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THE PSYCHOLOGICAL CONSEQUENCES OF JUDICIALLY IMPOSED CLOSETS IN CHILD CUSTODY AND VISITATION DISPUTES INVOLVING GAY OR LESBIAN PARENTS

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ABSTRACT

This article examines child custody and visitation cases in which courts operate under the assumption that parents who live openly as sexual minorities will harm their children. Based on this assumption, courts frequently impose restrictions on parents, requiring them to live closeted lives in order to have access to their children. Part I of this article introduces the concept of the judicially imposed closet as courts have applied it through several custody and visitation cases. Part II examines social science research concerning the psychological impact of "family secrets" on parents and children as well as research on sexual minority parenting. This research does not support the assumption of custody and visitation courts that it is harmful to

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children when their parents live openly as sexual minorities. Part III analyzes how, in cases involving sexual minority parenting, such as same-gender marriage, foster care, and adoption, the underlying assumption is that sexual minority parents who are open about their sexual orientation are raising happy, healthy, and well-adjusted children. Part IV then compares adoption cases with child custody and visitation cases examining how the same set of facts in an adoption case would be used against a sexual minority parent in a custody or visitation case. Finally, Part V argues that if courts were to treat sexual orientation as a neutral factor, as they do in most of the adoption cases involving sexual minority parents, then the courts could properly focus on assessing each parent's child-raising abilities, investigating the nature of the parent-child relationship, and preserving the emotional attachment of the children to their parents. It is these factors, not a parent's sexual orientation, that are relevant to determining the true best interests of the children in custody and visitation disputes.

INTRODUCTION

This article examines the judicial assumption present in child custody and visitation¹ cases that parents who live openly as sexual minorities² will harm their children and how this assumption results in courts judicially imposing closeted lives on sexual minority parents and their children. In these cases, the heterosexual parent will raise the issue of sexual orientation, generally coupled with a request for severe restrictions imposed on the sexual minority parent's exercise of visitation, in an attempt to obtain custody of the child.³ Many of the earlier cases, decided in the 1970s and 1980s, resulted in courts finding that being a sexual minority rendered a parent *per se* unfit to

1. Most jurisdictions have replaced the terms "custody" and "visitation" with more modern terms, such as "primary residential parent" and "exercising parenting time." These former two terms, however, are used in this article because they easily distinguish the primary residential parent, who was previously described as having "custody," from the parent who is not the primary residential parent, formerly referred to as the parent with "visitation rights." In addition, most of the references cited in this article use the terms "custody" and "visitation."

2. In this article, the term "sexual minority" refers to persons who are not heterosexual, such as lesbians, gay men, bisexuals, omnisexuals, and transgendered and intersex individuals. See Mark Blasius, *Sexual Identities, Queer Politics, and the Status of Knowledge*, in *SEXUAL IDENTITIES AND QUEER POLITICS* 1, 4 (Mark Blasius ed., 2001).

3. See, e.g., *Ex parte J.M.F.*, 730 So. 2d 1190, 1192 (Ala. 1998) (upholding the trial court's decision to change custody to the father after the mother began living openly with her lesbian partner); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming the trial court's restriction of the mother's visitation "in order to limit the children's exposure to their mother's lesbian lifestyle").

have custody or unrestricted visitation.⁴ The underlying assumption in these earlier custody and visitation cases was that children are harmed by the parent's sexual orientation.⁵ Some of the more recent cases, however, have adopted the "nexus" approach; these cases require evidence that there is some connection, or nexus, between the parent's sexual orientation and a detrimental impact on the child.⁶

Although later cases appear less restrictive than the earlier cases, this article more closely examines the facts in these later cases, revealing that many courts continue to disapprove of parents living openly as sexual minorities. Even appellate cases that decide in favor of the sexual minority parent do so because the parent is being discreet,⁷ the parent does not share a bedroom with his or her partner,⁸ or the parent does not express affection toward his or her partner or hug or kiss the partner in the presence of the children.⁹ On the other hand, parents who explain their sexual orientation to their children, kiss or hug their partners in front of their children, or attend gay-related events or activities, have a difficult time maintaining custody or having unrestricted visitation with their children.¹⁰ These judicial holdings may result in sexual minority parents living in judicially imposed closets, even in their own homes, to maintain unrestricted contact with their children, reaffirming the earlier cases' assumption that parents harm their children by being open about their sexual orientation.

4. See *Irish v. Irish*, 360 N.W.2d 739, 741 (Mich. Ct. App. 1981) (noting that "[b]ased on the mores of our society, we do not consider the continued presence of the [lesbian] lover of the children's mother as an element of the children's custodial environment which must be preserved and protected"); see also *Roe v. Roe* 324 S.E.2d 691, 694 (Va. 1985) (holding that "[t]he father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law").

5. See, e.g., *Roe*, 324 S.E. 2d at 694.

6. E.g., *McGriff v. McGriff*, 99 P.3d 111, 117 (Idaho 2004) ("Only when there is a nexus between harm to the child and a parent's homosexuality, can that parent's sexual orientation be a factor in determining custody of a child."); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) ("There must be a nexus between harm to the child and the parent's homosexuality.").

7. See *Hodson v. Moore*, 464 N.W.2d 699, 700-01 (Iowa Ct. App. 1991); see also *McKay v. Johnson*, No. C6-95-1626, 1996 WL 12658, at *5 (Minn. Ct. App. Jan. 16, 1996) (mother agreed not to take the children to any gay rights events in the future when the father sought to restrict the mother's visitation).

8. See *In re R.E.W.*, 471 S.E.2d 6, 8 (Ga. Ct. App. 1996).

9. See *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847, at *4 (Tenn. Ct. App. May 31, 2005); *Eldridge v. Eldridge*, 42 S.W.3d 82, 86-87 (Tenn. 2001).

10. See *S.E.G.*, 735 S.W.2d at 167; *Hertzler v. Hertzler*, 908 P.2d 946, 951 (Wyo. 1995); *Ex parte J.M.F.*, 730 So.2d at 1195-96; *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *1, 3 (Tenn. Ct. App. Mar. 30, 1998); *McGriff*, 99 P.3d at 119, 123; see also Susan M. Moss, Note, *McGriff v. McGriff: Consideration of a Parent's Sexual Orientation in Child Custody Disputes*, 41 IDAHO L. REV. 593, 603-05 (2005).

This article applies existing research concerning the psychological impact of "family secrets" on parents and children to this judicial action, which requires parents to keep parts of their lives secret to maintain custody or visitation rights. According to current social science research, keeping secrets from children and, as a result, living inauthentic lives, has negative consequences for both the parents and their children, creating distance, mistrust, and anxiety.¹¹ Thus, court decisions that order or expect parents to live in the closet harm the children and are not in their best interests. In addition, the research concerning children raised by openly gay parents demonstrates that these children adjust as well and are as psychologically healthy as children raised by heterosexual parents.¹²

This article observes that in other cases involving sexual minority parenting, such as same-gender marriage,¹³ foster care, and adoption, the majority of courts accept the results of the research about sexual minority parents.¹⁴ The underlying assumption in these cases is that sexual minority parents, who are open about their sexual orientation and fully integrated into society as sexual minority individuals, are raising happy, healthy, and well-adjusted children.¹⁵ In particular, the adoption cases, in which the courts examine the specific facts of the case to determine whether adoption is in the best interest of the child, view the sexual orientation of the parents in neutral terms, along with other facts describing the adoptive parents.¹⁶ The adoption courts discuss, with approval, how the adoptive parents' families, employers, co-workers, and faith communities support them as parents.¹⁷ In other words, the underlying reasoning used in court decisions regarding adoption cases is that a court will not grant or reject adoption petitions of openly gay parents solely because of the parents' lifestyle, rather, the courts will grant adoptions in accordance with the best interests of the child.¹⁸ This reasoning contradicts the courts' opposite assumption in the custody and visitation cases that openly gay parents cannot provide stable and nurturing home environments.¹⁹

11. See EVAN IMBER-BLACK, *THE SECRET LIFE OF FAMILIES: TRUTH-TELLING, PRIVACY, AND RECONCILIATION IN A TELL-ALL SOCIETY* 35-36 (1998).

12. See LESLIE COOPER & PAUL CATES, *AMERICAN CIVIL LIBERTIES UNION FOUND., TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 25-73 (2d. ed. 2006), available at http://www.aclu.org/images/asset_upload_file953_24098.pdf (summarizing studies examining the psychological health of children in homes with openly gay minorities).

13. This article uses the term "same-gender" instead of "same-sex."

14. See *infra* Part III for a discussion of cases involving sexual minority parents.

15. See *id.*

16. See *infra* Part III, § C.

17. See, e.g., *In re M.M.D.*, 662 A.2d 837, 859 (D.C. 1995).

18. See *infra* note 225 and accompanying text.

19. See *infra* Part I.

This article next compares adoption cases with custody and visitation cases. This comparison demonstrates how the same set of facts in an adoption case would be used against a sexual minority parent in a custody or visitation case.²⁰ This section also explores some of the reasons why courts treat these cases differently.²¹

In conclusion, this article discusses how the underlying assumption and findings in the marriage, foster care, and adoption cases — that sexual minority parents who are open about their sexual orientation are raising happy, healthy, well-adjusted children — should be applied to child custody and visitation cases. In accepting this underlying assumption, the issue of a parent's sexual orientation should become a neutral factor, as it is in the adoption cases. Courts could then focus on assessing each parent's child-raising skills and preserving the emotional attachment of the children to their parents, as in any other child custody or visitation dispute.

I. CUSTODY AND VISITATION CASES INVOLVING SEXUAL MINORITY PARENTS

Prior to 2000 most courts strongly disapproved of a sexual minority parent attaining custody or unrestricted visitation of a child when there was a custody or visitation dispute with a heterosexual parent.²² Some earlier cases,²³ using what is known as the *per se* analysis, found that a parent's homosexuality rendered the parent an unfit and improper custodian of the child as a matter of law.²⁴ In other cases, the courts conditioned a parent's custody or visitation on numerous restrictions, based on a presumption that knowledge of or exposure to the parent's homosexuality would harm the child.²⁵

An earlier Ohio case highlights the restrictions courts placed on gay parents.²⁶ The Ohio appeals court held that the trial court erred in not establishing proper protections against the father revealing to

20. See *infra* Part III.

21. See *id.*

22. Robin Cheryl Miller, Annotation, *Restrictions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R. 5TH 475, 504-06 (2002); Elizabeth Trainor, Annotation, *Custodial Parent's Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order*, 65 A.L.R. 5th 591, 601-12 (1999); Elizabeth Trainor, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R. 5th 591, 600-16 (1998).

23. Interestingly, all of these earlier cases were decided after the American Psychiatric Association removed homosexuality as a diagnosable mental disorder in 1973. See Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, FAM. ADVOC., Summer 1997, at 20, 21.

24. See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).

25. See Miller, *supra* note 22, at 504-06 for a list of cases that support this rationale.

26. *Roberts v. Roberts*, 489 N.E.2d 1067, 1069-70 (Ohio Ct. App. 1985).

his children that he was a homosexual.²⁷ The court's reasoning for imposing this restriction was that "the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles."²⁸ The appellate court stated that if the trial court was unable to devise adequate protections from the children discovering their father's homosexuality, then the trial court should terminate all contact between the father and the children "until the children attain such an age that they will not be harmed or influenced by learning of their father's homosexuality."²⁹ The court believed this restriction was necessary because the father had testified that if his children were to ask him directly whether he was homosexual he could not "lie to [his] children."³⁰

Earlier cases have also restrained the parent who is exercising custody or visitation from having the child in the presence of a same-gender partner,³¹ in the presence of other gay or lesbian individuals,³² or in the presence of individuals believed to be gay or lesbian.³³ Additionally, other courts have prevented a gay parent from taking the child to any functions that support gay persons or gay causes³⁴ or from taking the child to a gay-supportive church.³⁵ For example, in 1989 the Missouri Court of Appeals reviewed a trial court order in which "neither the [father's] present lover nor any other male with whom the [father] may be residing shall be in the child's presence or in the [father's] home during such visits."³⁶ The appellate court held that these restrictions were insufficient and "found that unrestricted visitation by the father would endanger the child's mental health and emotional development. It is further determined that visitation by the father must be supervised visitation in the presence of a responsible adult."³⁷ A logical inference from the appellate court's choice of words is that homosexuals are not "responsible" adults.

