold that homosexual affection is entirely inappropriate in front of children.56 Some of these biases stem from the idea that the child will become, or be more pressured to become, a homosexual, and even some speculate that homosexual parents and, horrifyingly, their partners will be more likely to molest children than heterosexuals, regardless of the lack of empirical evidence for this theory.57 Applicable cases and relevant articles suggest introducing a mental health professional as a witness in cases like this, as it may be a useful tool in defending against these erroneous beliefs and to address the larger issue of the best interests of the child.58

In Thigpen v. Carpenter, the Court of Appeals affirmed the trial court’s decision in granting sole custody of the minor children to the father, and found that the father presented sufficient evidence to warrant a change in custody.59 Such evidence included the mother’s previous lack of emotional stability, (e.g. outbursts and an attempt at suicide) and her unwillingness to shield her children from her homosexual lifestyle, even though an expert witness at trial found the mother to be emotionally stable.60 Additionally, the maternal grandmother stated in court that her own daughter had been a “perfect

44 Id.
45 Id. at ¶ 7.
46 In re Marriage of Wiarda, 505 N.W.2d 506, 507 (Iowa Ct. App. 1993).
47 Wiarda at 508.
48 Id. at 507.
49 Id. at 508.
50 Id.
52 Id.
53 Massey-Holt at 610.
54 Id. at 611.
55 HARALAMBIE, supra note 11.
56 Id.
57 HARALAMBIE, supra note 11; Polikoff, supra note 11.
58 HARALAMBIE, supra note 11.
60 Thigpen at 512-513.
mother in the past,” however, she admitted, “that she did not like her daughter’s homosexuality.”

The trial court reasoned that neither the mother nor her lesbian partner “expressed a desire to take precautions to shield the children from exposure to their sexual activities.” When, in fact, the mother had testified that she had never engaged in sexual conduct with her partner in front of her children, save for sleeping in the same bedroom as her partner. Further, the chancellor pointed out that “homosexuality is generally socially unacceptable, and the children could be exposed to ridicule and teasing by other children; and that it was contrary to the court’s sense of morality to expose the children to a homosexual lifestyle.”

On appeal, however, the mother argued that the evidence presented was insufficient to support a finding by a preponderance of the evidence that her sexual orientation would adversely affect the children and, specifically, that her denial of custody and visitation based on her sexuality violated her constitutional rights. The mother reasoned that her emotional instability was a thing of the past, which she had sought treatment for, and she argued that the court did not causally link her homosexuality with the best interests of the children. In affirming the lower court’s decision, the Court of Appeals echoed the chancellor and attempted to justify his reasoning by arguing that while it is clear the mother’s homosexuality was a factor, it was not the only factor taken into consideration in this matter.

The Supreme Court reversed the judgment of the Appeals Court and affirmed the judgment of the District Court in *Pulliam v. Smith*. As a result of the former husband’s homosexual relationship and activities, the Supreme Court held that the evidence supported the former wife’s petition for modification through changed circumstances by granting her exclusive physical custody of the parties’ two minor children. The court argued that the former husband’s homosexuality contributed to finding a sufficient amount of evidence to warrant a modification of the custody order. The court cited mundane activities between the couple, such as kissing on the cheek and on the lips in front of the two minor children as justification.

The court also delved into the private sexual life of the homosexual couple and used their truthful answers as further evidence to support their decision. Minor details of the couple’s life were exacerbated to bolster more evidence again them, including stating that the two minor children’s bedroom was directly across the hall from the couple’s. The court argued that “the Plaintiff is presently in a position to provide an environment more suitable to the two minor children’s physical and emotional needs.” Ultimately, the court reasoned that the “Defendant’s conduct is not fit and proper and will expose the (2) minor children to unfit and improper influences,” and “the evidence leads the Court to find that the minor child Joey may already be experiencing emotional difficulties because of the active homosexuality of the Defendant.”

