

**Giving Back the Other Mommy:  
Addressing *White v. White*'s Failure to Recognize Legal Parent Status  
Following Same-Sex Relationship Dissolution**

**NELLIE HERCHENBACH**

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*Parents. They're here. Many of them are queer.  
But American court systems are certainly not getting used to it.*<sup>1</sup>

INTRODUCTION

This past summer Leslea White tried once again to get her baby back by establishing a legal right to the child she had raised with her partner.<sup>2</sup> Leslea and Michelle White had begun a committed same-sex relationship in 1997.<sup>3</sup> During the eight-year span of this relationship, Michelle changed her last name to Leslea's, and each woman conceived a child through the use of the same anonymous donor's sperm via artificial insemination.<sup>4</sup> Michelle gave birth to C.E.W. on December 15, 2001, and Leslea later had Z.A.W. on July 21, 2004.<sup>5</sup> The family lived together until the end of the relationship in November 2005, when the children began to spend half their time with Michelle and the other half with Leslea.<sup>6</sup> However, in May 2006, Michelle refused to allow Leslea and Z.A.W. to have any contact with C.E.W.<sup>7</sup> She also refused to accept financial support from Michelle for C.E.W., nor offer support to or communicate with Z.A.W.<sup>8</sup>

On January 18, 2007, Leslea resorted to filing a "Petition for Declaration of Maternity, For Order of Custody and For Order of Child Support" on behalf of herself and as next friend for the children in the Circuit Court of Boone County.<sup>9</sup> Claiming that neither child had a natural or presumed father, she asked the court to make both Leslea and Michelle legal parents of both

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<sup>1</sup> Heather Fann Latham, *Desperately Clinging to the Cleavers: What Family Law Courts Are Doing About Homosexual Parents, and What Some Are Refusing to See*, 29 LAW & PSYCHOL. REV 223, 223 (Spring 2005).

<sup>2</sup> *White v. White*, ---S.W.3d---, 2009 WL 1748551, at \*1 (Mo. Ct. App. 2009).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *White v. White*, ---S.W.3d---, 2009 WL 1748551, at \*1 (Mo. Ct. App. 2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

C.E.W. and Z.A.W.<sup>10</sup> She pointed out that the women decided together to conceive and raise the children as a family, and so the court should award joint legal and physical custody as to both children, in addition to requiring both women to pay reasonable child support.<sup>11</sup> Michelle responded to this filing by asserting Leslea’s lack of standing and failure to state a claim upon which relief can be granted.<sup>12</sup> She pointed out that Leslea is not biologically tied to C.E.W. and that no statute would provide such a non-biological person with maternity rights.<sup>13</sup> Furthermore, Michelle asserted that Leslea had no standing to bring a parentage claim under the Uniform Parentage Act.<sup>14</sup> On October 6, 2009, the Missouri Supreme Court declined to hear Leslea’s case.<sup>15</sup> Refusing without comment, the court agreed with Michelle that Leslea had no standing to bring a claim for custody.<sup>16</sup> The court explained that the Missouri Uniform Parentage Act did not apply since who was the biological parent was not at issue in the case.<sup>17</sup>

This note focuses specifically on Missouri’s treatment of same-sex partners as parents following the dissolution of their relationship. This issue is not unique to Missouri, rather, it is a part of a larger national debate on the rights of same-sex couples.<sup>18</sup> Same-sex partners “are forced to battle for their fundamental rights to love who they want, to form intimate associations,

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *White v. White*, ---S.W.3d---, 2009 WL 1748551, at \*1 (Mo. Ct. App. 2009).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See Missouri Uniform Parentage Act, encoded in MO. REV. STAT. §§ 210.817-210.852 (2000).

<sup>15</sup> Kelly Wiese, “Mo. Supreme Court declines to hear lesbian parent’s case” *The Countian*, Vol. 129, No. 276. Oct. 7, 2009.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* MO. REV. STAT. §§ 210.817-210.852 (2000).

<sup>18</sup> “[T]he United States Supreme Court’s decision in *Romer v. Evans* adds fuel to the equal protection fire and ably demonstrates that the courts’ treatment of gay and lesbian issues is evolving.” Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 448 (1998) referring to *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (holding that Colorado amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons from discrimination violated equal protection clause of the Constitution). For a national analysis of marriage between persons of the same sex, see Robin Cheryl Miller, J.D. & Jason Binimow, J.D., *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. FED. 2D 1 (originally published in 2005).

to form family relationships, and to have and raise children – all elemental, natural rights that are accorded, presumptively and without thought or hesitation, to heterosexuals” throughout the United States.<sup>19</sup> Thus, the analysis of the law and the suggestions for change discussed here are applicable to any state seeking to modify its treatment of same-sex partners and their children following the dissolution of the partners’ relationship.<sup>20</sup>

The issue to be dealt with specifically here is whether homosexuals who have lived together intimately and have brought children into the relationship have the right to parent those children following the dissolution of their partner relationship? Certainly, heterosexual couples do not face such an issue since man and wife are presumed to be parents, providing that they are fit to do so, for the lives of their children.<sup>21</sup> Unfortunately, there is no specific legislation in place in Missouri that would allow former same-sex partners to have equal parental interests in the children following the end of their relationship. However, a lack of legislation does not mean that a need does not exist. It is even more vital in this situation that courts recognize that the best interests of these children are ignored by not allowing the children equal access to both of the parents who have raised them in their home.

The court’s determination in *White* leaves same-sex couples without a remedy for the continued visitation, financial support, or custody of children who are a product of the relationship. Missouri needs such a remedy to legally acknowledge and account for both of the

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<sup>19</sup> American Civil Liberties Union (ACLU), *Montana High Court Affirms Rights of Lesbian Parent and Her Children*, Oct. 7, 2009, <http://www.aclu.org/lgbt-rights/montana-high-court-affirms-rights-lesbian-parent-and-her-children>.