The practical effect of the courts's restrictions in these cases is that the sexual minority parents must live "in the closet" when the parent and child are together. When parents attempt to counter

27. *Id.*

28. *Id.* at 1070.

29. *Id.*

30. *Id.* at 1069.

31. *E.g.*, *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985); *Roberts*, 489 N.E.2d at 1070.

32. *See In re Jane B.*, 380 N.Y.S.2d 848, 860-61 (N.Y. Sup. Ct. 1976).

33. *See Pennington v. Pennington*, 596 N.E.2d 305, 307 (Ind. Ct. App. 1992).

34. *See Marlow v. Marlow*, 702 N.E.2d 733, 738 (Ind. Ct. App. 1998).

35. *See id.* at 736; *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 872 (Mo. Ct. App. 1982).

36. *J.P. v. P.W.*, 772 S.W.2d 786, 786-87 (Mo. Ct. App. 1989).

37. *Id.* at 794 (citations omitted).

the judicially imposed closet with constitutional arguments or psychological studies, several courts have not hesitated to reject these arguments as lacking credibility. The Missouri Court of Appeals observed that:

Wife, as well as the American Civil Liberties Union (A.C.L.U.), cite articles that indicate there are no significant differences among heterosexual parents and homosexual divorced parents and their children. Of course, the trial court has the authority to find the evidence presented not credible.

....

Wife and lover show affection toward one another in front of the children. They sleep together in the same bed. . . . All of these factors present an unhealthy environment for minor children. Such conduct can never be kept private enough to be a neutral factor in the development of a child's values and character. We will not ignore such conduct by a parent which may have an effect on the children's moral development.

This analysis is sufficient to answer the aspects of Wife's and A.C.L.U.'s constitutional arguments.

....

In the few cases in our state dealing directly with the problem of a homosexual parent seeking primary custody, all courts have awarded custody to the non-homosexual parent, and restricted the homosexual parent's visitation rights, again relying on the impact upon the child. We are not presuming that Wife is an uncaring mother. The environment, however, that she would choose to rear her children in is unhealthy for their growth. She has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community. The purpose of restricting visitation is to prevent extreme exposure of the situation to the minor children. We are not forbidding Wife from being a homosexual, from having a lesbian relationship, or from attending gay activities or overt homosexual outings. We are restricting her from exposing these elements of her "alternative life style" to her minor children.³⁸

38. S.E.G. v. R.A.G., 735 S.W.2d 164, 166-67 (Mo. Ct. App. 1987) (citations omitted).

Similarly, in a 1995 Wyoming case, the mother and father became embroiled in a visitation dispute when the mother decided to live openly with her partner.³⁹

Initially, Pamela's custody of her children was predicated upon her disavowal of homosexuality. When it became clear that this was not the case, she voluntarily relinquished custody of the children to Dean in exchange for liberal visitation privileges. Pamela's capitulation did not quell the righteous fires burning within Dean and Christine, who felt compelled to instruct the children that Pamela had abandoned them for the affections of another woman, embracing a lifestyle which was a sin and abomination.

Pamela, of course, understood that Dean's aversion to lesbianism antedated his union with Christine. Pamela, on her part, insisted upon familiarizing the children with every aspect of her newfound existence, "snuggling" with the children and her companion, enlisting the participation of the children in a gay/lesbian rights parade and her "commitment" ceremony.⁴⁰

Consequently, the court considered the mother's actions of snuggling with the children and her partner, taking the children to a gay rights parade, and having the children involved in her commitment ceremony, which the appellate court characterized as a "compulsion to relentlessly expose the children to every aspect of her relationship," as blameworthy as the father's demonization of the mother.⁴¹ The Wyoming Supreme Court stated that although the trial court indulged an essentially personal view in derogation of Pamela's lifestyle, nonetheless, "[i]t was reasonable for the district court to conclude that limiting Pamela's visitation with the children would limit the damage done by mutual parental insistence upon use of the children as weapons in an acrimonious contest between lifestyles."⁴² Based on this rationale, the Wyoming Supreme Court upheld the trial court's severe limitations on the mother's visitation.⁴³ In conclusion, the court stated that the trial court's "judgment is not affirmed *because of* Dean and Christine's insistence upon their 'values' so much as it is *in spite of* that behavior. The damage their contest with Pamela has done to these children may already be irreparable."⁴⁴ The dissent

39. *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995).

40. *Id.* at 951.

41. *Id.* at 949.

42. *Id.* at 952. The dissent, however, found the majority's reasoning "strange and unacceptable," noting that all custody and visitation cases involve acrimonious contests. *Id.* at 954 (Golden, C.J., dissenting).

43. *Id.* at 953.

44. *Id.*

was incredulous at the majority's decision, noting that "[t]he record quite clearly reveals that the father and Christine worked long and hard at alienating these children from their mother. They should have been held in contempt for what they have done; instead, they are . . . rewarded for their outrageous behavior."⁴⁵

In a 1998 Alabama case, a father sought a change in child custody, not because the mother was a lesbian, but because the mother and her partner "were not conducting a discreet affair in the guise of 'roommates' but were, instead, presenting themselves openly to the child as affectionate 'life partners' with a relationship similar to the father and the stepmother."⁴⁶ The trial court determined that the mother should lose custody of her daughter and not be allowed to have her partner present during visitation even though it was the "unanimous opinion of all the psychologists that the child was pretty, well-groomed, intelligent, energetic, healthy, and generally happy."⁴⁷ Furthermore, the child's therapist testified that "a change in custody would have a substantial detrimental effect on the child, perhaps causing her to have immediate and/or long-term behavior problems, school problems, or depression."⁴⁸

The Alabama Supreme Court affirmed the trial court's decision to change custody to the father, finding that the father's subsequent marriage, together with the mother's decision to no longer live in a closeted relationship, provided sufficient evidence that "a change in custody would materially promote the child's best interests and that the positive good brought by this change would more than offset the inherently disruptive effect of uprooting the child."⁴⁹ According to the court, "the inestimable developmental benefit of a loving home environment that is anchored by a successful marriage is undisputed. . . . The mother's circumstances have also changed, in that she is unable, while choosing to conduct an open cohabitation with her lesbian life partner, to provide this benefit."⁵⁰

The lesson expounded by the courts in these earlier cases, all decided prior to 2000, was that sexual minority parents would lose unsupervised or unrestricted contact with their children if they did not live a closeted life. Some appellate courts in more recent cases, however, have begun to reverse trial court decisions that impose these types of restrictions on parents. Five cases, all decided after

45. *Hertzler v. Hertzler*, 908 P.2d 946, 954 (Wyo. 1995) (Golden, C.J., dissenting).

46. *Ex parte J.M.F.*, 730 So.2d 1190, 1194 (Ala. 1998).

47. *Id.* at 1193.

48. *Id.* (citing testimony of Dr. Sharon Gotlieb).

49. *Id.* at 1194.

50. *Id.* at 1196.

2000, exemplify this shift in the court decisions. In a 2001 Colorado case, for example, the trial court adopted the mother's request to restrict the father from "having any other person spend the night at his home during parenting time and from taking the child to his church," which has a congregation with a primarily gay orientation.⁵¹ The court of appeals, however, reversed the trial court because imposing the restrictions was not supported by the Colorado visitation statute's language, which provides that "the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger the child's physical health or significantly impair the child's emotional development."⁵²

In 2002, an Indiana Court of Appeals reached a similar result, striking down a restriction preventing either parent from having "unrelated adults," with whom he or she was having a relationship, from spending a night in the home.⁵³ The court of appeals found that there was "no evidence of any adverse effect upon the children based upon [the] Mother's sexual [orientation] and relationship with a same-sex partner."⁵⁴

Tennessee appellate courts, in three cases since 2000, have also reversed restrictions on sexual minority parents. In the first case, a Tennessee Court of Appeals held that the trial court erred in not restricting the mother from having her partner present during overnight visitation with her daughter.⁵⁵ The Tennessee Supreme Court reversed the court of appeals, reinstating the trial court's unrestricted order of visitation.⁵⁶ In doing so, the Tennessee Supreme Court stated:

We may, however, find an abuse of discretion when the record contains definite evidence that visitation, as ordered, would jeopardize the child in a physical or moral sense. We have carefully scrutinized the entire record for any evidence that [the child] has been, or would be, subject to physical or emotional harm from overnight stays with her mother while [her mother's partner] was present in the home and have found none.⁵⁷

51. *In re Marriage of Dorworth*, 33 P.3d 1260, 1260-61 (Colo. Ct. App. 2001).

52. COLO. REV. STAT. § 14-10-129(1)(II)(b)(I) (2005) (adopted from UNIF. MARRIAGE & DIVORCE ACT § 407, 9A U.L.A. (Part II) 398 (1998)); *id.* at 1262; *see also* Gould v. Dickens, 143 S.W.3d 639, 643 (Mo. Ct. App. 2004) (involving a similar visitation statute); *Damron v. Damron*, 670 N.W.2d 871, 874 (N.D. 2003) (involving a similar statute and motion to modify custody).

53. *Downey v. Muffley*, 767 N.E.2d 1014, 1016 (Ind. App. 2002).

54. *Id.* at 1020.

55. *Eldridge v. Eldridge*, 42 S.W.3d 82, 84 (Tenn. 2001).

56. *Id.*

57. *Id.* at 89 (citations omitted).

The second Tennessee case involved a restraining order that restrained the father “from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle.”⁵⁸ The trial court found the father in contempt of the restraining order “for telling his son that he was gay” and sentenced the father to serve two days in the county jail.⁵⁹ The father challenged the language in the restraining order that prohibited him from informing his son about his “gay lifestyle.”⁶⁰ The appellate court found that the language was not sufficiently specific, as required by the Tennessee statute authorizing restraining orders.⁶¹ Thus the restraining order was unenforceable and the father could not be punished for violating the order.⁶²

Most recently, in 2005, a Tennessee court of appeals reversed a trial court decision changing custody from the mother to the father based on the assumption that the child would suffer future harm living with his mother.⁶³ The court noted that “[t]here was no credible proof in the record to support a finding that the mother’s sexual orientation would have an adverse impact on the child as he grew older. Further, this was not a proper matter of which the court could take judicial notice.”⁶⁴

A review of these later cases shows a shift from courts assuming that the parent’s homosexuality was, in and of itself, detrimental to the best interests of the child, to courts requiring concrete evidence that a parent’s homosexuality was causing harm to the child.⁶⁵ This requirement has been referred to as the “nexus” approach — there must be a nexus, or connection, between the parent’s sexual orientation and harm to the child.⁶⁶ Another version of the nexus approach

58. *Hogue v. Hogue*, 147 S.W.3d 245, 247 (Tenn. Ct. App. 2004).

59. *Id.* at 248.

60. *Id.* at 252, n.6.

61. *Id.* at 254-55.

62. *Id.* at 255.

63. *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847, at *5 (Tenn. Ct. App. May 31, 2005).

64. *Id.* at *4.

65. It is interesting to note that regardless of the statutory provisions regarding visitation or custody and of the standard of review on appeal, the key factors in the appellate court decisions appear to be how the court viewed the “harmfulness” of the parents’ sexual orientation or behavior and the willingness of the court to attribute any difficulties the child was experiencing, or might experience in the future, to a parent’s sexual orientation. Compare *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) and *Roberts v. Roberts*, 489 N.E.2d 1067, 1069-70 (Ohio Ct. App. 1985), with *In re Marriage of Dorworth*, 33 P.3d 1260, 1260-61 (Colo. Ct. App. 2001), *Downey v. Muffley*, 767 N.E.2d 1014, 1020 (Ind. Ct. App. 2002), and *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847 at *4 (Tenn. Ct. App. May 31, 2005).

