

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

SECTION OF FAMILY LAW

CHICAGO COUNCIL OF LAWYERS

STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN

Recommendation

RESOLVED, That the American Bar Association supports the enactment
of legislation and the implementation of public policy providing that child custody
and visitation shall not be denied or restricted on the basis of sexual orientation.

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Introduction

The American Bar Association long has been a leader in eradicating bigotry and prejudice against, among other groups, gay and lesbian Americans. In February 1989, the House of Delegates adopted a policy urging federal, state, and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation. The ABA also has adopted policies urging the repeal of all laws that criminalize private non-commercial sexual conduct between consenting adults (1973); condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the perpetrators of such crimes (1987); amending the Association's Constitution to recognize the National Lesbian and Gay Law Association as an affiliated organization with a seat in the House of Delegates (1992); adopting canon 3B(5) of the Model Code of Judicial Conduct, which requires that "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . .sexual orientation." (1990); urging affirmative steps to increase the diversity of the House of Delegates, including diversity based upon sexual orientation (1990); supporting the enactment of federal legislation requiring a study of bias in the federal judicial system, including bias based upon sexual orientation (1991); and opposing efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who discriminate on the basis of sexual orientation (1992).

The proposed recommendation extends these policy developments to the field of family law. It urges the Association to support legislative or other measures to ensure that child custody or visitation is not denied or restricted on the basis of sexual orientation.

Status of the Law

The issue of a parent's sexual orientation and child custody/visitation recently received national attention in Bottoms v. Bottoms, Va. Sup. Ct., Rec. No. 941166 (April 21, 1995). In that case, the Virginia Supreme Court upheld a trial court decision terminating a lesbian mother's custody of her young son. The court deemed the natural mother unfit to retain custody because of her sexual orientation.

In contrast, only one jurisdiction, the District of Columbia, mandates in its custody statute that custody and visitation shall be determined without regard to the sexual orientation of a parent. The statute reads that "[w]ith respect to matters of custody and visitation, the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party shall not be a conclusive consideration." D.C. Code Ann. 16-914(a).

In examining court decisions where the sexual orientation of a parent is considered for purposes of denying or limiting custody, many courts have required a showing of actual harm

to the child attributable to the parent's sexual orientation before that fact becomes relevant. The majority of state courts that have considered the impact of a parent's lesbian or gay identity in a contested custody case have applied or adopted a nexus test, also called the direct adverse impact standard, which requires a clear connection, or nexus, between the parent's actions and harm to the child before the parent's sexual orientation assumes any relevance in the custody determination.

The nexus standard is an evidence-based test that requires a factual finding of harm to the child before a change in custody will be ordered.¹ A court must base its custody determination on the evidentiary record and must point to specific evidence that the child has been harmed by the parent's sexual orientation. In S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985), for example, the Alaska Supreme Court explained that the "scope of judicial inquiry is limited to facts directly affecting the child's well-being." *Id.* at 878. While the record in that case clearly revealed that the mother was a lesbian, no evidence existed to show that the mother's sexual orientation had an adverse impact on the child. Under these circumstances, the Alaska Supreme Court ruled that the lower court's reliance on the mother's sexual orientation as a decisive factor in determining custody was impermissible and reversed the court's decision shifting custody to the father. Similarly, in the more recent case of Tucker v. Tucker, 881 P.2d 948 (Utah App. Sept. 6, 1994), the Utah Court of Appeals, in remanding the trial court's award of custody to the father, held "[t]he fact that Ms. Tucker was participating in a monogamous, lesbian relationship does not *per se* render her unable to provide the necessary care, support, and guidance that her daughter requires . . ." *Id.* at 30.

¹See, e.g., S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985) (awarding custody to lesbian mother on grounds that "there is no suggestion that [the mother's lesbian sexual orientation] has or is likely to affect the child adversely . . . [and] it is impermissible to rely on any real or imagined social stigma attaching to mother's status as a lesbian."); In re Marriage of Birdsall, 197 Cal.App.3d 1024, 1031, 243 Cal.Rptr. 287 (Cal.App. 4th Dist. 1988) (vacating restrictions on gay father's visitation on grounds that "[e]vidence of one parent's homosexuality, without a link to detriment to the child, is insufficient to constitute harm"); Bezio v. Patenaude, 3811 Mass. 563, 410 N.E.2d 1207 (Mass. 1980) (awarding custody to lesbian mother on grounds that "[i]n the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record"); New Jersey, M.P. v. S.P., 126 N.J.Super. 425, 404 A.2d 1256 (N.J. Super A.D. 1979) (awarding custody to lesbian mother on grounds that "[n]othing suggests that her homosexual preference in itself presents any threat of harm to her daughters or that in the ordinary course of events they will be unable to deal with whatever vexation may be caused to their spirits by the community"); Blew v. Veria, 410 Pa. Super. 528, 617 A.D.2d 32, 35 (removing restrictions on lesbian mother's custody on grounds that "the conclusion that [the child] has been harmed by his mother's lesbian relationship is not supported by [the trial court's] own findings of fact"); South Carolina, Stroman v. Williams, 291 S.C. 376, 353 S.E. 704 (S.C.App. 1986) (affirming award of custody to lesbian mother on grounds that "the record did not uncover any evidence that . . . [the child's] welfare was being adversely affected in any substantial way").