<sup>20</sup> For more discussion on the arguments for and against same-sex marriage, as well as the consequences of allowing it, see John G. Culhane, *Uprooting the Arguments Against Same-sex Marriage*, 20 CARDOZO L. REV. 1119 (March 2009); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Couples*, 95 MICH. L. REV. 447 (November, 1996).

<sup>21</sup> See GOLDSTEIN *infra* note 45, at 16; see also LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 840-67 (2002) (explaining the process of terminating parental rights). MO. REV. STAT. § 532.370 (2009).

parental bonds established with the children of the relationship.<sup>22</sup> This remedy does not have to recognize same-sex marriage in order to be afforded to former couples<sup>23</sup>, but rather should be focused on the best interests of the child. The best interests of the child are the paramount concern in heterosexual divorces<sup>24</sup>, and this priority should not be ignored simply because a child's parents are of the same sex.

As succinctly pointed out by *White* attorney Ms. Susan Sommer after she worked on the case: "Missouri law needs to change to account for such families."<sup>25</sup> The law currently in place does not account for the best interests of the children, rather choosing to judge parenting ability simply based on sexual orientation.<sup>26</sup> Seeing as how 20% of same-sex couples are raising children in their homes, and there are more than 770,000 same-sex couples living in the United

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<sup>22</sup> Heather Bueth, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283 (2006).

<sup>23</sup> For a timeline of same-sex marriage status over the last several years in the United States, see National Conference of State Legislatures, *Timeline: Same-Sex Marriage*, <http://www.ncsl.org/Default.aspx?TabId=4243> (last visited Feb. 2, 2010). For a table outlining states that have specific constitutional language defining marriage or constitutional language defining marriage as between a man and a woman, see National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships* <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last visited Feb. 2, 2010). See also Adrienne K. Wilson, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991) (discussing the history, purpose, and benefits of marriage); Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529, 529 (2004) (pointing out that "the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against").

<sup>24</sup> "The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child." MO. REV. STAT. § 452.375(4) (2009). See also *infra* Part III.

<sup>25</sup> Wiese, *supra* note 15, at 1.

<sup>26</sup> See Latham, *supra* note 1, at 226. But see when the Tennessee Court of Appeals "unanimously ordered a trial court to reconsider a ban preventing a divorced mom from having her partner of 10 years and her own children stay overnight at her home at the same time." ACLU, *Tennessee Appeals Court Unanimously Upholds Rights of Lesbian Mom*, Sep. 21, 2009, <http://www.aclu.org/lgbt-rights/tennessee-appeals-court-unanimously-upholds-rights-lesbian-mom>. (As Christine Sun, the Southeast regional senior counsel with the ACLU Lesbian Gay Bisexual Transgender Project, explains "same-sex couples are just as capable and suitable as parents as opposite-sex couples... [and] when the trial court looks at this case anew with the best interests of the children foremost in mind" the partners will be able to live together with the children.) *Id.*

States, the issue of same-sex relationship dissolution and its ramifications for the children of such relationships can no longer be ignored.<sup>27</sup> The right to raise a child in the United States is a fundamental one.<sup>28</sup> The Supreme Court has determined that the parents' "desire for and right to the companionship, care, custody and management of [their] child is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"<sup>29</sup> In particular, Missouri has gone so far as to deem the relationship between a parent and child as "sacred."<sup>30</sup> The Court has already expanded the definition of the typical American family beyond the traditional definition of a heterosexual couple with two children to one that is not limited by blood, marriage, or adoption.<sup>31</sup> The time has come for Missouri to account for the new American family and no longer ignore the increasing amount of homosexual couples raising children together as a family in the United States.<sup>32</sup>

I. *KULSTAD v. MANIACI*: MONTANA'S PROPER DESIGNATION OF BOTH MOTHERS AS LEGAL PARENTS

In *Kulstad v. Maniaci*, the Montana Supreme Court granted legal parent status to Michelle Kulstad following the dissolution of her ten-year relationship with Barbara Maniaci.<sup>33</sup> Barbara had adopted two children during the relationship, and the court essentially found that "homosexuals in an intimate domestic relationship each have the right to parent the children they

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<sup>27</sup> The Williams Institute, *Census Snapshot: United States*, (December 2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf>. For an alternative proposal dealing with the dissolution of same-sex relationships, see Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 FAM. CT. REV. 87 (January 2006) (arguing for the creation of mediation programs where same-sex marriages are valid to determine child custody agreements upon divorce).

<sup>28</sup> Parents have a fundamental liberty interest in the care, custody and management of their child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626-27 (1923).

<sup>29</sup> *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159-60 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212-13 (1971)).

<sup>30</sup> *Jonathan H. v. Margaret H.*, 771 S.W.2d 111, 114 (Mo. Ct. App. 1989).

<sup>31</sup> *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816 (1977).

<sup>32</sup> Latham, *supra* note 1, at 223-24.

<sup>33</sup> *Kulstad v. Maniaci*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441, at \*1 (Mont. 2009).

mutually agree that one party will adopt (or, presumably conceive).”<sup>34</sup> Michelle had lived with the children for the entirety of her relationship with Barbara, and had acted on a daily basis like a parent, providing for the children’s needs just like in any other two-parent household.<sup>35</sup> Barbara had relied on Michelle’s support in raising the children and had communicated to home study evaluators and adoption authorities that Michelle and herself would be raising the children together as parents.<sup>36</sup> Thus, the court relied on the District Court’s earlier reasoning that Barbara had “consented to and fostered the parent-like relationship” between Michelle and the children, thus resulting in Michelle having established “a bonded, dependent relationship parental in nature” with the children.<sup>37</sup>

Notably, the state of Montana does not recognize same-sex marriage, and thus Michelle’s original petition, which included claims for both the dissolution of marriage and parenting, was not fully acknowledged.<sup>38</sup> The court only allowed the claims that did not relate to marriage to go forward, and thus markedly separated the marriage consideration from parentage in doing so.<sup>39</sup> It was enough in *Kulstad* that the children came into the shared home during the relationship, and that it was apparent through clear and convincing evidence that the children would be raised by

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<sup>34</sup> *Id.* at \*19.