C. The Best Interests of the Child Should Be the Focal Point of Custody and Visitation Determinations

Several family law articles and books attack the “best interests” argument of and discuss the real harm that may result when a child is actually kept from his or her homosexual parent. Despite being concerned over what could happen to a child of a homosexual parent, these sources argue the immediate detriment that would negatively impact the best interest of the child. Regardless of the parent’s sexuality, the child is being divided between his or her two parents when they are unwillingly subject to a divorce. The following cases illustrate how a court properly implements the “best interests” test, in the context of a custody determination involving a homosexual.

First, Nan Hunter, the founding director of the American Civil Liberties Union (ACLU) Lesbian and Gay Rights Project and an early advocate for eliminating the “best interests” test, argued that a parent’s sexual orientation should be irrelevant to custody and visitation determinations:

A parent’s sexual orientation, in and of itself can never have an adverse impact on a child. A parent might not pay sufficient attention to a child’s needs

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61 *Id.* at 512.
62 *Id.* at 513.
63 *Id.*
64 *Thigpen* at 514.
65 *Id.* at 513.
66 *Id.* at 514.
68 *Id.* at 902.
69 *Id.*
70 *Pulliam* at 901.
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.* at 901-902.
75 *Haralambie*, *supra* note 11.
76 *Id.*
77 *Id.*
79 Polikoff, *supra* note 11 at 237.
or feelings or might choose a new partner who treats a child poorly. These could have an adverse impact on the child. But neither has anything to do with whether the parent is gay or straight, married or not.80

In D.H. v. J.H., the mother and the father of three minor children divorced and custody was awarded to the father while the mother was merely granted visitation privileges.81 Most of the father’s evidence against the mother’s parenting abilities consisted of the mother’s homosexual relationships and related activities, such as sharing a bed with her partner.82 On appeal, the mother argued that the court placed too much weight on her homosexual lifestyle and the award of custody to the father was in error.83 The court held that the decision of the trial court could be supported on other grounds, and not solely on the mother’s homosexuality.84 The court supported its decision by citing examples of how the mother was not a “model housekeeper,” due to leaving dirty dishes out until they molded, and the lack of time she spent raising her children and instead chose to be with her partner.85

The court did clarify, though, that although not explicitly listed, the mother’s conduct constituted marital misconduct and adultery, which are factors in determining the best interests of the child.86 The court ultimately reasoned, however, that, despite the father’s insufficient focus on the mother’s sexuality, both the mother’s and the father’s testimony raised enough issues relative to the mother’s parenting abilities to warrant a granting physical custody to the father, based on the best interests of the children.87

In contrast, in Matter of Parsons, the mother and the father had one minor child out of wedlock.88 Paternity had been questioned by the father until it had been confirmed when the child was approximately two years old.89 The mother went on to marry another man and had two additional children with him.90 That couple divorced and the mother began to experience financial, emotional, and physical difficulties.91 The mother agreed to grant custody of her first minor child to the child’s biological father and was allowed specific visitation.92 At this time, the mother had admitted she was a lesbian.93

The mother petitioned to obtain custody of the child based on changed circumstances, but not before the court ordered the parents to attend counseling. However, before the court could reassess the circumstances after the judge’s orders, the father was held in contempt for violation of the parenting schedule and the child was placed with his maternal grandparents.94 The mother again filed for modification due to changed circumstances. She cited her consistent compliance with court orders, such as attending counseling and honoring prohibited topics of discussion, such as the custody conflict.95 Meanwhile, the father continuously and blatantly disregarded the court’s authority in the matter, and did nothing to prove his fitness as a parent.96 The court awarded the mother custody of the child and relied on her “remarkable improvement in parenting and ... improved insight into how her inconsistent behavior patterns have contributed to the situation.”97

The court made a point to note that the source of much of the father’s hostility throughout the proceedings, such as refusal to obey court orders to attend therapy, preventing his son from seeing his mother, and intimidating the other, school personnel and court appointed special advocates, seemed to stem from the mother’s lesbian lifestyle.98 The court reiterated that, although lifestyle is a factor, the mother has never been inappropriate in front of the child, and thus deemed it irrelevant.99 The court also reasoned that, “father’s behavior intentionally places the child in the center of conflict with all around him, including interference with the advocate’s role of protecting the child’s interest, which the Court considers a form of emotional abuse.”100