66. See *In re Marriage of Diehl*, 582 N.E.2d 281, 291 (Ill. App. Ct. 1991); *Delong v. Delong*, No. WD 52726, 1998 WL 15536 at *11 (Mo. Ct. App. Jan. 20, 1998).

requires a connection between the restricted behavior, for example the parent's expressions of affection to his or her partner, the presence of the parent's partner or other homosexuals, or the inclusion of the child at gay functions, that results in actual harm to the child.⁶⁷ Although some courts assume that any distress or other emotional difficulty that a child experiences is caused by factors related to the parent's sexual orientation, other courts interpret the nexus approach as requiring a connection between any emotional difficulties that a child experiences and factors related to the parent's sexual orientation. For example, in a Washington case, the trial court prohibited the father from "exhibiting, or participating in displays of affection . . . with a partner" in the presence of his children.⁶⁸ The court of appeals stated:

We hold that the trial court erred by restricting [the father's] conduct based on his sexual orientation. The evidence showed only that the children experienced difficulty adjusting after their parents' separation. But where the only harm is adjustment, the remedy is counseling, not restrictions on the parents' lifestyle in terms of sexual orientation.⁶⁹

Although the post-2000 cases from Colorado, Indiana, and Tennessee show that sexual minority parents have been successful on the appellate court level, these cases are also evidence that trial judges continue to require parents to live in the closet when their children are present. More disturbing, however, is that a closer look at these particular appellate cases does not reveal an acceptance of parents living open lives. For example, in *In re Marriage of Dorworth*, the 2001 Colorado case, the court found that the father "agreed it would be harmful to disclose his sexuality to the child at this time"⁷⁰ In *Downey v. Muffley*, the 2002 Indiana case, the court distinguished its holding from that of an earlier Indiana case in which restrictions were necessary because "the father took the children to a day-long conference that focused on the concerns of homosexuals, to a lesbian choir, and to a baptismal service where the minister 'came out as a gay man.'"⁷¹ Similarly, in *Eldridge v. Eldridge*, the 2001 Tennessee Supreme Court case, the court found that:

67. See *Boswell v. Boswell*, 721 A.2d 662, 664 (Md. Ct. App. 1998); *Blew v. Verta*, 617 A.2d 31, 34 (Pa. Super. Ct. 1992); *Damron v. Damron*, 670 N.W.2d 871, 873, 875 (N.D. 2003).

68. *In re Marriage of Wickland*, 932 P.2d 652 (Wash. Ct. App. 1997).

69. *Id.* at 653.

70. 33 P.3d 1260, 1262 (Colo. Ct. App. 2001).

71. 767 N.E.2d 1014, 1019 (Ind. Ct. App. 2002) (citing *Marlow v. Marlow*, 702 N.E.2d 733, 736 (Ind. Ct. App. 1998)).

[the mother and her partner] live in the same home but had slept in separate bedrooms for three months prior to the hearing. . . . They have a monogamous relationship but have not been sexually intimate in over a year. [The mother's partner] characterized them as "best friends, roommates." They make no expression of "physical emotion or physical contact" when [the daughter] is in the home.⁷²

In *Hogue v. Hogue*, the 2004 Tennessee case, in which the appellate court found the father could not be punished under the language of the restraining order that prohibited him from exposing the child to his "gay lifestyle," the appellate court noted that the father did not challenge that portion of the restraining order that prohibited him from introducing the child to his "gay lover(s)."⁷³ Consequently, the appellate court did not address that portion of the restraining order.⁷⁴

Finally, in *Berry v. Berry*, the 2005 Tennessee Court of Appeals case, the court distinguished the facts before it from the facts in a 1988 case, where the child was removed from the mother's custody.⁷⁵ The court noted that "[i]n *Collins* the child testified that her mother slept in the same bed with her female partner, kissed her, hugged her and told her that she loved her. Because there was no such testimony in the case at bar, the cases are factually distinguishable."⁷⁶ In these aforementioned cases the parents were living closeted lives or chose not to challenge all of the restrictions imposed on them by the court. These cases provide evidence that being honest to one's children about one's sexual orientation⁷⁷ and displaying affection toward a partner⁷⁸ or sharing a bedroom with a partner⁷⁹ are activities that continue to result in courts denying a parent custody of his or her child or restricting visitation rights.⁸⁰

72. 42 S.W.3d 82, 86-87 (Tenn. 2001).

73. 147 S.W.3d 245, 252 n.6 (Tenn. Ct. App. 2004).

74. *Id.*

75. No. E2004-01832-COA-R3-CV, 2005 WL 1277847, at *4 (Tenn. Ct. App. May 31, 2005).

76. *Id.* (citing *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. June 27, 1988)).

77. *See id.*

78. *See, e.g., In re Marriage of Collins*, 51 P.3d 691, 693 (Or. Ct. App. 2002) (stating that although the child saw her mother kissing her partner, custody should not be changed to the father because the incidents were "isolated and inadvertent").

79. *See Taylor v. Taylor*, 110 S.W.3d 731, 732, 734 (Ark. 2003).

80. *Jenkins v. Jenkins*, No. 05-98-01849-CV, 2001 WL 507221, at *6 (Tex. App. May 15, 2001) (father was not allowed increased visitation in part because his partner lived with him and both attended events with the children).

II. THE PSYCHOLOGICAL CONSEQUENCES OF JUDICIALLY IMPOSED CLOSETS

A. *Research on the Consequences of Family "Secret-Keeping"*

Court rulings in child custody or visitation cases that place restrictions on sexual minority parents may have several possible consequences. One potential consequence could be that other sexual minority parents, who may be considering divorce or who are divorced but just coming to terms with their sexual orientation, are sent the message that they may need to live very secretive lives if they want to maintain unrestricted contact with their children. In reaction to fears of losing custody or having restricted visits, sexual minority parents may be forced to keep their sexual orientation secret. Alternatively, if they tell someone, they may feel pressure to couple the disclosure with an assurance from the confidant to keep the secret from others, including other family members. Either way, this secret-keeping may be damaging to the parents as well as their families.

Dr. Evan Imber-Black, a renowned family therapist and author of research on family secrets,⁸¹ has found that family relationships become imbued with distance when individuals keep important aspects of their lives a secret from the other family members.⁸² People with secrets grow more isolated in an attempt to prevent the discovery of the secret.⁸³ They become distrustful and denial is prevalent in their daily lives.⁸⁴ They can develop a negative internal dialogue that includes repeating to themselves that "if they really knew [my secret, then] they would dislike me, disrespect me, maybe even disown me."⁸⁵ Thus, in the context of a child custody and visitation dispute, this internal dialogue might encompass the parent's fear that if others knew the secret, then it could be used to prevent the parent from having custody or unrestricted visitation with his or her children.

According to Imber-Black, when someone has a secret, those who are close to that individual, especially family members and children, often sense something is being kept from them, and they "create their own fantasies and myths" about the person with the secret.⁸⁶ Family interactions become based on an illusion. The other family members may "pursue the content of the secret in ways that ultimately violate

81. IMBER-BLACK, *supra* note 11, at "About the Author" (noting that the author is a Professor of Psychiatry at the Albert Einstein College of Medicine and a former president of the American Family Therapy Academy).

82. *Id.* at 34; *see also* HARRIET LERNER, *THE DANCE OF DECEPTION* 85-86, 88-90 (1993).

83. IMBER-BLACK, *supra* note 11, at 34.

84. *Id.*

85. *Id.*

86. *Id.*

[the secret holder's] privacy or [they] may respond . . . with denial and pervasive distance, [resulting in a] pattern of mutual and escalating exclusion."⁸⁷ Conversations may become superficial, halting honest communication and rendering true intimacy unachievable.⁸⁸ The person with the secret is afraid to be honest for fear of losing important personal relationships.⁸⁹ Ironically, however, this lack of honesty results in personal relationships becoming superficial.⁹⁰ The guilt about having a secret may result in individuals feeling they lack integrity, which can permeate other parts of their lives.⁹¹ Because of the irreconcilable conflict between the fear and the guilt, they could potentially plunge into a state of depression so black that others cannot help but notice.

Applying Imber-Black's model to a closeted parent in the context of a custody or visitation dispute, one can see that, over time, these parents could suffer from the intense guilt of living a lie. In addition, they may internalize feelings of homophobia and feel shame for being gay.⁹² If parents are aware that local courts restrict contact between sexual minority parents and their children, then these parents may feel forced to live a life of denial in order to continue having custody or unrestricted visitation with their children. This denial could have very serious consequences for the parents and their children. For example, some parents may not seek custody, or they may relinquish custody when they realize that they are struggling with their sexual orientation.⁹³ Alternatively, out of a fear that others may discover their orientation, they may set up elaborate schemes to live double lives.⁹⁴ They may even believe that they can live two separate lives having both a "straight" life with their children and a parallel life with a same-gender relationship, sinking further into a state of denial.⁹⁵

87. *Id.*; see also *Hertzler v. Hertzler*, 908 P.2d 946, 948 (Wyo. 1995) (noting that the husband insisted the mother sign a stipulation that, in order to have primary custody of the children, she disavow lesbianism. Less than a year after the divorce, the mother's parents informed the father, against the mother's wishes, that their daughter was, indeed, a lesbian. As a consequence of this violation of her privacy, the mother immediately agreed to transfer the primary custody of the children to the father in return for liberal visitation rights with her children).

88. IMBER-BLACK, *supra* note 11, at 35.

89. *Id.* at 34.

90. *Id.* at 34-35

91. *Id.* at 15-16.

92. See, e.g., *Hassenstab v. Hassenstab*, 570 N.W.2d 368, 374 (Neb. Ct. App. 1997) (noting that the mother was in a lesbian relationship until shortly before the hearing on her ex-husband's motion to modify custody. She testified, however, during the trial that she believed that "the practice of homosexuality [was] morally wrong"). *Id.*

93. *Hertzler v. Hertzler*, 908 P.2d 946, 951 (Wyo. 1995).

94. See, e.g., *Hassenstab*, 570 N.W. 2d. at 374.

95. For example, African American males who chose to "live on the down-low," do not identify themselves as gay although they have sexual relations with men. J.L. KING,

This closeted parenting results in some of the most bizarre and incredulous testimony concerning the parents' living arrangements, which is only overshadowed by even more bizarre court orders. The following three cases from Arkansas, Mississippi, and Missouri are examples of the dilemma sexual minority parents face in jurisdictions that historically have not allowed these parents to have custody of their children.

The first case, *Taylor v. Taylor*, was decided in Arkansas in 2003.⁹⁶ The father sued for a change in custody because the mother lived with an "admitted lesbian."⁹⁷ The mother and the "admitted lesbian" had shared the same bed "about half the time" prior to the father filing for a change in custody, but both denied that they were sexually intimate.⁹⁸ The "admitted lesbian" even testified at trial that she "did not condone a homosexual lifestyle or advocate it."⁹⁹

The trial court found as follows:

The [father] here claims the circumstances of the expressed sexual preference of Kelli [sic] Tabora and the fact that she and defendant [mother] slept together for approximately one year requires the conclusion that sex occurs. But if the testimony of defendant and Kelli [sic] Tabora is accepted as the truth what is present here is that no actual inappropriate behavior but rather the appearance of inappropriate behavior exists. Is that harmful enough to require removal of these children from that environment? It would seem likely that if it is generally known by friends and acquaintances that defendant resides with and also sleeps with an admitted lesbian, that most will conclude sex is involved. This assumption on the part of the public would subject the children to ridicule and embarrassment and could very well be harmful to them. Therefore, it is the conclusion of this Court that residence of Kelli [sic] Tabora with defendant and the children even without sex is inappropriate behavior and is a circumstance that justifies changing of custody from defendant to plaintiff. It is at least poor parental judgment on the part of defendant to allow a well known lesbian to both reside with defendant and the children and sleep in the same bed with defendant.¹⁰⁰

ON THE DOWN LOW 6 (2004).

96. 110 S.W.3d 731, 731 (Ark. 2003).