<sup>35</sup> *Id.* at \*2. A Montana statute specifically allows “a person other than a parent” to bring an action to declare parentage “if the person has established a child-parent relationship with the child, by filing a petition for parenting in the county in which the child resides or is found.” MONT. CODE ANN. § 40-4-211(4)(b) (2009). Also, Montana sets out that for purposes of subsection (4)(b), “child-parent relationship” means a relationship that: □(a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline; (b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child’s psychological needs for a parent as well as the child’s physical needs; and (c) meets or met the child’s need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home. MONT. CODE ANN. § 40-4-211(6) (2009).

<sup>36</sup> *Kulstad*, 2009 WL 3179441, at \*14.

<sup>37</sup> *Id.* at \*15.

<sup>38</sup> Brief of Petitioner-Appellee at 2 n.1, *Maniaci v. Kulstad*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441 (Mont. 2009).

<sup>39</sup> *Id.*

both women, and in fact were.<sup>40</sup> Michelle was thus granted status as a legal parent for both of the children that she raised with Barbara<sup>41</sup> since she was relied on in this parental role from the first day each child entered the home.<sup>42</sup>

## II. OVERVIEW OF MISSOURI'S STANCE ON MARRIAGE AND PARENTAGE

Like Montana, Missouri does not legally recognize same-sex marriage.<sup>43</sup> However, just as the Montana Supreme Court separated the determination of parentage from the status of the couple's relationship in *Kulstad*<sup>44</sup>, so can Missouri as well when determining the legal status of same-sex partners as parents.<sup>45</sup> In Missouri, one-third of female partners are raising children in

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<sup>40</sup> *Kulstad*, 2009 WL 3179441, at \*17.

<sup>41</sup> *Id.* at \*1.

<sup>42</sup> *Id.* at \*17. This grant of legal parentage to Michelle is noteworthy, as there are several considerably lower options on the continuum of remaining a parental presence over children of a former relationship. As pointed out in the Amicus Curiae brief in favor of Michelle in *Kulstad*: “[c]ourts have used several theories to reach an equitable result when there are children involved and where there are established parent-child relationships including persons other than their biological parents. These include equitable estoppel, equitable parentage, *in loco parentis*, *de facto* parent, and ‘psychological parent’ theories.” Northwest Women’s Law Center’s Amicus Curiae Brief in Support of Appellee Michelle *Kulstad*, filed Mar. 30, 2009 quoting *In re Marriage of K.E.V.*, 267 Mont. 323, 883 P.2d 1246, 330-31 (Mont. 1994). Note that these alternate options in place of full legal parentage were pursued by Leslea White in *White v. White*, and they all failed to be sufficient. *White v. White*, ---S.W.3d---, 2009 WL 1748551 at \*1 (Mo. Ct. App. 2009). See also Bueche, *supra* note 22, at 293-301 (explaining how second-parent adoption and the equitable parent doctrine may be viable options for same-sex parents in Missouri).

<sup>43</sup> Brief of Petitioner-Appellee at 2 n.1, *Maniaci v. Kulstad*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441 (Mont. 2009). MO. REV. STAT. § 451.022 (2009). Currently the only states granting same-sex marriages are Massachusetts, Vermont, Connecticut, Iowa and soon to be in New Hampshire. National Conference of State Legislatures, updated October 2009, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx>. The California Supreme Court deemed same-sex marriages lawful, but the popular vote on November 4, 2008 appealed this decision. *Id.* Thus marriages before the Proposition 8 vote are valid, while those attempted after the vote are not. *Id.* In Maine, the popular vote in November 2009 struck down the potential for same-sex marriage to be legal in the state, after it was approved by the legislature. *Maine voters repeal gay-marriage law*, Associated Press Nov. 4, 2009, [http://www.msnbc.msn.com/id/33609492/ns/politics-more\\_politics/?GT1=43001](http://www.msnbc.msn.com/id/33609492/ns/politics-more_politics/?GT1=43001).

<sup>44</sup> Brief of Petitioner-Appellee at 2 n.1, *Maniaci v. Kulstad*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441 (Mont. 2009).

<sup>45</sup> Other states have also separated parentage from marriage status, such as Delaware. William C. Duncan, *De Facto Parents*, National Review Online, Aug. 31, 2009, <http://article.nationalreview.com/?q=YzwcwZjA0ODk2NzY4N2IyYTQwYmY1NGQ3NGUyODc=>. Delaware amended its Uniform Parentage Act to allow such a person that has fostered a relationship that is “parental in nature” with a child, provided that the biological parent has promoted that relationship. Title 13, Ch. 8, Subchapter II, § 8-201. This legislation allows state courts to determine this non-parent as a de facto parent with full parental legal rights to the child. *Id.* In addition to Delaware, “the District of Columbia Council passed a law (available at <http://www.dccouncil.us/images/00001/20090511122621.pdf>) this year allowing biological parents’ registered domestic partners to be presumed parents, and to be listed as such on the children’s birth certificates. The law also allows a person to be legally designated a parent if he consents in writing to the artificial insemination of his partner, or if he “hold[s] out” the child as his own—that is, presents the child as his to others. (D.C. already had a law

their home, and about one in five of male couples are doing likewise.<sup>46</sup> If these couples split up, there are no measures in place in Missouri to keep both partners in their children's lives following the dissolution of the relationship. The lack of legal measures to ascertain that both caretakers have custody of the children from the relationship means that the entire family will have to endure even more of an adverse impact from the dissolution.<sup>47</sup> This is certainly not in the best interests of the children.<sup>48</sup>

If the question of who should raise the children following a heterosexual divorce arises in Missouri, then there is straightforward legislation on how to determine custody based on the children's best interests.<sup>49</sup> Missouri Revised Statute § 452.375(1)(2) establishes "joint legal custody" as granting both parents "decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child."<sup>50</sup> This clause also mandates that "unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority."<sup>51</sup> Custody should be determined based on what would be in the best interests of the children, and the relevant factors used in determining the best interests are laid out in Missouri Revised Statute § 452.375(2)(1-8):

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties; (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively

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allowing people to sue for child custody if they could show they had acted as "de facto" parents (D.C. Code 16-831.01).)" Duncan, *supra* note 45.