Along similar lines, in Tipsword v. Tipsword, the mother and the father divorced after having two minor children together.101 An evidentiary hearing was held to

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80 Id.
82 Id.
83 Id. at 290.
84 Id. at 293.
85 Id.
86 D.H. at 290-291.
87 Id. at 296.
89 Parsons at 891.
90 Id. at 890.
91 Id. at 891.
92 Id.
93 Parsons at 892.
94 Id.
95 Id. at 891-892.
96 Id.
97 Id. at 892.
98 Parsons at 892.
99 Id. at 890.
100 Id.
determine custody and visitation. The court granted the mother sole legal custody, but only granted the father four hours of supervised visits every other week. The court reasoned that the father’s emotional struggles, which were a byproduct of his transition, caused him to be absent from the children’s lives, and would confuse the children. In addition, the court ordered therapy to help the children adjust to the father’s presence in their lives, as well as his gender transition.

The father appealed the judgment. He argued abuse of discretion on behalf of the court by improperly considering his transgender status when they denied him joint custody of the children. The Court of Appeals affirmed their grant of sole legal custody to the mother and reiterated the trial court’s argument, by reasoning that, “Father is certainly free to be who he or she wishes to be... but the consequences of and confusion caused by his choices in the lives of 4 and 2 year old children simply cannot be ignored.”

Further, “The bare fact that a parent is transgender is not relevant to his or her ability to parent effectively;” however, “when a parent’s conduct attendant to his or her gender transition harms the parent-child relationship, that conduct and resulting harm is a legitimate consideration in determining the child’s best interests – just as all parental conduct is relevant.”

IV. ANALYSIS

A. The “Best Interests” and “Nexus” Tests Are Not Sufficient or Applicable

Although the “best interests” test was implemented to avoid generalized assumptions and stereotypes when determining custody and visitation, it does a poor job of protecting homosexual parents from being punished for their sexuality. The test does not need to factor in a parent’s sexuality, and it considers plenty of other factors that can paint a far more accurate picture as to a parent’s ability to meet the needs of their child. Attorney-advocates, such as Polikoff and Haralambie, and cases such as Wiarda, Massey-Holt, D.H., Parsons, and Tipsword, have already pointed out that sexuality does not have a place in determining custody or visitation, and that being a homosexual does not create an unfit parent.

To compensate for negligent application of a parent’s homosexuality, the court justifies its consideration of sexual orientation by reasoning that it will only do so when it is causally related to harm upon the child. However, some courts have cited the criminality of homosexuality and homosexual conduct when denying custody or visitation, and have even reasoned that one’s homosexuality naturally renders them an unfit parent. The court in Bottoms, out of Virginia in 1995 cited, “felonious conduct inherent in lesbianism” as a majority reason to withhold custody from the mother, but it took the state until 2013 to pass a bill repealing the behavior that was enacted in 1877. Still, several states have yet to repeal such behavior from their statutes at all, or have yet to even clarify as to which behaviors their amended statutes apply to. Even if a court does not find evidence of harm that is directly caused by a parent’s homosexuality, the vast majority of courts still find a way to place heavier weight than they should on sexual preference in the context of child custody matters. In essence, a perfectly acceptable heterosexual parent under the “best interests” test would not be treated the same as they would if they were a homosexual.