Medical Research Relating to the Effects of Parent's Sexual Orientation on Children

Years of misinformation provided by the mental health and social service professions,² coupled with persistent myths, have resulted in popular stereotypes about lesbian and gay people in general and about lesbian and gay parents, in particular. There is now a significant body of social science research on the well-being of the children of gay and lesbian parents that consistently demonstrates that there is no basis for any generalized concern about harm to children in a lesbian family or with a gay parent.

Over the last ten years, social science studies examining children of lesbian mothers and gay fathers have focused on the children's gender identity, sexual orientation, self-esteem, and social adjustment. A review of the studies indicates no measurable negative effect on child development resulting from a parent's sexual orientation.³ Social adjustment problems that were observed also occurred in control groups and were clearly aligned to a history of divorce or other factors in the families of children in both groups. Gottman, supra, at 186.

Like other myths and fears about lesbian and gay parents, the fear that children raised in families with lesbian or gay parents will have difficulty distinguishing between men and women or difficulty acquiring a gender identity has no basis in fact. Children's gender identity and gender role behavior have been among the most thoroughly researched lesbian

²Prior to 1973, the American Psychological Association officially listed "homosexuality" as an illness. American Psychiatric Association, D.O.M. III: Diagnostic and Statistical Manual of Disorders 281-82, 380 (3rd ed. 1980). The American Psychiatric Association, the American Psychological Association and the National Association of Social Workers have official nondiscrimination statements regarding lesbians and gay men. Ricketts & Achtenberg, Lesbian and Gay Parents, 107 (Frederick Bozett, ed. 1987).

³See Julie S. Gottman, Children of Lesbian and Gay Parents, 14 *Marriage and Fam. Rev.* 177, 179, 186 (1989). See also Susan Golombok, et al., Children in Lesbian and Single Parent Households: Psychosexual & Psychiatric Appraisal, 24 *J. Child Psychol. & Psychiatry* 551 (1993) (no significant differences on gender role measures between children of lesbian mothers and control group children); Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parent, 135 *Am J. Psychiatry* 692 (1978) (no significant difference in gender role identity); Beverly Hoeffler, Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families, 51 *Am. J. Orthopsychiatry* 545 (1981) (no significant difference in gender role identity); Karen G. Lewis, Children of Lesbians: Their Point of View, 25 *Soc. Work* 198 (1980) (children of lesbian mothers talk about their social adjustment and self-esteem); Lara Lott-Whitehead and Carol T. Tully, The Family Lives of Lesbian Mothers, 63 *Smith C. Stud. in Soc. Work* 265 (1993) (no negative effect on self-esteem and social adjustment); Mandel, Hotvedt, & Green, The Lesbian Parent: Comparison of Heterosexual and Homosexual Mothers and Children, paper presented to the American Psychological Association in New York, NY (Aug. 1979); Ann O'Connell, Voices from the Heart: The Development Impact of a Mother's Lesbianism on Her Adolescent Children, 63 *Smith C. Stud. in Soc. Work* 281 (1993) (no correlation between parents' sexual identity and sexual identity of child). See also the definitive article in science studies pertaining to lesbian and gay parents: Charlotte Patterson, Children of Lesbian and Gay Parents, 63 *Child Development* 1025 (Oct. 1992).

and gay parenting issues.⁴ The results of this research, as a recent summary of existing studies has pointed out, are clear: children of lesbian or gay parents and the children of heterosexual parents show no significant differences in gender identity, gender role behavior, or general psychological development. Patterson, *supra* note 2.