97. *Id.* at 732.

98. *Id.*

99. *Id.* at 732-33.

100. *Id.* at 734.

The trial court then restricted the mother's visitation rights with her children "to overnight visits when Kellie Tabora was not spending the night with her."¹⁰¹

The Arkansas Supreme Court reversed, finding that because the trial court believed the two women's testimony, the only basis for the trial court's decision was the appearance of impropriety and the potential for future harm.¹⁰² The court stated:

Because no harm has been shown to the children, because there was no showing that the two women are engaged in a lesbian relationship, and because Kellie Tabora is no longer sleeping in [the mother's] bed, we disagree that a change of custody premised on appearances and on the potential for teasing in the future is sufficient to constitute a material change in circumstances.¹⁰³

The message sent to sexual minority parents in Arkansas by the court in this factually strange case is quite clear — to maintain custody of your children, deny being a sexual minority and testify that there is no sexual relationship.¹⁰⁴ Furthermore, if you happened to have been sharing a bed with an "admitted" sexual minority individual, definitely stop sleeping in the same bed when the other parent files a change of custody motion.¹⁰⁵

The second case, *Hollon v. Hollon*, was decided in 2001 in Mississippi.¹⁰⁶ During her testimony, the mother "freely admitted that she and [another woman] slept in the same bed. However, she vehemently denied any sexual relationship existed between her and [the other woman], continually characterizing their relationship as platonic."¹⁰⁷ Unfortunately, Donna, a friend of the mother's, testified that the mother had told Donna she was having a sexual relationship with the other woman, a fact that the mother asked Donna to

101. *Taylor v. Taylor*, 110 S.W.3d 731, 734 (Ark. 2003).

102. *Id.* at 739.

103. *Id.*

104. See, e.g., *Ratliff v. Ratliff*, No. CA 02-844, 2003 WL 1856408 at *10-11 (Ark. Ct. App. Apr. 9, 2005). In *Ratliff*, the mother moved out of the family residence with the children and may have been sharing the "living quarters" of a woman with whom the mother admitted to having a sexual relationship. *Id.* at 10. However, the mother testified that the sexual relationship ended six months prior to the entering of the divorce decree. *Id.* The appellate court affirmed the award of custody to the mother, noting "there was an absence of proof of any sharing of a bedroom or sleeping together with the children residing in the abode." *Id.* at 10-11.

105. *Id.*

106. 784 So. 2d 943, 943 (Miss. 2001) (noting that the trial court discussed whether two people sharing a bed creates a legal presumption that they are engaged in "sexual activity"). *Id.* at 950-51.

107. *Id.* at 945.

keep secret.¹⁰⁸ Because of Donna's testimony, the trial court not only found the mother's denial untrustworthy but also asked the District Attorney's office to consider conducting an investigation into whether the mother had committed perjury.¹⁰⁹ The Mississippi Supreme Court reversed the award of custody to the husband in this case, stating that the trial court's "defining consideration in determining custody of [the child] centered on the *allegations* of [the mother's] homosexual affair."¹¹⁰ Despite the supreme court finding error in the trial court's reliance on an alleged homosexual affair to determine moral unfitness, four justices joined the concurring opinion which stated that:

[w]ithout question the living arrangement of [the mother with the other woman] was inappropriate and questionable at best. However, [the mother] made a positive change in her physical living arrangements first by terminating the untenable living arrangements with [the other woman] and then by planning a move to the newly-remodeled three bedroom house.¹¹¹

Without these concurring justices, the court could not have reversed the award of custody to the father.¹¹² Similar to the message being sent to sexual minority parents in Arkansas, *Hollon* warns sexual minority parents of the dangers in telling someone about their orientation. Even more troubling is the possibility that a vehement denial on the stand may result in a trial judge requesting the District Attorney to investigate the parent for committing perjury. One can only imagine what kind of investigative techniques the District Attorney's office might use to determine whether the parent is or is not a homosexual.

The Missouri Court of Appeals decided the third case, *Delong v. Delong*, in 1998.¹¹³ In this case, prior to the custody trial, the mother repeatedly denied that she was involved in lesbian relationships.¹¹⁴ Under oath, the mother finally admitted to having had sexual relationships with two women.¹¹⁵ In response, the trial judge required the

108. *Id.*

109. *Id.* at 949.

110. *Id.* at 952 (emphasis added).

111. *Id.* at 953 (Waller, J., concurring).

112. *Id.* at 952.

113. No. WD 52726, 1998 WL 15536 (Mo. Ct. App. Jan. 20, 1998).

114. *Id.* at *2.

115. *Id.* at n.3. The mother alleged that

"the courtroom became a battleground in which sexual orientation was the principal issue" and that [the] father and the guardian ad litem became obsessed with dissecting her sexual life, "uncovering every detail of any kiss, touch or other intimate contact she may have engaged in with a member of the same sex"

instead of focusing on the best interests of the children. *Id.* at *3.

mother to *tell* her children she was a lesbian; the judge's final order included a "telling session" with the mother's older children, in the presence of the guardian ad litem, in which she was required to admit to the children she was a lesbian.¹¹⁶ In addition, the trial court found:

that joint custody would not be appropriate and that the children's best interests would be met if they were in their father's custody. In making these findings, the [trial] court cited [the] Mother's engagement "in a promiscuous series of four homosexual affairs," her repeated denial and concealment of "her adulterous lesbian activity," her intention to continue "exposing her lesbian lovers to her children," and her "immaturity in seeking after repeated new love relationships."¹¹⁷

Although the mother objected to the court's order, by the time the case reached the Missouri Supreme Court, the "telling session" had already occurred, so the Missouri Supreme Court considered that issue moot.¹¹⁸ In addition, the Missouri Supreme Court upheld the award of custody to the father.¹¹⁹

All three of these cases are vivid examples of the dilemma sexual minority parents face when the courts view sexual orientation of the parent as a negative factor in determining child custody disputes. In order to have custody or unrestricted visitation of their children, the parents realize they must live a secret life. In addition, as was evident in the *Taylor* and *Hollon* cases, keeping the secret of the parent's sexual orientation can also impact the life of the parent's partner.¹²⁰ The risk of discovery may require that the partner also live a closeted life or at least deny that the relationship is a sexual one if the partner had been living openly as a sexual minority prior to cohabiting with the parent. Keeping this secret could complicate the new relationship by forcing the couple to live essentially two lives. The constant fear that someone will discover the true nature of their relationship could cause the couple to live in extreme isolation and be dishonest about even the most minuscule aspects of their lives. Imber-Black reported one case involving a lesbian couple where one of the women had a child from a previous marriage.¹²¹

116. *Id.* at *3 (emphasis added).

117. *Id.* at *2.

118. *Delong v. Delong*, No. WD 52726, 1998 WL 15536 (Mo. Ct. App. Jan. 20, 1998), *aff'd sub nom.* J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998).

119. *Id.*

120. See *Taylor v. Taylor*, 110 S.W.3d 731, 732-33 (Ark. 2003); *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001).

121. IMBER-BLACK, *supra* note 11, at 197.

The couple acted as "roommates" in an attempt to keep their relationship a secret from the mother's family, out of fear that the father would find out and restrict the mother's contact with the child.¹²² Keeping this secret placed enormous stress on the couple's relationship and it dominated and controlled all aspects of their lives.¹²³

Not only do the adults suffer from the secret-keeping, but Imber-Black also has found that secrets can be very damaging to children.¹²⁴ Children often feel confused and will not understand the tension in the family home.¹²⁵ They will feel distant from the parent who has the secret and be led to believe it is better not to ask questions and to be dishonest.¹²⁶ Often children will fill the unknown with their own perceptions, which usually relate to their fear that they are causing the "problem."¹²⁷ These feelings can result in physical problems, emotional problems, or acting out to move the focus on them rather than the real issue.¹²⁸ In other words, if the children can make themselves the "problem," they believe that at least they have control over that particular problem, diverting attention from the underlying issue over which they have no control.¹²⁹

If the sexual minority parent cannot live with the distance and guilt created by trying to hide their sexual orientation from their children, one potential solution to the judicially imposed closet is to share the secret with the children, warning them that they have to keep the secret or risk losing their relationship with their parent. However, when one parent and child know a secret and the other parent does not, it places the child in an "untenable loyalty bind."¹³⁰ According to Imber-Black, a confidence between a parent and his or her child will create a dysfunctional family because the secret always excludes other vital members of the family.¹³¹ When this happens, a complicated family dynamic comes into play.¹³² Not only is the issue per se a secret, but the secret-keeping relationship is also hidden. As a result, families with secret-keeping alliances lose their elasticity and spontaneity.¹³³

122. *Id.* at 197-98.

123. *Id.* at 197-99.

124. *Id.* at 224-30.

125. *Id.* at 259-63.

126. IMBER-BLACK, *supra* note 11, at 247.

127. *Id.* at 225.

128. *Id.* at 216-17, 246-47.

129. *Id.* at 247.

130. *Id.* at 35.

131. *Id.* at 36.

132. IMBER-BLACK, *supra* note 11, at 36.

133. *Id.* at 26

Imber-Black also found that when parents use children as confidants, "the natural hierarchy of informational decision-making in a family is turned upside down."¹³⁴ This situation can result in either the child having a false sense of power, or, on the opposite pole, the child sacrificing his or her own emotional well-being to keep the secret.¹³⁵ If the secret is cloaked in covert threats, such as "it will be your fault if you tell the secret and the situation becomes more difficult," the relationship with the parent who has the secret can become marked by distance and mistrust.¹³⁶

In the context of a custody and visitation dispute, the child's false sense of power from knowing the secret might be manifested when the child tries to manipulate the sexual minority parent by threatening to disclose the secret. Alternatively, if the child tries to keep the secret but is unable to do so and the court removes the child from the parent's home or restricts the parent's contact with the child, then the child might feel responsible for the court's decision. In fact, Imber-Black states that a toddler or kindergartener does not have the developmental ability to keep a secret; they have not yet developed the capacity to understand family privacy, boundaries, or the difference between the private sphere of the family and the public sphere of the outside world.¹³⁷ Although adolescents are capable of understanding these boundaries and can keep "secrets that maintain privacy or protect the family from unwanted intrusions," keeping a secret of this magnitude requires them to use "deception and evasion on a daily basis, [cutting them off from the other parent], siblings, extended family or friends."¹³⁸ These teenagers are forced into a situation that jeopardizes their own development, diverting energy that should go into their lives and activities toward masking a family secret.¹³⁹

Although one could criticize the sexual minority parents for asking their children to remain silent about the parents' sexual orientation, a court sends this exact message to the children when it denies custody to the sexual minority parent or imposes restrictions on the parent when he or she is with the child. This is particularly true when the child already knows about the parent's sexual orientation because the parent has decided to live openly as a sexual

134. *Id.* at 36.

135. *Id.*

136. *Id.* at 249.

137. IMBER-BLACK, *supra* note 11, at 239-40.

138. *Id.* at 247.

139. *Id.*

minority.¹⁴⁰ In cases in which the court takes away custody or prohibits the parent's partner from being present during visitation, the court implies to the child that the parent's sexual orientation must be hidden not only from the public, but even within the privacy of that parent's own home.¹⁴¹ In addition, when the court orders that the child cannot have any future contact with the parent's partner, the court ignores the fact that the child may have a strong and loving relationship with the parent's partner.¹⁴²

Even when the court decides in favor of the sexual minority parents, many of these decisions contain language that requires the parents to continue to live in the closet. Numerous cases find that although the parent is living in a same-gender relationship, the parent can maintain custody or have unrestricted visitation because the parent acts with discretion.¹⁴³ In these scenarios the parent may not share a bedroom with the partner,¹⁴⁴ or the couple may not express affection, hug, or kiss in the presence of the children.¹⁴⁵ One infers from these cases that the couple must continue to live a closeted life in their own home if the sexual minority parent wants to maintain custody or have unrestricted visitation with the children.