<sup>46</sup> Gary J. Gates, The Williams Institute, Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey, (October 2006), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf> Note that in Montana almost 30% of male couples are raising children in the home, in addition to about 35% of female couples. *Id.*

<sup>47</sup> Buethe, *supra* note 22, at 284-85. *See also*, Nathan Koppel, *Same-Sex Couples Face Another Growing Hurdle – Divorce*, THE WALL STREET JOURNAL (June 10, 2008), *available at* <http://pewforum.org/news/display.php?NewsID=15789> (discussing that national problem of a lack of legal remedies for same-sex couples who choose to end their relationship).

<sup>48</sup> Latham, *supra* note 1, at 224.

<sup>49</sup> MO. REV. STAT. § 452.375(1)(2) (2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

perform their functions as mother and father for the needs of the child; (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent; (5) The child's adjustment to the child's home, school, and community; (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. . . ; (7) The intention of either parent to relocate the principal residence of the child; and (8) The wishes of a child as to the child's custodian.<sup>52</sup>

The best interests of the child are paramount in any child custody determination due to the public policy belief that the child should be the ultimate concern in the dissolution of any relationship.<sup>53</sup>

Although the couple is splitting up, the child should be disturbed to the least amount possible so that the split does not have long-lasting negative effects on the child.<sup>54</sup>

When a heterosexual couple divorces and one parent is then designated as homosexual, Missouri courts often use that sexual orientation designation as a *per se* reason to grant custody to the other parent.<sup>55</sup> This *per se* rule creates an undisputable presumption that homosexual behavior deems the parent to be unfit to raise a child.<sup>56</sup> However, this presumption is often not supported with substantial evidence of actual inability, but rather has withstood the test of time due to public misconceptions of common homosexual behavior<sup>57</sup> and the assumed detrimental impact of homosexuality on a child.<sup>58</sup> However, the Supreme Court of Missouri assures that no

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<sup>52</sup> MO. REV. STAT. § 452.375(2)(1-8) (2009).

<sup>53</sup> See *infra* Part III.

<sup>54</sup> *Id.*

<sup>55</sup> Delong v. Delong, No. WD 52726, 1998 WL 15536, at \*6 (Mo. Ct. App. 1998).

<sup>56</sup> *Id.*

<sup>57</sup> Buethe, *supra* note 22, at 284; James C. Black, *Same-Sex Parents and Their Children's Development*, SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA (Donald J. Cantor, et. al., ed. 2006).

<sup>58</sup> *Id.* See also MO. REV. STAT. §451.022 (1994) “[T]he citizens of Missouri, through the General Assembly, have a legitimate interest in preserving heterosexual marriage as the primary family institution for propagation and rearing children.” This statute has now been amended, strictly defining marriage in Missouri as between a man and woman. MO. REV. STAT. §451.022 (2009); MO. CONST. art. I, § 33 (2009) (In 2004, Missouri defined a valid marriage as only between a man and woman.).

state case has maintained that “a homosexual parent is not *ipso facto* unfit for custody of his or her child.”<sup>59</sup> Rather, in theory, the court limits the impact of homosexuality to being only one factor that the court will consider in making custody determinations.<sup>60</sup> In order for homosexuality to be considered a negative factor in determining custody, there must be actual evidence of an adverse impact on the best interests of the child.<sup>61</sup>

The Supreme Court of Missouri maintains that “[w]ithout question, the guiding star in a custody determination is the best interest of the children.”<sup>62</sup> In cases where the decision to grant custody is a difficult one, the best interests of the child is the policy that sways the decision one way instead of the other.<sup>63</sup> The single most important and relevant factor in determining custody per the best interests of the child is a good environment and a stable home for the child.<sup>64</sup> This explains why a Missouri trial court judge awarded visitation to a non-biological father after he divorced the girl’s mother.<sup>65</sup> The girl grew up believing the man was her real father, and the judge found that not allowing visitation after the divorce would not be in the best interests of the child.<sup>66</sup> This decision was the product of the judge knowing “the right result . . . [as] [t]he whole

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<sup>59</sup> J.A.D. v. F.J.D., 978 S.W.2d 336, 349 (Mo. 1998).

<sup>60</sup> *Id.* (citing T.C.H. v. K.M.H., 693 S.W.2d 802, 804-05 (Mo. banc 1985)). For a look at how judges may factor personal beliefs about homosexuality in making custody decisions, see Latham, *supra* note 1, at 224 n11.

<sup>61</sup> See generally Massman v. Massman, 784 S.W.2d 848 (Mo. Ct. App. 1990); Wiegand v. Wiegand, 884 S.W.2d 411 (Mo. Ct. App. 1994); M.D.R. v. P.K.R., 716 S.W.2d 866 (Mo. Ct. App. 1986) (all explaining how any factor to be used in custody determinations must be substantially supported by evidence showing an adverse impact on the best interests of the child to be relevant).

<sup>62</sup> J.A.D., 978 S.W.2d at 349.