Since Richard Green's study of gender identity in children raised by lesbian mothers in 1978,⁵ many other researchers have confirmed Green's finding that children in gay or lesbian families are indistinguishable from other children in terms of gender identity, gender role behavior, and general psychological health. One study, for example, compared 27 families headed by lesbian mothers with 27 families headed by heterosexual mothers. In both groups, the children experienced no gender identity problems and displayed gender-typed behavior typical of their ages and genders. There were no differences between the two groups in measures of psychological health. Golombok, et al., *supra* notes 3 and 4.

Other studies have focused more specifically on whether a parent's sexual orientation influences a child's choice of toys or gender-typed play behavior. One study looked both at children's toy and activity preferences and at parents' encouragement or discouragement of gender-typed play behavior. The study found no significant differences between gay or lesbian parents and their children and the control group of heterosexual parents and their children. While both groups of parents encouraged play with neutral, rather than gender-typed, toys, both groups of children preferred toys traditionally associated with their gender. Hoefter, *supra* note 3. Other studies comparing children in lesbian/gay and heterosexual families have reached similar conclusions, finding no differences between the groups of children in terms of toy preferences, activities, interests, or occupational choices. See Green; Golombok; and Gottman, *supra* note 2.

In sum, although some courts have rationalized the separation of children from lesbian or gay parents by their purported concern for the children's gender identity, the real-life experiences of children of lesbian or gay parents have shown this concern to be factually inaccurate. As a substantial body of social science research clearly and consistently has found, there is simply no correlation between the sexual orientation of parents and the gender identity of their children.

⁴See E.D. Gibbs, Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research, 8 *Women and Therapy* 55-75 (1988); S. Golombok, A. Spencer & M. Rutter, Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 *Journal of Child Psychology and Psychiatry* 551-72 (1983); F.W. Bozett, Children of Gay Fathers, in *Homosexuality and the Family* 137-62, *Relations* 177-96 (Bozett & Sussman, eds. 1990); Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 *American Journal of Psychiatry* 692-97 (1978).

⁵Green, *supra* note 4.

On the contrary, the incidence of same-sex orientation among children of lesbian or gay parents is the same as that in the general population. These findings are borne out by the fact that most lesbians and gay men are the products of heterosexual parents and were raised in heterosexual households. Anne O'Connell, Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children, 63 *Smith C. Stud. in Soc. Work* 281, 285 (1993).

Unconstitutionality of Considering Community Fear or "Stigma" in Parental Custody or Visitation Decisions

Evidence that children of lesbian or gay parents experience increased harassment would be inconsistent with studies and reported custody decisions specifically analyzing whether children are susceptible to additional ridicule or harassment because of their parents' sexual orientation. Although courts have cited fear of harassment or ostracism of children as bases for denying custody to gay or lesbian parents,⁶ the evidence rarely supports such fear. In fact, in one appellate case reported nationwide, the actual evidence of harassment presented showed that the harassment occurred while the child was in the custody of the non-gay parent. (L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982). Transfer of custody will not alleviate any perceived harm from teasing, particularly if the communities in which both parents and the children live are closely knit, and the factual circumstances are known to most of the parents' peers, colleagues, and neighbors.

As one scholar noted:

In the context of myriad factors that might lead to a child's being harassed or rejected, courts exaggerate the significance of parental homosexuality. . . The relative psychological well-being of children of lesbian mothers suggests either that judicial concern about peer or community harassment is overstated, or that such harassment causes no special adjustment difficulties. For example, one study of fifty-six children of lesbian mothers and forty-eight children of heterosexual mothers found no significant differences between the children's reports of their popularity at school and in their neighborhood. (citation omitted).

Nancy Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 *Geo. L. Rev.* 459, 546 (1990).

⁶See, e.g., Jacobson v. Jacobson, 314 N.W. 2d 78, 81 (N.D. 1981); M.J.P. v. J.G.P., 640 P.2d, 969 (Okla. 1982); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

One study showed that only about five percent of the children studied who had lived with an openly lesbian or gay parent experienced harassment by other children.⁷ On the other hand, the harmful effects suffered by a child when he or she is removed from his or her primary caregiver are well documented. The social science literature strongly suggests that a court does great harm when it removes the child from his or her gay or lesbian parent to "protect" the child from the possibility of future taunting. Many children are teased because they or their families are different from the norm. Teasing may be based on a child's physical appearance, race, religion, economic status, or any number of other factors. The important issue for the child's development is not whether teasing occurs, but how the teasing is handled and whether the child has the support of parents in learning to deal with it.

Further, even if the child is not placed with the gay or lesbian parent, the child still will have a gay or lesbian parent and will have to learn how to cope with any harassment resulting therefrom.