In most of the cases the child's heterosexual parent requests the restrictions on the sexual minority parent; by accepting the heterosexual parent's fear of homosexuality, the court judicially enforces that parent's homophobia, imposing it on all the family members.¹⁴⁶ Not only does this ruling send the message to the child that the heterosexual parent's world view is the "correct" one, but it also judicially sanctions control and power to one parent over the private life of the sexual minority parent. Such rulings are particularly difficult for children, who already are caught in a loyalty bind between their

140. See *Ex parte J.M.F.*, 730 So. 2d 1190, 1192 (Ala. 1998); *Hertzler v. Hertzler*, 908 P.2d 946, 949, 952 (Wyo. 1995); *McGriff v. McGriff*, 99 P.3d 111, 120 (Wyo. 1995).

141. See *id.*

142. See *Ex parte J.M.F.*, 730 So. 2d at 1193; *Hertzler*, 908 P.2d at 955 (Golden, C.J., dissenting).

143. See *Hodson v. Moore*, 464 N.W.2d 699, 701-02 (Iowa Ct. App. 1990); see also *McKay v. Johnson*, No. C6-95-1626, 1996 WL 12658 at *3, 5 (Minn. Ct App. Jan. 16, 1996) (noting that when the father sought to restrict the mother's visitation, the mother agreed not to take the children to any gay pride events in the future).

144. E.g., *In re R.E.W.*, 471 S.E.2d 6, 8 (Ga. Ct. App. 1996) (noting that the father "testified that he and his partner each have their own bedroom and few people know they have a sexual relationship").

145. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 86-87 (Tenn. 2001); see also *In re Marriage of Collins*, 51 P.3d 691, 692-93 (Or. Ct. App. 2002) (stating that, although the child saw her mother kissing her partner, custody should not be changed to the father because the incidents were "isolated and inadvertent"). *Id.* at 693.

146. See Eileen P. Huff, Comment, *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 AM. U. J. GENDER SOC. POL'Y & L. 695, 695-96, 711 (2001).

parents through the custody litigation itself.¹⁴⁷ In addition, if the restrictions prohibit the parent from having a partner or other gay or lesbian individuals present when the child is in the parent's home, the court has forced the gay or lesbian parent to live a closeted life, without considering the emotional consequences of forcing a "secret" on the parent or on the child.¹⁴⁸ As previously discussed, this court-imposed requirement of keeping a secret creates distance, guilt, shame, and fear, in disregard for the best interests of the child.¹⁴⁹

B. Research on Sexual Minority Parenting

Social science research on sexual minority parents supports the position that they are nurturing and effective parents. Furthermore, it is more emotionally healthy for children to have sexual minority parents who are open about their orientation than it is for sexual minority parents to conceal their sexual orientation.¹⁵⁰ For example, one longitudinal study involved twenty-five children who were living with their divorced, lesbian mothers and twenty-one children with their single, heterosexual mothers.¹⁵¹ The results of the study found "there was a nonsignificant trend indicating that young people who were most positive about their lesbian family identity tended to have mothers who, at the time of the first study, were open about being a lesbian mother to their son or daughter's school."¹⁵² In addition, those children "whose mothers reported having had a greater number of relationships prior to the [first] study, tended to have a more positive view of their [lesbian] family identity as young adults."¹⁵³ Finally, the results of the follow-up study suggested that the children who reported that their mothers were involved in the gay rights movement or feminist politics "also tended to be more positive about their lesbian family identity."¹⁵⁴

147. *Id.* at 706.

148. *Id.* at 709.

149. *See id.* at 715 (noting that awareness of the parent's sexual identity and open communication concerning his or her sexual orientation is in the best interests of the child according to scientific studies); *see also* notes 130-48 and accompanying text.

150. *See* COOPER & CATES, *supra* note 12; Kevin F. McNeill, *The (Lack of) Differences Between Gay/Lesbian and Heterosexual Parents: A Review of the Literature*, 4 NAT'L J. SEXUAL ORIENTATION L. 10, (1998), available at <http://www.ibiblio.org/gaylaw/issue6/Mcneill.htm> (summarizing articles addressing scientific studies on the parenting skills of sexual minority parents and the psychological well-being of children raised by sexual minority parents).

151. Fiona Tasker & Susan Golombok, *Young People's Attitudes Toward Living in a Lesbian Family: A Longitudinal Study of Children Raised by Post-Divorce Lesbian Mothers*, 28 J. DIVORCE & REMARRIAGE 183, 183 (1997) [hereinafter *Young People's Attitudes*].

152. *Id.* at 194.

153. *Id.*

154. *Id.*

Another study found that the more open and relaxed a lesbian mother is about her sexual orientation, the more accepting her child is of her orientation.¹⁵⁵ In addition, the more realistic the mother is about the potential problems of being a lesbian mother, the more successful her children are in adjusting to their non-traditional family.¹⁵⁶ Another comparative study found that adolescents tend to be more accepting of their mother's lesbianism if they learn about it in early childhood.¹⁵⁷

In some areas, lesbian mothers showed better outcomes than their single heterosexual counterparts. For example, heterosexual single mothers express more feelings of inferiority and deference when compared to lesbian mothers, who tend to have higher self-confidence and dominance.¹⁵⁸ Lesbian mothers are also more likely to own their homes or have a business than single heterosexual mothers.¹⁵⁹ Lesbian mothers are not detracted from their parenting responsibilities when they have a partner,¹⁶⁰ and they are more child-oriented in their responses to the children than heterosexual single mothers.¹⁶¹ One study found that children had a more positive relationship with the mother's partner when the partner was a female, as opposed to a male.¹⁶² In addition, in one study comparing lesbian co-parents with married heterosexual couples, ninety percent of the biological or adoptive mothers' partners shared childrearing tasks, whereas only thirty-seven percent of heterosexual fathers did so with their own children.¹⁶³

Studies of gay fathers, when compared with heterosexual fathers, also show that sexual orientation was not a detrimental factor in their parenting ability.¹⁶⁴ In fact, gay fathers exhibited greater responsiveness to their children than heterosexual fathers.¹⁶⁵ Both gay and

155. Saralie Pennington, *Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS 58, 63 (Frederick W. Bozett ed., 1987).

156. *Id.*

157. Sharon Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in HOMOSEXUALITY AND THE FAMILY 123, 133-34 (Frederick W. Bozett ed., 1989).

158. Richard Green, et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES OF SEXUAL BEHAV. 167, 173 (1986).

159. Mildred D. Pagelow, *Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions*, 5 J. HOMOSEXUALITY 189, 203 (1980).

160. Charlotte Patterson & Richard Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, J. SOC. ISSUES, Fall 1996, at 29, 40.

161. Judith Miller, et al., *The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research*, 7 J. HOMOSEXUALITY 49, 55 (1981).

162. FIONA L. TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 53 (1997); *Young People's Attitudes*, *supra* note 150, at 184.

163. Garry Cooper, *Network Briefs*, FAM. THERAPY NETWORKER, July-Aug. 1997, at 15, 15.

164. Jerry Bigner & R. Brooke Jacobsen, *Parenting Behaviors of Homosexual and Heterosexual Fathers*, 18 J. HOMOSEXUALITY 173, 176, 180-81 (1989).

165. *Id.* at 180.

heterosexual fathers tend to have positive relationships with their children.¹⁶⁶ The gay and heterosexual fathers also showed no difference in their level of involvement with their children in such areas as general problem solving, encouraging autonomy, and handling problems related to child rearing.¹⁶⁷ Gay fathers, however, tended to be more consistent in stressing "the importance of setting and enforcing limits, . . . plac[ed] greater emphasis on verbal communications, [were] more responsive to [their children's] perceived needs," and went to greater "lengths to act as a resource for activities with children when compared with many nongay fathers."¹⁶⁸

One study of gay fathers particularly relevant to the negative consequences of a judicially imposed closet finds that children of gay fathers do not have concerns about their fathers fulfilling their parental roles.¹⁶⁹ If children see a negative social reaction to gay men, however, this causes them stress regarding their father's identity as a gay man.¹⁷⁰ This study advised that children should be informed of the myths and stereotypes about homosexuals, so that they understand that these myths and stereotypes do not accurately represent most gay men.¹⁷¹ In applying the results of this study to judicial decision making, judges should be aware that issuing a ruling, which accepts myths and stereotypes about gay men and refuses custody or restricts visitation based on sexual orientation, could create even more stress for the child.

In a number of custody and visitation cases, some judges appear so convinced that children will be harmed by a parent who is open about his or her sexual orientation that they refuse to accept the results of social science research on sexual minority parenting, much of which is based on similar life situations, such as children of divorce who are being raised by a sexual minority parent.¹⁷² Contradictory to many of the perceived fears expressed by the trial courts, social science research does not support that these children will suffer from social rejection, be less psychologically healthy, be sexually abused, be at risk for AIDS, be harmed by being exposed to other sexual minorities, be confused about their gender identity, "emulate" homosexual behavior, or not have role models from both genders.¹⁷³

166. *Id.* at 176.

167. *Id.* at 180-81.

168. *Id.*

169. Frederick W. Bozett, *Social Control of Identity by Children of Gay Fathers*, 10 W. J. NURSING RES. 550, 555 (1988).

170. *Id.* at 555, 562.

171. *Id.* at 562.

172. See, e.g., *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (stating that "the trial court has the authority to find the [social science studies] presented not credible").

173. See COOPER & CATES, *supra* note 12, and D.L. Hawley, *Custody and Visitation of*

If, however, the purpose of the court in denying custody or restricting visitation is to send a message to the sexual minority parent and their children that they should adopt the judge's belief that homosexuality is "an unnatural [and] immoral" act¹⁷⁴ and the judge wishes to express disapproval of or even punish the parent for "becoming" a homosexual, leaving the marriage, living unashamed as a sexual minority, or having a same-gender domestic partnership, then the results of the studies are, indeed, irrelevant. Even an expert witness, testifying that the denial of custody to a sexual minority will have serious psychological consequences for the child, will not deter a judge with this type of mind-set.¹⁷⁵ These judges, often fueled by a similarly thinking parent who objects to the sexual minority parent having custody or unrestricted visitation with the child, remain impervious to any evidence other than their own value system.¹⁷⁶

For those judges who endeavor to minimize the emotional turmoil of the children caught in a custody or visitation dispute, these studies provide evidence that a judicially imposed closet will not serve that purpose. Based on the numerous studies about sexual minority parenting coupled with Imber-Black's research on the detrimental consequences of family secrets, the court will most likely only exacerbate the stress and anxiety of children of sexual minority parents if the court restricts the parent's contact with the child and requires the parent to live a closeted life.¹⁷⁷

III. OTHER SEXUAL MINORITY PARENTING CASES

In direct contrast to the child custody and visitation cases, most courts dealing with sexual minority parents accept the large body of social science studies. Courts in these cases assert that sexual minority parents who are open about their sexual orientation and are fully integrated into society as sexual minority individuals raise happy, healthy, and well-adjusted children.

Children by Gay and Lesbian Parents, in 64 AM. JUR. PROOF OF FACTS 3D 403, §§ 3-12 (2006) for a review of the findings of social science research concerning sexual minority parenting.

174. See *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, P. J., concurring).

175. *E.g., Ex parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998) (upholding the trial court's decision to change custody from the lesbian mother to the father in spite of psychological testimony finding a healthy mother-child relationship and likely detrimental mental health consequences if a change in custody were to occur).

176. See, e.g., *id.* at 1196; *Hertzler v. Hertzler*, 908 P.2d 946, 949-52 (Wo. 1996); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987); see also *supra* note 174 and accompanying text.