<sup>63</sup> DeLong, 1998 WL 15526 at \*5 (citing Hack v. Hack, 695 S.W.2d 498, 500 (Mo. Ct. App. 1985)); “[The best interests of the child] is not a factor by which itself is placed on the legal balance scales but rather it is the single standard by which all relevant factors are to be measured.” In re Marriage of Hayden, 588 S.W.2d 165, 167 (Mo. Ct. App. 1979).

<sup>64</sup> DeLong, 1998 WL 15526 at \*5 (citing D.K.L. v. L.C.L., 764 S.W.2d 664, 666-67 (Mo. Ct. App. 1988); M v. M., 688 S. W.2d 384, 386 (Mo. Ct. App. 1985)). See also Mark Strasser, *The Alleged Harms of Recognizing Same-Sex Marriage*, in WHAT’S THE HARM? 27 (Lynn D. Wardle ed., 2008) (discussing how the opposition to same-sex marriage is actually harming children in the relationship, as the ability to marry would increase stability in the home).

<sup>65</sup> See Kelly Kress, *Man Wasn’t Father But Is Awarded Visitation: Biological Dad Was in Prison for Homicide*, Mo. Law Wkly., Feb. 17, 2003 (discussing Gain v. Gain, MLW NO. 32646 (Mo. Co. Cir. Ct., Feb. 4, 2003)) available at [http://www.thecarsonlawfirm.com/new\\_page\\_19.php](http://www.thecarsonlawfirm.com/new_page_19.php).

<sup>66</sup> *Id.*

purpose of establishing the family courts was to put judges on the bench who have an aptitude for creative solutions.”<sup>67</sup> The case was unique, as

”[u]nder a strict construction of the law, [the husband] would be out [of the child's life], the mother would have custody, and she would determine the child's relationship with the biological father. . . the court would be well within its rights to reach that conclusion, and an appeals court would not overturn it. The judge really reached to do what he could to protect the kid.”<sup>68</sup>

Obviously, the dissolution of the relationship that a child is used to in the home would disrupt the child’s stable home environment. However, further adding insult to injury by removing someone who has brought the child up as a parent only worsens the situation, and is not in the child’s best interest.<sup>69</sup> Missouri courts need to recognize the harm in ignoring the person a child considers a parent when determining custody after the dissolution of a same-sex relationship.

As in *Gain*<sup>70</sup>, the presumed father doctrine may suggest key language to allow courts to give legal parent status to both partners in a same-sex relationship. Presumed fathers, even those who were legally recognized, can have access to the children of a relationship since in Missouri the relationship between parent and child is paramount.<sup>71</sup> Missouri courts give primary custody to those adults who are the primary caretakers of the child, who specifically provide care on a daily basis to the child.<sup>72</sup> Since maintaining the stability of home life is the primary factor in determining a child’s best interests, custody determinations can even be overturned if it is shown

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *infra* Part III.

<sup>70</sup> *Gain v. Gain*, MLW NO. 32646 (Mo. Co. Cir. Ct., Feb. 4, 2003).

<sup>71</sup> See also Maggie Manternach, *Where Is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, J. OF GENDER RACE AND JUST. 385 (Winter 2005) (discussing how the presumed father doctrine can be construed for such purposes in California).

<sup>72</sup> *Sarwar v. Sarwar*, 117 S.W.3d 165, 168-69 (Mo. Ct. App. 2003) (finding the trial court was correct in awarding more custody time to the mother since she was the primary caretaker of the child throughout his life, and thus it would be in his best interests to maintain that relationship).

that the best interests of a child could be better met.<sup>73</sup> Such was the case in *In re Marriage of Miller*, where if the mother had been able to prove with substantial evidence that her extramarital affairs were incorrectly given more weight than the best interests of the child, she would have received primary custody since she was the primary caretaker of the child.<sup>74</sup> Thus, the best interests of the child are always paramount in custody cases.

### III. THE CHILD’S BEST INTERESTS AS THE PRIMARY CONCERN IN CUSTODY DISPUTES

Although the national debate in the United States seems to focus primarily on same-sex marriage, rather than the children assumed in these relationships, the focus here is on the best interests of the child. Frankly, Missouri is “[i]n one great sweep. . . den[ying] homosexuals the opportunity to make formal commitments to one another *and* den[ying] them parental status—due to their not making such a commitment.”<sup>75</sup> Thus, while Missouri does not recognize same-sex marriage and this argument for legal parent status in the state can stand without such recognition, Missouri needs to start recognizing the best interests of the child by recognizing the changing landscape of the American family.<sup>76</sup>

Missouri is not unique in focusing on the best interests of the child when determining custody after the dissolution of a relationship.<sup>77</sup> The rationale for focusing on the best interests of the child is so that the end of the parents’ relationship does not affect the child’s welfare anymore than necessary.<sup>78</sup> While it is easy to say that the best interests of the child will always

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<sup>73</sup> *In re Marriage of Miller*, 876 S.W.2d 289 (Mo. Ct. App. 1994).

<sup>74</sup> *Id.*

<sup>75</sup> Latham, *supra* note 1, at 225.

<sup>76</sup> *Id.* at 224. *See id.* at 238-39 for a brief look at options other state courts are allowing for same-sex parents.

<sup>77</sup> MO. REV. STAT. § 452.375(2)(1-8) (2009). Julia A. Cox, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Social Homogeneity?*, 59 MO. L. REVIEW. 775 (1994) (recognizing a countrywide best interests of the child standard).

<sup>78</sup> MO. REV. STAT. § 452.375(4) (2009).

be paramount in custody decisions, this is not always the case.<sup>79</sup> Outside influences and constitutional parental rights can often influence these decisions, and these can often offset the primary focus on the best interests the child.<sup>80</sup> The debate surrounding homosexuality is obviously thus influential in custody decisions due to the public's point of view on the topic and the seeming lack of constitutional protections for homosexuals.