For example, in Jacoby v. Jacoby, the trial court attempted to send a message that the stigma of homosexuality naturally outweighs the parental fitness of a homosexual parent. The lower court attempted to paraphrase the court psychologist by stating, generally, that

102 Id. at ¶ 2.
103 Id. at ¶ 5.
104 Id.
105 Tipsword at ¶ 6.
106 Id. at ¶ 8.
107 Id.
108 Id.
109 See Haralambie, supra note 19.
110 LANDE, supra note 2.
111 See Haralambie, supra note 11; see Wiarda, 505 N.W.2d 506; see Massey-Holt, 255 S.W.3d 603; see D.H., 418 N.E.2d 266; see Parsons, 914 S.W.2d 889; see Tipsword, supra.
112 Joslin, supra note 12.
113 See Bottoms, 457 S.E.2d 102.
116 See Nadler, 255 Cal. App. 2d 523; see Jacoby, 763 So. 2d 410; see Bottoms, 457 S.E.2d 102.
117 See id.
118 See Jacoby, 763 So. 2d 410.
even though times are changing, a stigma about homosexuality still remains in our society.\textsuperscript{119} However, the judge actually misinterpreted her opinion to make it look like her words supported the court’s private biases, thus reasoning that the stigma qualifies as harm under the “nexus” test.\textsuperscript{120} while in \textit{Bottoms}, the court cloaks the mother’s “lesbianism” with various past instances of minimal parental unfitness, such as being a high school drop out and mental illness that had already been addressed, to justify its denial of custody.\textsuperscript{121}

In \textit{Nadler v. Superior Court of Sacramento County}, the court held that the mother’s homosexuality automatically rendered her an unfit and improper parent based on her sexuality alone.\textsuperscript{122} Fortunately, they recognized their error and properly reversed the decision, reasoning that the lower court failed to specify exactly how the mother’s sexual orientation rendered her an unfit parent, and until then, homosexuality itself cannot sustain parental unfitness.\textsuperscript{123} This case reminds us that there is no room in the court for a mere battle between parents to see who can “beat” the other, but that actual harm stemming from a parent’s sexual orientation must be established, rather than we ruling for one parent over another based solely on sexual orientation.\textsuperscript{124} We must remember that it is the lives of children that are at stake in these proceedings and that they must be placed ahead of egos and biases.\textsuperscript{125} Outside influences and opinions cannot cloud the judgment of the court when children are often too young to voice their own opinions.\textsuperscript{126} If the error could have been acknowledged in 1967, it surely can be recognized in 2015.\textsuperscript{127}

\textbf{B. Speculative Harm is Never Sufficient to Preclude Custody to a Homosexual Parent}

Courts have argued that homosexuality itself does not preclude a homosexual parent from being granted custody or visitation, unless it is accompanied by causal harm.\textsuperscript{128} However, despite courts’ attempts to be progressive by overlooking the stigma of homosexuality, they are, in actuality, still inserting their biases and personal beliefs into their decisions by arguing that children may still be harmed by their parent’s sexual orientation, one way or another, without concrete evidence or facts from the case.\textsuperscript{129} It is unrealistic and inefficient to speculate about future possibilities when there is a lack of evidence supporting such a theory.\textsuperscript{130}

For example, in \textit{M.A.T. v. G.S.T.}, the parents even sought the help of a third party custody evaluation to determine a proper parenting schedule.\textsuperscript{131} Despite this, the judge still speculated that the adopted daughter would fare better in a “traditional heterosexual environment,” without articulating what that environment exactly consisted of or could provide for better than a homosexual environment could.\textsuperscript{132} He essentially passed judgment on the capabilities of a lesbian mother, as compared to a heterosexual mother, without sufficient evidence, in addition to providing less than substantial reasoning for his final judgment.\textsuperscript{133}

The judge also tried to place blame on the mother for not overcoming the burden of proving that her homosexuality would not adversely affect the child.\textsuperscript{134} Other cases and opinions have pointed out that one parent should not have a greater burden than the other in custody or visitation proceedings.\textsuperscript{135} Further, there should be no presumption that mere homosexuality adversely affects children.\textsuperscript{136} It is evident that the judge’s personal attitudes towards homosexuality overshadowed the real parental fitness of the mother.\textsuperscript{137}

\textit{In re Marriage of Wiarda} illustrated that when it comes to “close calls,” a court’s decision will, unfortunately, hinge on the presence of homosexuality, and the court will defer in favor of the heterosexual parent.\textsuperscript{138} The case also brought to the forefront the court’s argument that homosexual relationships exacerbate the effect of the disruption of a divorce on the children.\textsuperscript{139} Instead of considering the turmoil that divorce causes on its own, the court finds another way to play the homosexuality card in custody and visitation determinations.\textsuperscript{140}