As the court in M.P. v. S.P., 126 N.J. Super. 425, 404 A.2d 1256 (N.J. Super., App. Div. 1979) points out, it is not always wise to attempt to shield a child from every possible adversity:

If defendant (lesbian mother) retains custody, it may be that because the community is intolerant of her differences. These girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirement of reason and tested knowledge, not the constraints of currently popular sentiments or prejudice.

Id. at 1236. See also M.A.B. v. R.B., 134 Misc. 2d 317 (N.Y. 1986).

Moreover, regardless of the incidence of stigma or harassment, fear that a child will suffer because of prejudice and discrimination is not a constitutionally permissible basis on which to remove a child from a parent. In Palmore v. Sidoti, 466 U.S. 429 (1984), the U.S.

⁷Brian Miller, Gay Fathers and Their Children, 28 Fam. Coordinator 544, 548 (1979). See also, Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 Am. J. Psychiatry 692, 695-96 (1978) (showed that in six lesbian mother families in which issue was discussed with 21 children, only three children reported being teased; in all three cases, the teasing was minor and transitory).

Supreme Court refused to allow a parent's interracial remarriage to serve as a basis for denying that parent custody of her child. In so holding, the Court clearly disavowed the propriety of basing custody decisions on social prejudices and perceived stigma:

[The issue is] whether . . . private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

466 U.S. at 433. Neither public prejudice nor judicial fear that such prejudice will be experienced by the child is a proper basis for limiting a parent's constitutional right to raise a child. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (individual's right to bring up children recognized as "essential liberty interest"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (parent's interest in a child "undeniably warrants deference and absent a powerful countervailing interest, protection").

Conclusion

In recent years, the Association has given considerable attention to the legal needs and rights of children, as well as the health and well-being of the family as an institution. The proposed recommendation would enhance these efforts by affirming that decisions regarding custody of all children focus only on relevant criteria.

Respectfully submitted,

Rebecca J. Westerfield, Chair
Section of Individual Rights and
Responsibilities

Lynne Z. Gold-Bikin, Chair
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August 1995

GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities
Section of Family Law

Submitted By: Rebecca J. Westerfield, Chair, Section of Individual Rights and
Responsibilities
Lynne Z. Gold-Bikin, Chair, Section of Family Law

1. Summary of Recommendation(s).

The recommendation supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

2. Approval by Submitting Entity.

The Family Law Section Council approved the recommendation at its spring meeting on April 7, 1995. The Section of Individual Rights and Responsibilities Council approved the recommendation at its spring meeting on April 21, 1995.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This recommendation has not been submitted previously to the House of Delegates or the Board of Governors. However, numerous recommendations regarding nondiscrimination on the basis of sexual orientation in other contexts have been submitted and approved by the House of Delegates.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Existing Association policies regarding non-discrimination on the basis of sexual orientation would be strengthened by this recommendation. In February 1989, the House of Delegates overwhelmingly adopted a policy urging the enactment by federal, state, and local governments of legislation prohibiting discrimination on the basis of sexual orientation. The ABA also has adopted policy urging the repeal of all laws that criminalize private non-commercial sexual conduct between consenting adults (1973); a policy condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the

perpetrators of such crimes (1987); an amendment to the Association's Constitution recognizing the National Lesbian and Gay Law Association as an affiliated organization with a seat in the House of Delegates (1992); canon 3B(5) of the Model Code of Judicial Conduct, which requires that "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation . . ." (1990); a resolution urging affirmative steps to increase the diversity of the House of Delegates, including diversity based upon sexual orientation (1990); a resolution supporting the enactment of federal legislation requiring a study of bias in the federal judicial system, including bias based upon sexual orientation (1991); and a resolution opposing efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who discriminate on the basis of sexual orientation (1992).

5. What urgency exists which requires action at this meeting of the House?

It is important that the Association consider this issue this year. The recent ruling by the Virginia Supreme Court in Bottoms v. Bottoms, Va. Sup. Ct. Rec. No. 941166 (April 21, 1995) in which the court found a lesbian mother to be an unfit mother because of her sexual orientation and deprived her of custody of her minor son, illustrates the need for the Association's guidance in this area. In addition, this recommendation will further existing policies of nondiscrimination supported by the Association.

6. Status of Legislation. (If applicable.)

There is no legislation known to be pending regarding this issue.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest. (If applicable.)

There are no conflicts of interest known at this time.

9. Referrals.

The recommendation was referred to the Steering Committee on the Unmet Legal Needs of Children on May 2, 1995, and approved on May 6, 1995.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

None known at this time.