Nationwide, courts have employed three different ways of addressing the homosexuality of a parent.<sup>81</sup> The rare *per se* rule automatically excuses the parent as an option due to sexual orientation making him or her unfit to care for a child.<sup>82</sup> Another option is presumed harm to the child because of the homosexuality, but this presumption is more rebuttable by the parent.<sup>83</sup> Finally, an alternative scenario uses the “nexus test” where actual evidence of a harmful effect on the child due to the homosexuality is necessary in order to prevent custody, since the mere fact a parent is homosexual is not enough to show that he or she is unfit.<sup>84</sup> Thus, in every case homosexuality is still undeniably examined as a factor in determining custody, most likely because it is still unfortunately seen as a defect.<sup>85</sup>

However, research has shown that being raised by a homosexual parent does not in fact expose children to more risks nor does it increase the chances the child himself will be homosexual.<sup>86</sup> In fact, “[c]hildren’s optimal development seems to be influenced more by the nature of relationships and interaction within the family unit than by the particular structural

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<sup>79</sup> See *infra* Part III.

<sup>80</sup> See generally Beuthe, *supra* note 22.

<sup>81</sup> Latham, *supra* note 1, at 226.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Latham, *supra* note 1, at 227-34.

form it takes.”<sup>87</sup> Thus, regardless of the sexual orientation of the child’s parents, the strength of the loving relationship between the parents is the principal determinant of how well a child will develop.<sup>88</sup>

Ideally, the best interests of the child are met by maintaining the biological parent-child relationship.<sup>89</sup> However, the psychological parent-child relationship is also irreplaceable and interference with such a relationship can be particularly agonizing for a child.<sup>90</sup> An adult becomes a psychological parent to a child through “day-to-day interaction, companionship, and shared experiences,” and thus, any caring adult, regardless of her “biological or legal relationship to the child,” may become such an irreplaceable figure.<sup>91</sup> The importance of maintaining these parent-child relationships is a factor in determining the best interests of the child, as “continuity in relationships, surroundings, and environment are essential for a child’s normal development.”<sup>92</sup> While courts often assume that custody for the biological parents of a child would be in the best interests of the child,<sup>93</sup> this assumption is actually displaced by some, who believe that being with one’s psychological parents is the best setting for a child’s normal development.<sup>94</sup>

Goldstein, Freud and Solnit suggest that the best interests of the child standard should in fact be replaced by “the least detrimental available alternative for safeguarding the child’s

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<sup>87</sup> *Id.* at 231 (citing *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, PEDIATRICS 341 (Feb. 2002)).

<sup>88</sup> *Id.*

<sup>89</sup> JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 16-17 (2d ed. 1979).

<sup>90</sup> *Id.* at 17-20, 31-34.

<sup>91</sup> *Id.* at 19-20.

<sup>92</sup> *Id.* at 31-32.

<sup>93</sup> MO. REV. STAT. § 452.375(4) (2009).

<sup>94</sup> See GOLDSTEIN *supra* note 89, at 31 (explaining that touted placement guidelines “rest on the belief that children whose placement becomes the subject of controversy should be provided with an opportunity to be placed with adults who are or are likely to become their psychological parents”).

growth and development” standard.<sup>95</sup> This standard emphasizes the importance of the psychological parent over all other parental relationships in a child’s life.<sup>96</sup> This amended standard takes the best interests of the child standard to a higher degree of child protection, as it does not balance the child’s best interests against other related adult interests and rights.<sup>97</sup> By never making the child subordinate, the child will prosper.<sup>98</sup> Courts in eleven states have allowed the psychological parent a place in the child’s life recognizing that the vital emotional bond overcomes the constitutional rights of the child’s fit legal parent.<sup>99</sup> These states have found that this does not violate the Fourteenth Amendment, and used “innovative theories designed to give heightened protection to the emotional relationship.”<sup>100</sup>

When courts look at the best interests of the child, they need to recognize the reality of his or her life: “By failing to do so, they perpetuate the fiction of family homogeneity at the expense of children whose reality does not fit this form.<sup>101</sup> [The child]’s best interest is served by exposing him to reality and not fostering in him shame or abhorrence for his [parent]’s nontraditional commitment.”<sup>102</sup> Seeing as how research time and time again has shown that there is no recognizable welfare difference between children of homosexual parents and those of

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<sup>95</sup> *Id.* at 53.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 54.

<sup>98</sup> *Id.*

<sup>99</sup> *Clark v. Mcleod*, No. 04-1392, 2005 WL 899481, Petition for Writ of Certiorari, at \*15 (2005)

<sup>100</sup> *Id.*

<sup>101</sup> Latham, *supra* note 1, at 240 (*quoting* *Blew v. Verta*, 617 A.2d 31, 36 (1992)).

<sup>102</sup> *Id.* at 241.

heterosexual parents<sup>103</sup>, courts need to refocus on the best interests of the child and stop sidetracking custody issues with debates over the effect of homosexual orientation on a child.<sup>104</sup>

The basic premise in custody disputes is that

“the best interests of the child are ordinarily served when the existing pattern of parent-child interaction is altered to the least extent required by the changed relationship of the parents. Even when a state’s statutory scheme does not address, or even contemplate, the specific familial scenario at issue, courts are compelled to adapt the law. . . to maintain the parent-child relationship. Ultimately, the best interest of the child must be at the center of any custody dispute.”<sup>105</sup>

The courts of Missouri cannot allow preconceived notions of what homosexuality is and what it means in the lives of children whose parents are homosexual, as well as a lack of existing legislation addressing same-sex parents, to mean that there is no need to address the issue. The best interests of children of same-sex couples are being ignored in a seeming crusade to maintain social homogeneity by only allowing heterosexual marriages in Missouri. If Missouri intends to represent the best interests of all its children, it must set aside the politics of homosexuality and put the focus back on the child in the custody

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<sup>103</sup> Elizabeth Cantor, *Gays and Lesbians as Parents and Partners: Psychological Evidence*, SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA (Donald J. Cantor, et. al., ed. 2006); *Maniaci v. Kulstad*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441, at \*6 (Mont. 2009). (“Same-sex parents have no adverse impact on children’s adjustment or well-being. Children of same-sex parents fare just as well as their peers physically, psychologically, emotionally, cognitively, and socially. This development includes a child’s progression in gender and sexual development.”)