On the other hand, the court in \textit{Massey-Holt v. Holt} struck down the father’s concerns over the mother’s new

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\textsuperscript{119} \textit{Id.} at 413.
\textsuperscript{120} \textit{See id.}
\textsuperscript{121} \textit{See Bottoms}, 457 S.E.2d 102.
\textsuperscript{122} \textit{See Nadler}, 255 Cal. App. 2d 523.
\textsuperscript{123} \textit{Id.} at 525.
\textsuperscript{124} \textit{Id.} at 523.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{See Nadler}, 255 Cal. App. 2d 523.
\textsuperscript{128} \textit{Haralambie, supra} note 19.
\textsuperscript{129} \textit{See id.}
\textsuperscript{130} \textit{See id.}
\textsuperscript{131} \textit{M.A.T.}, 989 A.2d at 13.
\textsuperscript{132} \textit{Id.} at 14.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{See Wiarda}, 505 N.W.2d 506.
\textsuperscript{136} \textit{See Polikoff, supra} note 19.
\textsuperscript{137} \textit{See M.A.T.}, 989 A.2d 11.
\textsuperscript{138} \textit{See Wiarda}, 505 N.W.2d 506.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\end{footnotesize}
homosexual relationship. This court denied that “nonspecific, speculative potential effects” qualified as harm, and thus did not warrant a changed circumstance. There was no twisting of evidence or stretching of facts to make it conform to society’s general immoral attitudes towards homosexuality. The court did not attempt to speculate on the future, and decided the case solely on the facts presented.

C. Affection Between Homosexual Couples is No Different Than Affection Between Heterosexual Couples

Courts have held that ordinary displays of affection and cohabitation between homosexual couples is enough to deny a homosexual parent custody or visitation rights. They conjecture that children will be adversely affected by these displays of affection and may be influenced to become homosexual themselves. Once again, courts have speculated the adverse effects children could suffer as a result of having an affectionate homosexual parent, when this, except potentially in very extreme cases, would never stand as a valid challenge against the parenting appropriateness of a heterosexual.

Such cases have instructed homosexual parents to refrain from showing ordinary affectionate to their partner, and even consciously shielding their children from such actions. Shockingly enough, intimate, minor details of a homosexual parent’s sexual relations were unnecessarily prodded and used against him. Such instances include the court delving into the private sexual acts couples engage in behind closed doors, and inquiring the frequency of such acts and how such acts were specifically performed on one another. On the other hand, heterosexual couples are encouraged to display affection as a means of showing happiness and stability as a family. The mundane details of a heterosexual couple’s intimacy would never be probed, as the bedroom has been deemed off limits.

Still, judges have injected their personal beliefs into the court system when they disregard the strong evidence of parental fitness and overshadow it with minimal, or speculative, indications of harm caused by homosexuality. No matter how discreetly a homosexual parent lives his or her life, courts seem to always find a way to find them in the wrong, or use some scintilla of evidence as a deal-breaker.

D. Sexual Preference of Parents Should Not be a Factor in the Best Interests of Children

Instead of focusing on a parent’s sexual preference, more emphasis should be placed on the child’s interests and how best to serve their needs during an inherently tumultuous time. Rather than creating additional differences between children based on their parents’ sexual preferences, sources, such as experienced family law attorney Ann Haralambie, focus on the pressures young children already face just by being different from one another.

Nan Hunter’s quote accurately points out that parents of all sexual orientations have the capability of being a poor parent or a great parent. All kinds of parents have the ability to do something that may or may not adversely impact the best interests of their child. The adverse behavior she highlights is not limited to homosexuals. She drives the idea home that sexual orientation does not determine parental fitness, but it is the personality and decisions each individual makes as a human being. Sexuality itself does not render a human being incapable of properly caring for a child.