177. See *supra* notes 82-91, 150-73 and accompanying text.

A. Same-Gender Marriage

In recent cases in which same-gender couples seek the right to marry, courts have extensively examined the issue of whether it is in the best interests of children to be raised by sexual minority parents. In some of the same-gender marriage cases, the State argued, often unsuccessfully, that same-gender couples should not be allowed to marry because a same-gender household is not the optimal environment in which to raise children.¹⁷⁸ The evidence presented to counter this argument consisted of expert testimony about the ability of sexual minorities as parents in general,¹⁷⁹ rather than looking specifically at the parenting skills of the petitioners who challenged the marriage statutes. In that context, the trial court in the remanded Hawaii case of *Baehr v. Miike* held that the state of Hawaii could not demonstrate that the development of children raised by sexual minority parents was adversely impacted.¹⁸⁰ Various experts testified at the trial that sexual minority parents are fit parents and sexual orientation does not serve as an indicator of parental fitness or "how well the children do in terms of a child's well-being and adjustment."¹⁸¹ Even the state's expert witnesses agreed that sexual minority parents can and do "maintain stable and nurturing homes and are capable of raising physically and psychologically healthy children."¹⁸²

One of the experts, a practitioner in the area of adoption and foster care, testified that, based on his experience, sexual minority parents provided "warm and loving environments."¹⁸³ Another expert, a pediatrician who had worked with adolescent children of sexual minority parents, stated that these children were as mentally and physically healthy as children raised by heterosexual parents.¹⁸⁴ Although the doctor admitted that some teenagers in these families have experienced embarrassment or distress or have had a difficult time because of their nontraditional family structure, he went on to say that "they get through these periods. And if anything, I think they grow stronger through that experience. They learn about life. They learn about diversity. . . . The research confirms that — that teenagers get through this period."¹⁸⁵ Based on the evidence of the expert witnesses in this case, the court made the following findings:

178. See, e.g., *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 at *3 (Haw. Cir. Ct. Dec. 3, 1996); *Baker v. State of Vermont*, 744 A.2d 864, 884 (Vt. 1999).

179. *Baehr*, 1996 WL 694235 at *11-16.

180. *Id.* at *18.

181. *Id.* at *13, (citing testimony of Charlotte Patterson, Ph.D.).

182. *Id.* at *4, *5, *7 (citing testimony of Kyle D. Pruett, M.D. and David Eggebeen, Ph.D.).

183. *Id.* at *14, (citing testimony of David Brodzinsky, Ph.D.).

184. *Id.* at *16 (citing testimony of Robert Bidwell, M.D.).

185. *Id.*

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.

More specifically, it is the quality of parenting or the "sensitive care-giving" described by David Brodzinsky, which is the most significant factor that affects the development of a child.

126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.

127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.

128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.

129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.

130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests [sic] that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion.¹⁸⁶

In a recent same-gender marriage case, *Goodridge v. Department of Public Health*, the court found that the state's argument against same-gender marriage, that heterosexual marriages were the optimal

186. *Id.* at *17.

setting for raising children, did not meet the rational basis test.¹⁸⁷ According to the court, “[t]he ‘best interests of the child’ standard does not turn on a parent’s sexual orientation or marital status.”¹⁸⁸ In addition, the court stated that:

the marriage restriction impermissibly “identifies persons by a single trait and then denies them protection across the board.” *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1260, 134 L.Ed. 2d 855 (1996). In so doing, the State’s action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.¹⁸⁹

Based on findings in the marriages cases it appears that, for the experts to conduct research about sexual minority parenting, the parents in these studies were living sufficiently open lives in order for them to be identified as sexual minority parents. In addition, these parents were likely “out” to their children, who also were the subjects of the studies.¹⁹⁰ In particular, if the experts were addressing concerns about the potential consequences of outsiders’ negative reactions toward the children who did not have heterosexual parents, then it is also apparent that in these studies the parents’ sexual orientation was common knowledge in their communities.¹⁹¹ Within that context, the studies conducted by these expert witnesses showed that sexual minority parents and, in particular, same-gender couples who are open about their sexual orientation, are raising healthy, well-adjusted children.¹⁹²

B. Foster Care

Courts also discuss sexual minority parenting in the context of litigation that challenges regulations prohibiting non-heterosexuals from being foster parents.¹⁹³ For example, a recent Arkansas case struck down the Arkansas Child Welfare Agency Review Board’s prohibition against homosexuals caring for, or living with, foster children.¹⁹⁴ As in the same-gender marriage cases, experts testified

187. 798 N.E.2d 941, 964 (Mass. 2003).

188. *Id.* at 963.

189. *Id.* at 962.

190. *See, e.g., Baehr*, 1996 WL 694235 at *12-16.

191. *See id.* at *16.

192. *See id.* at *13, *16.

193. *See, e.g., infra* notes 207-15 and accompanying text.

194. *Dept. Human Services & Child Welfare Agency Review Bd. v. Howard*, No. 05-814, 2006 WL 1779467 (Ark. June 29, 2006). The standard states:

about whether it is in the best interests of children to be raised by sexual minorities. One expert, a psychologist authorized by the Arkansas Psychological Association to testify in the case, stated that her analysis of many studies revealed that "the sexual orientation of the parents did not negatively affect the development of the child, result in any kind of pathology, [and] was not contraindicated for child health."¹⁹⁵ Another expert in psychology testified "there is no child welfare basis to categorically exclude gay people from being foster parents, that such categorical exclusion could be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents."¹⁹⁶ Based on the expert testimony, the trial court found that:

27. There are four well known predictors of healthy child adjustment: (I) the quality of the child's relationship with the parent primarily responsible for his or her care[;] (ii) the relationship the child has with another parent figure; (iii) the quality of the relationships between the adults; and (iv) the resources available to the child.

28. The traditional family form is now the minority family form in this country.

29. Being raised by gay parents does not increase the risk of problems in adjustment for children.

30. Being raised by gay parents does not increase the risk of psychological problems for children.

31. Being raised by gay parents does not increase the risk of behavioral problems.

32. Being raised by gay parents does not prevent children from forming healthy relationships with their peers and others.

No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent.

Ark. Child Welfare Agency Review Bd., Minimum Licensing Standards for Child Welfare Agencies § 200.3.2 (Jan. 2002), available at <http://www.arkansas.gov/dhhs/chilnfam/PUB%2004%20-%20Feb%2022,%2002.PDF>.

195. *Howard v. Child Welfare Agency Review Bd.*, No. CV1999-9881 2004 WL 3154530 at *4 (Ark. Cir. Ct. Dec. 29, 2004) (citing testimony of Dr. Cheralyn Powers).

196. *Id.* at *6 (citing testimony of Dr. Michael Lamb).

33. Being raised by gay parents does not cause academic problems.

34. Being raised by gay parents does not cause gender identity problems.

35. Both men and women have the capacity to be good parents and there is nothing about gender, per se, that affects one's ability to be a good parent.

36. There are benefits to children's adjustment in having two parents as opposed to one parent and children in single parent families are more likely to have adjustment difficulties than children in two parent families.

37. Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.

38. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents.

39. There is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment.

40. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment.

41. There is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.¹⁹⁷

As with the same-gender marriage cases, the court based its findings on expert witnesses interacting with sexual minorities who were effectively "out" in their communities.¹⁹⁸ More specifically, the sexual minority petitioners in this case openly acknowledged their sexual orientation to the state foster care officials, resulting in their being disqualified as foster care parents.¹⁹⁹ Consequently, the court reached its findings with the same underlying assumption as in the same-gender marriage cases : sexual minority parents who are open

197. *Id.* at *3.

198. *Id.* at *2-7.

199. *Id.* at *2. Plaintiff was a married heterosexual man whose adult gay son occasionally lived with him. In this case, the son was "out" to his parents.

about their sexual orientation are fit parents raising healthy, well-adjusted children.

C. Adoption

The previous cases involving same-gender marriage and foster care address the issue of sexual minority parenting broadly, asking whether having non-heterosexual parents negatively impacts children's development. The majority of the adoption cases, however, focus specifically on the parenting abilities of the particular adoption petitioners. The obvious exception is the Florida case of *Lofton v. Secretary of the Department of Children and Family Services*, in which the Court of Appeals for the Eleventh Circuit upheld the constitutionality of a Florida statute prohibiting homosexuals from adopting children.²⁰⁰ According to Florida Senator Curtis Peterson, one of the main sponsors of the bill that resulted in the adoption prohibition, the law's purpose was to send a message to sexual minorities that, "[w]e're really tired of you. We wish you'd go back into the closet."²⁰¹

The posture of the *Lofton* case is similar to the marriage and foster care cases, as opposed to the other adoption cases, because the petitioners made constitutional claims to obtain the same rights granted to heterosexuals.²⁰² The Court of Appeals rejected these constitutional arguments, finding that the parties did not have any liberty interests in becoming adoptive parents and, unlike the Vermont, Hawaii, and Massachusetts marriage cases, found that a rational basis existed for the unequal treatment of homosexual and heterosexual couples.²⁰³ In addressing the social science research on sexual minority parenting the court stated that "the legislature might consider, and even credit, the research cited by appellants, but find it premature to rely on a very recent and still developing body of research, particularly in light of the absence of longitudinal studies . . . of

200. 358 F.3d 804, 827 (11th Cir. 2004). Interesting to note, however, is that sexual minorities are allowed to act as foster parents in Florida. See Cheryl Wetzstein, *High Court Lets Stand Ban on Gay Adoption*, WASH. POST, Jan. 11, 2005, at A1.

201. Jessica Berman & Kenneth Leichter, Note, *Family Law Chapter: Adoption and Foster Care*, 6 GEO. J. GENDER & L. 667, 688 n.152 (2005).

202. Compare *Lofton*, 358 F.3d at 808 (noting that the appellants' "complaint alleged that the statute violates [their] fundamental rights and principles of equal protection"), and *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 at *22 (Haw. Cir. Ct. Dec. 3, 1996) (holding that "the sex-based classification [required to get a marriage license was] unconstitutional and in violation of the equal protection clause"), with Dep't. Human Services & Child Welfare Agency Rev. Bd. v. Howard, No. 05-814 (Ark. June 29, 2006) (noting that the appellee's cross-appeal claimed that a regulation preventing homosexuals from becoming foster parents violated equal protection and privacy rights).

203. *Lofton*, 358 F.3d at 811, 821-22. See *supra* Part III.A for a discussion of *Baker v. State of Vermont*, *Baehr v. Miike*, and *Goodridge v. Department of Public Health*.

adopted, rather than natural, children of homosexual parents.”²⁰⁴ The court also claimed that “[o]penly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults.”²⁰⁵ *Lofton*, however, is distinguishable from the other sexual minority adoption cases because they involve fact-specific examinations of the best interests of a particular child.

The standard in these adoption cases is whether granting the adoption is in the best interest of the child, requiring the court to make a factual analysis of the ability of the prospective adopting parent or parents to care for the children they are seeking to adopt.²⁰⁶ In almost all of the adoption cases involving sexual minority adopting parents, the sexual orientation of the petitioners is not directly in issue and is mentioned along with numerous other facts concerning the prospective adoptive parents.²⁰⁷ For example, in one Indiana case a lesbian couple decided to be co-parents.²⁰⁸ One of the women adopted two Ethiopian children and one Chinese child.²⁰⁹ The adoptive mother’s partner then filed a petition to adopt the three children without terminating the parental rights of her partner, to enable the couple to become legal parents of the children.²¹⁰ The court mentioned the relationship without unduly focusing on the sexual orientation of the parties: “The petitioner and [her partner] have been companions in a single sex partnership for the past eight years [The couple]

204. *Lofton*, 358 F.3d at 825.

205. *Id.* at 826. This statement ignores the results of several existing longitudinal studies. See COOPER & CATES, *supra* note 12, at 25, 51-53, 67-69.

206. See *In re* Petition of C.M.A., 715 N.E.2d 674, 676 (Ill. App. Ct. 1999); *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004); Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); *In re* Adoption of M.J.S., 44 S.W.3d 41, 55 (Tenn. Ct. App. 2000).

207. But see *In re* Adoption of M.J.S., 44 S.W.3d at 56 (in which the grandparents of the child raised the issue of the sexual orientation of the adoptive parent); *In re* Petition of C.M.A., 715 N.E.2d at 676 (in which the trial court raised the issue of the sexual orientation of the petitioners). The appellate court in *C.M.A.* stated that the trial judge showed: extreme and patent bias against the adoptive parents based upon their sexual orientation. This bias was manifest in numerous ways, including her insensitive probing and wrongful interrogation of the adoptive parents’ early sexual history. We can conceive of no legitimate motive or worthwhile purpose for questioning the petitioners on such clearly irrelevant matters. . . . [S]he not only injected inadmissible facts into each of the cases, but also inflicted anguish on the petitioners and needlessly prolonged what should have been a simple and straightforward process.