<sup>104</sup> There is no evidence to suggest that same-sex couples are unfit to be parents. Rather, the emphasis is on how same-sex partners can be a loving and stable force in a child’s life, and thus function as to be in the child’s best interests as a parent. *Maniaci*, 2009 WL 3179441 at \*7.

<sup>105</sup> Brief for Northwest Women’s Law Center’s as Amicus Curiae Supporting Appellee Michelle Kulstad at 10, *Maniaci v. Kulstad*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441 (Mont. 2009).

dispute in the court. By doing this, the courts will actually be living up to the lip service of the omnipresent and well-touted best interests of the child standard.

#### IV. THE REMEDY: GRANTING LEGAL PARENT STATUS IN MISSOURI TO BOTH PARTNERS UPON SAME-SEX RELATIONSHIP DISSOLUTION

##### A. *The Current Missouri Statutory Framework Lacks a Straightforward Solution*

As explained in the *Kulstad* Amicus Curiae brief, equitable doctrines are appropriate to apply to situations such as *White*, “where non-traditional families present complex family law issues that may not be readily susceptible to legislative prescriptions.”<sup>106</sup> Particularly where legislation is slow to catch up to the ever-changing domain of domestic relations law, de facto parent designations have been used, even with same-sex couples.<sup>107</sup> For example, the Washington Supreme Court used the doctrine “to fill the interstices that our current legislative enactment fails to cover.”<sup>108</sup> Like Missouri, Washington has adopted the Uniform Parentage Act<sup>109</sup>, however the state’s Supreme Court recognized that there was no legislation directly asserting whether non-biological parents could claim parental status nor to what degree those rights could extend.<sup>110</sup> As the numbers of same-sex households raising children in Missouri continues to rise, and the legislation fails to keep pace, the courts need to step in and address the issues that same-sex couples face.<sup>111</sup>

Even by not acknowledging same-sex marriage, Missouri can address the parentage issues of same-sex couples.<sup>112</sup> As shown by the results in many states, marriage and parentage

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<sup>106</sup> *Id.* at 5-6.

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 6.

<sup>109</sup> *Id.*

<sup>110</sup> Amicus Curiae Brief, *supra* note 105, at 6.

<sup>111</sup> *See supra* note 46.

<sup>112</sup> *See supra* notes 38-39.

do not go hand in hand.<sup>113</sup> As the amount of homosexual parents continue to rise, same-sex relationships become more socially acceptable<sup>114</sup>, and states begin to acknowledge same-sex partnerships as valid unions<sup>115</sup>, Missouri needs to recognize the need for clear legislation to outline the procedure for determining the parental status of both partners following the dissolution of a relationship, no matter what the sexual orientation or marriage status of those partners may be.<sup>116</sup> Seeing as how legislation is not always able to mobilize quickly, here the courts are in the ideal position to set the precedent.<sup>117</sup>

The process for asserting legal parent status in Missouri is currently a luck-of-the-draw situation or a tactical game, when it could easily be structured so that parents do not question their status nor are children dragged through endless litigation in order to determine parentage.<sup>118</sup> Missouri Revised Statute § 210.818 sets out the parent and child relationship as extending

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<sup>113</sup> *Id.*

<sup>114</sup> Lynn D. Wardle, *Preface to WHAT'S THE HARM?* vii, xi n.4 (Lynn D. Wardle ed., 2008) (“[I]n the dawn of the twenty-first century, Americans have come to value and expect nearly complete individual autonomy, privacy and freedom from government restraint in their adult, consensual, personal, intimate, family, and sexual lives. The recent mainstream social acceptance of homosexual relations is the latest manifestation of this personal autonomy principle.”)

<sup>115</sup> Alison Walkley, *Gay Divorce in the United States: Splitting Up as a Same-Sex Couple Is Harder Than Wedding* Suite 101.com (April 22, 2008) [http://gay-rights-law.suite101.com/article.cfm/gay\\_divorce\\_in\\_the\\_united\\_states](http://gay-rights-law.suite101.com/article.cfm/gay_divorce_in_the_united_states). For a breakdown of the validity of assorted legal claims based on unmarried same-sex relationships, *see generally* American Law Reports, *Validity of Legal Claim Predicated on Nonmarital Same-Sex Relationship*, 8 A.L.R.6TH 339 (originally published in 2005). For references to the status of parties of the same sex, *see generally* Mitchell Waldman, J.D., *Marriage, II. Creation and Validity, C. particular Impediments to Lawful Marriage, 1. In General*, 52 AM. JUR. 2D MARRIAGE § 49 (updated May 2009)

<sup>116</sup> For a thorough analysis of the same-sex marriage debate, *see generally* John D. Fletcher, J.D., *Validity of Marriage*, 36 Am. Jur. Proof of Facts 2d 441 §1-1.56 (updated July 2009); American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 Fam. L.Q. 339 (Summer 2004).

<sup>117</sup> “Our state’s current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. Yet, simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned. We cannot read the legislature’s pronouncements on this subject to preclude any potential redress . . . In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law---to effectuate the best interests of the child in the fact of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state.” Amicus Curiae Brief, *supra* note 105, at 7. *See also* GOLDSTEIN *supra* note 89, at 50-51; Buethe, *supra* note 22.