The courts in D.H. v. J.H. and Matter of Parsons illustrated that such frivolous claims of homosexuality creating an unfit parent will not be tolerated. These courts focused

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141 See Massey-Holt, 255 S.W.3d 603.
142 Id.
143 Id.
144 Id.
145 HARALAMBIE, supra note 11.
146 Id.
147 See HARALAMBIE; see Thigpen, 730 S.W.2d 510; see Pulliam, 501 S.E.2d 898.
148 See Thigpen, 730 S.W.2d 510; see Pulliam, 501 S.E.2d 898.
149 Pulliam, 501 S.E.2d 898.
150 Id. at 901.
151 See Thigpen, 730 S.W.2d 510; see Pulliam, 501 S.E.2d 898.
152 Id.
153 See M.A.T., 989 A.2d 11; see Wiarda, 505 N.W.2d 506; see Thigpen, 730 S.W.2d 510; see Pulliam, 501 S.E.2d 898.
154 Polikoff, supra note 11.
155 HARALAMBIE, supra note 19.
156 Id.
157 Polikoff, supra note 69.
158 Id.
159 Id.
160 Id.
161 See id.
162 See D.H., 418 N.E.2d 286; see Parsons, 914 S.W.2d 889.
on the facts at hand and made determinations on a proper basis.\textsuperscript{163} They did not stray from the facts of the case, nor were they influenced by outside opinions of homosexuality.\textsuperscript{164} There was sufficient evidence otherwise to determine the mothers’ fitness without improperly relying on her sexual orientation as a basis.\textsuperscript{165} The mother in \textit{D.H. v. J.H.} exhibited enough behavior to render her unfit, while the mother in \textit{Matter of Parsons} was actually lauded for placing her child’s needs over her own.\textsuperscript{166} The “best interests” and “nexus” tests would be much more useful and acceptable if they could be applied distinctly, and as smoothly and clearly as they were here.\textsuperscript{167}

\textbf{V. CONCLUSIONS}

The sexual orientation of a minor child’s biological parents has no place in the courts when determining custody and visitation. Homosexual and heterosexual parents must be placed on the same playing field when vying for custody and visitation of their children. There are a wide variety of factors that should be considered when making custody determinations, and they do not include sexual orientation. All parents alike, regardless of their differences, are capable of making the same mistakes that can adversely impact their children.

Speculative harm is not sufficient to preclude custody without actual evidence of real harm being done, regardless of sexual orientation. Affection between homosexual parents should be as equally accepted and encouraged as it is amongst heterosexual parents. Ultimately, the focus of the “best interests” test, namely, the best interests of the children, needs to consciously be pushed to the forefront of the case and not over shadowed by outside influences and the personal feelings of the presiding judge.

The lack of uniform application of the “best interests” and “nexus” tests, in the context of child custody cases with one homosexual parent, has resulted in inconsistent and unpredictable court decisions. Some states won’t consider a parent’s sexual orientation at all, while some may consider it in application of the “nexus test” to identify any related harm to the child.\textsuperscript{168} In the cases cited, only \textit{Thigpen} specifically refers to the “nexus” test once, while all of the cases claim to implement the “best interests” test.\textsuperscript{169} However, the rationales behind the courts' decisions in the cited cases rely heavily on the underpinnings of the “nexus test” evidence that the parent’s homosexuality has a direct negative effect on the child. It is time for advancements in the probate and family court that allow a parent’s fitness to be determined in a manner that is sexual orientation neutral.

\begin{itemize}
\item \textsuperscript{163} See id.
\item \textsuperscript{164} See id.
\item \textsuperscript{165} See \textit{D.H.}, 418 N.E.2d 286; see \textit{Parsons}, 914 S.W.2d 889.
\item \textsuperscript{166} See id.
\item \textsuperscript{167} See id.
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\item \textsuperscript{169} Supra note 16; supra note 20; supra note 27; supra note 35; supra note 6; supra note 51; supra note 59, supra note 67; supra note 81; supra note 88; supra note 101.
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