Id. at 679.

208. *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 268 (Ind. Ct. App. 2003).

209. *Id.*

210. *Id.*

appears to [have established] a relaxed and comfortable household."²¹¹ Similarly, in a second Indiana case in which the partner filed a petition to adopt her partner's biological children from a previous marriage,²¹² the court merely referred to the adoption petitioner as the mother's "partner"²¹³ or as the "second parent"²¹⁴ and stated that the mother and her partner are "both integral members of the proposed adoptive family"²¹⁵ and both were "acting as parents."²¹⁶

If the adoption court addresses the issue of the sexual orientation of the parents, it usually does so in the context of whether the parents have the ability to deal effectively with the fact that the child is being raised in a same-gender household. For example, in a 1995 adoption case in New Jersey the home study report of the Children's Aid and Adoption Society stated:

[Hannah] and [Mary] plan to be open and honest with the children about the circumstances of their birth and non-traditional family composition. Their plan is to provide the children with information suitable to their ability to understand. More detail is to be furnished as the twins mature. Both parents want the children to have good self esteem and a good sense of gender identity. They will provide the children every opportunity for an excellent education and development of skills and talents.²¹⁷

Similar to the New Jersey case, a New York case cited a home study report that stated "[b]oth women understand that there will be questions they will have to deal with when the children become knowledgeable about the family lifestyle. It is my belief that they will deal with these concerns in a loving and honest manner."²¹⁸

Also, in a 1993 Massachusetts adoption case, the court considered not only evidence about the specific petitioners, but also studies about sexual minority parents in general.²¹⁹ In addition to over a dozen character witnesses, the court heard from

[a] court-appointed guardian ad litem, Dr. Steven Nickman, assistant clinical professor of psychiatry at Harvard Medical School, [who] conducted a clinical assessment of Tammy and her family

211. *Id.*

212. *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1254 (Ind. Ct. App. 2004) (the children's biological father consented to the adoption by the mother's partner).

213. *Id.*

214. *Id.* at 1255.

215. *Id.* at 1258.

216. *Id.* at 1258.

217. *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 537 (N.J. Super. Ct. App. 1995).

218. *In re Adoption of Caitlin*, 622 N.Y.S.2d 835 (N.Y. Fam. Ct. 1994).

219. *Adoption of Tammy*, 619 N.E.2d 315, 316-17 (Mass. 1993).

with a view toward determining whether or not it would be in Tammy's best interests to be adopted by Helen and Susan. Dr. Nickman considered the ramifications of the fact that Tammy will be brought up in a "non-standard" family. As part of his report, he reviewed and referenced literature on child psychiatry and child psychology which supports the conclusion that children raised by lesbian parents develop normally.²²⁰

As in the marriage and foster care cases,²²¹ in the adoption cases the petitioners' sexual orientation was well known within their communities, and the persons requesting the adoption were open about their status as sexual minorities.²²² Consequently, the adoption court made its findings with the same underlying assumption as in the marriage and foster care cases: sexual minority parents who are open about their sexual orientation are fit parents raising healthy, well-adjusted children.

IV. A COMPARISON OF ADOPTION CASES WITH CUSTODY AND VISITATION CASES

One of the striking features of the custody and visitation cases is how the heterosexual parent's strong objections concerning the other parent's sexual orientation seems to trigger the courts to accept, without question, the stereotypical fears and myths about homosexuals.²²³ This reaction appears in many of the custody and visitation cases in which the trial court willingly implements the heterosexual parent's request that the sexual minority parent must live "in the closet" in order to have access to his or her child.²²⁴ In fact it appears that the more adamantly opposed a parent is to the other parent's sexual orientation the more convinced the court becomes that it is appropriate to deny custody or restrict visitation of the gay or lesbian parent.²²⁵ The court reflexively adopts the parent's request to restrict the sexual minority parent's life, particularly if the other

220. *Id.* at 317.

221. *See supra* Parts III.A and III.B.

222. *See Adoption of Tammy*, 619 N.E.2d at 317; *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1254 (Ind. Ct. App. 2004); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 268 (Ind. Ct. App. 2003); *In re Adoption of Two Children by H.N.R.*, 666 A.2d at 536-37; *In re Adoption of Caitlin*, 622 N.Y.S.2d at 836-37.

223. *See* Kendell, *supra* note 23, at 21 (noting that in spite of extensive social science research concluding that "a parent's sexual orientation has no significant negative effect on children. . . . lesbian and gay parents continue to lose custody of their children in courts across the country. Such decisions reveal persistent myths about lesbian or gay parents and their children").

224. *See, e.g., J.A.D. v. F.J.D.*, 978 S.W.2d 336, 337, 339-40 (Mo. 1998); *see also* Hertzler v. Hertzler, 908 P.2d 946, 949, 951 (Wyo. 1995).

225. *Hertzler*, 908 P.2d at 951.

parent is sharing a residence and a bed or if the parent kisses and hugs his or her partner while the children are present.²²⁶

In many of the cases in which the court changes custody or places restrictions on the parents, the children know about, or have lived with, the parent and the parent's partner.²²⁷ It is *because* the parent has been open about his or her sexual orientation that the court feels compelled to accept the heterosexual parent's fears, even to the point of uprooting the child from a stable, happy home environment.²²⁸ This bias results in the court not only ignoring the best interests of the child but also failing to recognize the serious emotional consequences of judicially imposing a closeted life on the parent and the children.²²⁹

The phenomenon of trial courts accepting the stereotypical fears about homosexuals rarely appears in adoption cases.²³⁰ For example, it is very likely that the courts view with approval sexual minority couples in the adoption cases who share a bed and display mutual affection and support for each other.²³¹ In a New York adoption case, to support the court's position that the adoptive petitioners had a stable relationship, the court stated that the "petition and supporting documents establish that petitioners have resided together since 1981 in a committed relationship, and publicly demonstrated their commitment by participating in a 'Commitment Ceremony' recognized by the Episcopal Church and by registering as domestic partners in the City of Rochester."²³² By comparison, in custody and visitation cases, similar facts have been used against sexual minority parents.²³³

226. See, e.g., *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847 at *4 (Tenn. Ct. App. 2005 May 31, 2005) (noting that "[i]n *Collins* the child testified that her mother slept in the same bed with her female partner, kissed her, hugged her and told her that she loved her. Because there was no such testimony in the case at bar, the cases are factually distinguishable") (referring to *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1998)).

227. See, e.g., *Ex parte J.M.F.*, 730 So. 2d 1190, 1192 (Ala. 1998); *J.A.D.*, 978 S.W.2d at 337; *Collins*, No. 87-238-II, 1988 WL 30173, at *10; *Hertzler*, 908 P.2d at 949.

228. See, e.g., *Ex parte J.M.F.*, 730 So.2d at 1194, 1196.

229. See *supra* Part II for a discussion of the emotional consequences of closeting one's sexual identity.

230. See generally Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children*, 11 CARDOZO WOMEN'S L.J. 1 (2004) (discussing the use of language in custody and visitation cases, in comparison to adoption cases); Bradley Zane Haumont & Susan Ann Koenig, *Miss Susan's Etiquette Tips for the Socially Conscious Judge: A Guide to Honorable Conduct Toward Gays and Lesbians in the Courtroom*, 24 ST. LOUIS U. PUB. L. REV. 221 (2005) (presenting a humorous approach to instructing courts on proper etiquette when dealing with sexual minorities).

231. See, e.g., *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 228 (App. Div. 2004).

232. *Id.*

233. See, e.g., *Ex parte J.M.F.*, 730 So.2d 1190, 1194, 1196 (Ala. 1998); *Hertzler v. Hertzler*, 908 P.2d 946, 949, 952 (Wyo. 1995).

Two probable reasons exist for the difference between the adoption and custody or visitation cases. First, adoption cases generally are not contested cases, therefore there is no party present in the courtroom to raise the stereotypical fears about homosexuality. Second, evidence in adoption cases concerning the best interests of the child many times includes the testimony or report of a social worker whose professional ethics prohibit discrimination based on sexual orientation.²³⁴ In addition, the social workers may have had experience with sexual minority parents in the past and may have first-hand knowledge that supports the studies of homosexual parents, which find that sexual orientation is not a relevant factor in good parenting.²³⁵

These differences between the child custody cases and adoption cases, however, can be contradicted by the rare case of contested adoption, where the contesting party raises the stereotypical fears about parents who are sexual minorities. In one contested adoption case, *In re Adoption of M.J.S.*, where the grandparents, Mr. and Mrs. Snyder, attempted to intervene in the adoption of their grandchild by a lesbian,²³⁶ the Tennessee appellate court opinion reads more like a custody or visitation case than an adoption case involving sexual minority parents. In this case the Snyders' daughter had given physical custody of her infant son to Ms. Langston, together with an executed surrender of her parental rights in favor of Langston.²³⁷ Langston lived in a same-gender relationship with another woman, Ms. Craig, and the Snyders attempted to petition for adoption and oppose Langston's adoption, claiming that it was not in the best interests of the child to be adopted by a homosexual.²³⁸ During trial Langston's testimony matches testimony in many of the child custody cases in which sexual minority parents find themselves faced with the loss of custody or restricted visitation.²³⁹ Like the parents in custody cases, Langston downplayed or recast the nature of her relationship with Craig, referring to Craig as her "roommate."²⁴⁰ When questioned more about the relationship, Langston admitted that they had had a previous sexual relationship, but the sexual relationship ended

234. NAT'L ASS'N. OF SOCIAL WORKERS, SOCIAL WORK SPEAKS, NAT'L ASS'N OF SOCIAL WORKERS POLICY STATEMENTS 2000-2003 197 (5th ed. 2000).

235. See NAT'L CENTER FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW 1, 2-3 (2004), available at <http://www.nclrights.org/publications/pubs/adptn0204.pdf> (summarizing research that found that sexual orientation is not a relevant factor in good parenting); COOPER & CATES, *supra* note 12, at 25-73.

236. 44 S.W.3d 41, 46, 56 (Tenn. Ct. App. 2000).

237. *Id.* at 46.

238. *Id.* at 46, 56.

239. See Part I for a discussion of custody and visitation cases involving sexual minority parents.

240. *In re Adoption of M.J.S.* 44 S.W.3d 41, 56 (Tenn. Ct. App. 2000).

when Langston received physical custody of the child.²⁴¹ Langston also testified that Craig and she did not share a bedroom.²⁴²

The Tennessee Court of Appeals affirmed Langston's adoption and the trial court's determination that the Snyders did not qualify as adoption petitioners under the Tennessee adoption statute.²⁴³ Although the Snyders questioned Ms. Langston's living arrangement and her ability to raise a male child, the court observed:

[T]he record contains little evidence as to what, if any, effects this factor might have on the child. The evidence showed that Langston and her roommate maintained separate bedrooms and had ceased their sexual relationship since the child came into the home. They did not rule out the possibility of resuming their sexual relationship at some future date, but their present focus is on parenting their respective children. Langston acknowledged the child's need for interaction with adult males, and she expressed her commitment to providing opportunities for such interaction.²⁴⁴

The dissent in this case, however, relied on the Tennessee child custody and visitation cases where sexual orientation was in issue, arguing that "the preponderance of the evidence [did] not support a finding that adoption into a lesbian household [was] in the best interests of this child."²⁴⁵ The court further noted:

The clear picture that emerges from the trial is that Langston and Ms. Craig are lesbians, and that they have been living in a sexual, pseudo-marriage relationship with each other for a number of years. According to Langston, the two women were very close friends, and intended to live together forever. Ms. Craig pushed Langston to adopt this child, and played an active role in the entire adoption process. Ms. Craig cares for the child when Langston is at work. The women's sexual relationship, by Ms. Craig's account, ended only in April or May of 1998, at approximately the same time that the birth mother delivered the child to Langston. At the time of the trial, the women were reevaluating their decision to cease their sexual activity, and Ms. Craig admitted that there was a possibility that they would resume having sex with one another in the future. Ms. Craig stated that she felt no shame about their sexual relationship. The only reasonable inference that can

241. *Id.*

242. *Id.*

243. *Id.* at 61.