<sup>118</sup> For a set list of factors used, *see* Amicus Curiae Brief, *supra* note 105, at 8.

equally to every child and every parent, regardless of the marital status of the parents.<sup>119</sup>

Missouri parentage statutes do not seem to specifically set out parents as needing to be of opposite sexes nor married.<sup>120</sup> "Those responsible for the care, custody, and control of the child" are defined in Missouri Revised Statute § 210.110(16) as those included but not limited to the parents or guardian of a child, *other members of the child's household*, or those exercising *supervision over a child for any part of a twenty-four-hour day*.<sup>121</sup> Those responsible for the care, custody and control shall also include any adult who, *based on relationship to the parents of the child*, members of the child's household or the family, has access to the child.<sup>122</sup> Thus, based on the relationship between the homosexual partners, parent status can be granted to both based on the intimate couple relationship.<sup>123</sup> Just as in *White*, where Leslea and Michelle chose together to bring children into their relationship to raise together<sup>124</sup>, so do heterosexual couples.

Having chosen to be parents, same-sex couples should be able to establish a legal parent and child relationship in Missouri as well. Per Missouri Revised Statute § 210.817 (4), a "parent and child relationship [is] the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship."<sup>125</sup> Missouri Revised Statute § 210.819 sets out the parent and child relationship as between child and:

- (1) The natural mother may be established by proof of her having given birth to the child, or under the provisions of sections 210.817 to 210.852;

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<sup>119</sup> MO. REV. STAT. § 210.818 (2008).

<sup>120</sup> *Id.*

<sup>121</sup> MO. REV. STAT. § 210.110(16) (2008).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *White v. White*, ---S.W.3d---, 2009 WL 1748551, at \*1 (Mo. Ct. App. 2009).

<sup>125</sup> MO. REV. STAT. § 210.817 (4) (2009).

(2) The natural father may be established under the provisions of sections 210.817 to 210.852;

(3) An adoptive parent may be established by proof of adoption.<sup>126</sup>

However, while this statute could be used to limit the standing of same-sex partners both trying to establish themselves as legal parents, standing could also be possible via Missouri Revised Statute § 210.848.<sup>127</sup> This statute reads: “Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as possible, the provisions of sections 210.817 to 210.852 applicable to the father and child relationship apply to the mother and child relationship.”<sup>128</sup> As mentioned earlier, legal parentage can be established based on the relationship between partners in relation to the child, thus read together Missouri Revised Statutes § 210.848 and § 210.110(16) would establish same-sex partners as both caregivers in a child’s life and in turn, legal parents.<sup>129</sup>

#### B. *Applying Kulstad v. Maniaci Rationale in Missouri*

Ideally, Missouri courts would welcome the rationale of *Kulstad v. Maniaci* when determining parentage following the dissolution of a same-sex relationship.<sup>130</sup> Seeing as how Missouri has significantly more same-sex households (9,428) than Montana (1,218), such a legal framework is even more immediately necessary in order to maintain the best interests of the child standard in this state.<sup>131</sup> Recognizing that Missouri does not recognize same-sex marriage, Leslea White titled her petition to the court “Petition for Declaration of Maternity, For Order of

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<sup>126</sup> MO. REV. STAT. § 210.819 (2009).

<sup>127</sup> MO. REV. STAT. § 210.848 (2009).

<sup>128</sup> *Id.*

<sup>129</sup> MO. REV. STAT. § 210.110(16) (2009) and § 210.848 (2009).

<sup>130</sup> *Kulstad v. Maniaci*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441, at \*1 (Mont. 2009). *See infra* Part I.

<sup>131</sup> *Gates*, *supra* note 46, at 4.

Custody and For Order of Child Support”<sup>132</sup>, rather than asserting a petition for both dissolution of marriage and parentage like Michelle in *Kulstad*.<sup>133</sup> Since the debate over same-sex marriage may not result in a favorable result for same-sex couples in Missouri in the near future, titling a petition for custody as such is currently necessary.<sup>134</sup>

When analyzing the parentage petition in *Kulstad*, the court highlighted the importance of the best interests of the children.<sup>135</sup> The court focused on how the children came into the relationship through the joint decision of both partners and were then raised to rely on both mothers just as in any heterosexually run household.<sup>136</sup> Likewise, in *White*, Leslea and Michelle both took turns giving birth to each of their children, and both cared for the children in the home as parents.<sup>137</sup> Michelle’s actions were entirely inconsistent with an exclusive parent-child relationship, just as Barbara’s in *Kulstad*, since both couples discussed having and raising the children together just as a married couple would plan their family’s future.<sup>138</sup> The partners relied on each other to raise their families together, and because they are not allowed to marry does not mean that they should not be allowed to stay in their children’s lives.

## V. CONCLUSION

Missouri currently does not afford straightforward custody remedies to same-sex couples upon the dissolution of their relationship, which is to the unfortunate detriment of both the partners and children involved. There are remedies that can be afforded to such affected persons without the current policy or legislation of Missouri regarding same-sex marriage having to

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<sup>132</sup> *White v. White v. White*, ---S.W.3d---, 2009 WL 1748551, at \*1 (Mo. Ct. App. 2009). (Mo. Ct. App. 2009).

<sup>133</sup> *Kulstad v. Maniaci*, --- P.3d ---, No. DA 08-0483, 2009 WL 3179441, at \*4 (Mont. 2009).

<sup>134</sup> See *infra* Part II.

<sup>135</sup> *Kulstad*, 2009 WL 3179441, at \*1.

<sup>136</sup> *Id.* at \*2.

<sup>137</sup> *White*, 2009 WL 1748551, at \*1.

<sup>138</sup> *White*, 2009 WL 1748551, at \*1; *Kulstad*, 2009 WL 3179441, at \*1.

immediately change, such as in the case of *Kulstad v. Maniaci*.<sup>139</sup> Such remedies emphasize both the best interests of the children and the fundamental right of parents to raise their children. In order for Missouri to stand by its best interests of the child standard in custody disputes, the courts must use the authority and tools available to them to remedy this dire situation which currently leaves children of homosexual partners without their other parent in their lives.

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<sup>139</sup> *See infra* Part I.