244. *Id.* at 57.

245. *In re Adoption of M.J.S.* 44 S.W.3d 41, 67 (Tenn. Ct. App. 2000) (Tomlin, Sp. J., dissenting).

be drawn from these facts is that the child, if allowed to remain with Langston, will be raised in a household consisting of open, practicing lesbians who will co-parent the boy. In my view, such an arrangement cannot be and is not in the best interests of any child.²⁴⁶

In sharp contrast to the Tennessee adoption case is an Illinois adoption case, in which the trial court *sua sponte* raised the issue of sexual orientation.²⁴⁷ The trial judge did not ask any questions about the child's welfare but instead "question[ed] each petitioner regarding her 'coming out' process as a lesbian, her early sexual experiences, and whether petitioners were currently in a lesbian sexual relationship."²⁴⁸

The appellate court removed the trial judge from the case because of "extreme and patent bias against the adoptive parents based upon their sexual orientation."²⁴⁹ The appellate court found the judge's "bias was manifest in numerous ways, including her insensitive probing and wrongful interrogation of the adoptive parents' early sexual history. We can conceive of no legitimate motive or worthwhile purpose for questioning the petitioners on such clearly irrelevant matters."²⁵⁰ According to the appellate court, the petitioners came to court requesting an adoption of "children with whom they had already formed a loving relationship over a period of time. A higher purpose cannot be imagined. To have the petitioners treated in the manner that they were is nothing less than appalling."²⁵¹

This second adoption case differs radically from the previous Tennessee case, where the adoption was challenged by the grandparents.²⁵² Not only was the sexual nature of the petitioner's relationship with her partner seen as relevant in the Tennessee case, but because she had ceased the sexual relationship and the two women did not share a bedroom, the appellate court found that the adoption was in the best interests of the child.²⁵³ In the Illinois case, however,

246. *Id.* at 68 (Tomlin, Sp. J., dissenting). As pointed out by the concurring opinion, the dissent applied the per se analysis, that homosexuals are per se unfit to raise a child, to reach the conclusion that Langston's adoption was not in the best interests of the child. *Id.* at 62 (Highers, J., concurring). According to the concurring judge, however, Tennessee is not a per se jurisdiction. *Id.* Thus, by applying the nexus approach, the concurring judge found that there was insufficient evidence that Langston's sexual orientation adversely affected the child. *Id.*

247. *In re* Petition of C.M.A., 715 N.E.2d 674, 676 (Ill. App. Ct. 1999).

248. *Id.*

249. *Id.* at 679.

250. *Id.*

251. *Id.* at 680.

252. *In re* Adoption of M.J.S., 44 S.W.3d 41, 46 (Tenn. Ct. App. 2000).

253. *Id.* at 56.

as in most other adoption cases involving sexual minorities, information about the adoptive parents' sexuality is not only irrelevant but to inquire about it was "nothing less than appalling."²⁵⁴

V. APPLYING NEUTRAL FACTORS IN CUSTODY AND VISITATION CASES

To promote the best interests of children, the position of the Illinois court and the majority of the other adoption cases should serve as a model for courts that deal with custody and visitation disputes between parents when the heterosexual parent raises unfounded fears about sexual orientation. The courts should begin from the premise, supported by scientific research, that sexual minority parents who are open about their sexual orientation raise happy, healthy, and well-adjusted children.²⁵⁵ Consequently, as in the majority of adoption cases, the issue of sexual orientation should not be a relevant factor in an initial custody decision.

In addition, because the majority of courts refuse to use marital fault as a factor in making initial custody orders²⁵⁶ and instead look at the child's best interests, a parent's decision to end a marriage based on incompatibility because of the parent's homosexuality should not be a factor in awarding custody. Instead, the courts should apply the custody factors in a neutral fashion, focusing on the parent-child relationship to determine which parent-child relationship is in the best interests of the child.

A parent's attempt to impose restrictions on a sexual minority parent based on stereotypical misinformation about homosexuality also may be evidence that this parent is unwilling or unable to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, a factor relevant to determining the best interests of the child.²⁵⁷ Instead of accepting these homophobic fears, the court should react with suspicion and circumspection.²⁵⁸ When faced with

254. *In re* Petition of C.M.A., 715 N.E.2d 674, 680 (Ill. App. Ct. 1999).

255. *See supra* Part II.B.

256. *See Developments in the Law — Legal Responses to Domestic Violence: VI. Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1597 n.5 (1993).

257. *See, e.g.*, KAN. STAT. ANN. § 60-1610(a)(3)(B)(vi) (2005).

258. In some instances, the parent raising the sexual orientation issue may do so merely as a tactic in the custody litigation and not because he or she is truly concerned with the well-being of the child. *See, e.g.*, *Downey v. Muffley*, 767 N.E.2d 1014, 1020 (Ind. Ct. App. 2002) (noting that the licensed clinical social worker who conducted a custody evaluation testified that the mother's homosexuality "was not a primary focus for [the father] during the evaluation").

particularly vehement objections to a parent's sexual minority orientation, the court should consider appointing an expert to determine if the homophobia qualifies as parental alienation. The court should also require direct evidence that the requested restrictions on a sexual minority parent relate to an articulable harm and not to the child's general reactions to the divorce and the dissolution of the family.²⁵⁹ A Washington court exemplifies this approach, stating that the "evidence showed only that the children experienced difficulty adjusting after their parents' separation. But where the only harm is adjustment, the remedy is counseling, not restrictions on the parents' lifestyle in terms of sexual orientation."²⁶⁰

When a parent seeks a modification of custody or visitation based on sexual orientation, either by requesting custody or seeking restrictions on the sexual minority parent, the request may be prompted by the other parent learning that the sexual minority parent is dating or living with another person. The fact that a parent has formed a new romantic relationship, however, is not sufficient to warrant a material change in circumstances.²⁶¹ Much more is required, as was articulated in *Damron v. Damron*, where the North Dakota Supreme Court recognized "a doctrinal aversion to changing the custody of a happy child who has been living with one parent," noting that the burden on the parent seeking a change is "daunting" and "arduous."²⁶² The court then listed numerous cases that rejected the presumption of harm simply because children were living in a sexual minority household.²⁶³

In addition, courts should require a showing of a direct relationship between difficulties a child may experience with any restrictions imposed on a parent. This connection between harm to the child and restrictions on the parent is comparable to the "nexus" approach required by some courts.²⁶⁴ Judges, however, should be wary not to

259. Some courts require very little evidence to support the claim that a parent's sexual orientation has an adverse impact on the child. See, e.g., *Layne v. Layne*, No. CA20001-01-001, 2001 WL 1359784, at *1 (Ohio Ct. App. Nov. 5, 2001) (merely finding that the child was "upset" by his mother's relationship with another woman was sufficient evidence); *Pulliam v. Smith*, 501 S.E.2d 898, 904-05 (N.C. 1998) (the trial court found that it was not in the best interests of the children to reside under the same roof with any person with whom the father was having a homosexual relationship based on evidence that one of the children became visibly upset and began to cry when the father told the child that he was gay. The mother obtained a change in custody, even though the children were well-adjusted, attended school regularly, and made good grades).

260. *In re Marriage of Wicklund*, 932 P.2d 652, 653 (Wash. Ct. App. 1997).

261. See, e.g., *Damron v. Damron*, 670 N.W.2d 871, 874 (N.D. 2003).

262. *Id.*

263. *Id.* at 875.

264. See *supra* notes 65-67 and accompanying text.

falsely attribute a child's emotional distress in reaction to his or her parents' separation to turmoil over the sexual minority parent's sexual orientation. The Pennsylvania Superior Court in *Blew v. Verta* provides an example of reversing court-imposed parenting restrictions when there is no such causal connection, noting that "[t]here is simply no evidence in the record of a causal link between the mother's homosexuality and [the child's] acting-out behavior."²⁶⁵

Although some courts in the custody and visitation cases make statements such as, "a parent's unmarried cohabitation with a romantic partner . . . in the presence of a child cannot be abided,"²⁶⁶ adoption courts typically do not mask the sexual orientation issue by raising concerns that the same-gender petitioners are living in a non-marital sexual relationship.²⁶⁷ Furthermore, any assurances by the custody or visitation courts that the negative implications that result from "non-marital" cohabitation apply equally to heterosexual and homosexual parents ignores the obvious: same-gender couples cannot marry in that court's jurisdiction, so there can never be "equal" application of this factor.²⁶⁸ Instead of passing moral judgments on parents, the court should follow the inquiry of the adoption cases and look at the nature of the parent-child relationship to determine the best interests of the child.²⁶⁹ In addition, normal displays of affection, such as hand holding, kissing, and hugging should not be equated with "sexual conduct" more often when performed by parents in same-gender relationships than when they are performed by parents in a relationship with a person of the opposite gender.²⁷⁰

An example of applying the best interests of the child standard instead of applying the judge's or other parent's moral judgments is the

265. 617 A.2d 31, 34 (Pa. Super. Ct. 1992).

266. *Taylor v. Taylor*, 110 S.W.3d 731, 737 (Ark. 2003).

267. See *Adoption of Tammy*, 619 N.E.2d 315, 320-21 (Mass. 1993). It is precisely because the couple cannot marry that the courts find that the adoption is in the best interests of the child, so that the child's relationship with both parents will be protected. In *Adoption of Tammy*, the court notes that "Helen and Susan, recognizing that the laws of the Commonwealth do not permit them to enter into a legally cognizable marriage, believe that the best interests of Tammy require legal recognition of her identical emotional relationship to both women." *Id.* at 316.

268. See Matt Larsen, Note, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53 (2004) for an analysis of how the use of sexual orientation in child custody and visitation cases violates sexual minority parents' constitutional rights.

269. See Bruce D. Gill, Comment, *Best Interests of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361 (2001).

270. See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 666 (1996).

case of *Downey v. Muffley*.²⁷¹ In that case, the Indiana Court of Appeals found the visitation restriction imposed by the trial court, which prohibited both parents from having a romantic partner spend the night with them while the child is in his or her care, could be justified "only when it is based upon a finding of harm to the children on a *case-by-case basis*. Visitation and custody determinations must be determined with respect to the best interests of the children, not the sexual [orientation] of the parents."²⁷² The appellate court noted that the licensed clinical social worker who completed the custody evaluation for the family, "concluded that [the] Mother should be allowed to be in a 'committed relationship,' which 'would also be in the best interests of the children.' There was no evidence presented that [the] Mother was promiscuous or involved in 'revolving door' relationships."²⁷³

In the *Downey* case the appellate court required evidence of actual harm to the children before the trial court could impose a restriction on a parent.²⁷⁴ In other words, the parent seeking the restriction had the burden of producing evidence that the children were being harmed by the mother's partner spending the night. This position prevents the court from presuming that a parent who is living openly as sexual minority will cause harm to the child in the future, a presumption that once in place is difficult for the sexual minority parent to rebut.

A 1979 decision by the Superior Court of New Jersey provides an excellent example of a court refusing to accept the argument that children might suffer harm if they continue in their sexual minority parent's custody because of "the thinking of the vast majority of society" about homosexuality.²⁷⁵ In *M.P. v. S.P.*, the court notes:

If defendant 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 requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

271. 767 N.E.2d 1014, 1021 (Ind. Ct. App. 2002).

272. *Id.* at 1020-21 (emphasis in original).

273. *Id.* at 1021 (citation omitted).

274. *Id.*

275. *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979).

Taking the children from the defendant can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.²⁷⁶

Not only does this opinion turn a perceived harm into a positive factor, it also supports the findings of social science research: it is the nature of the parent-child relationship that matters in predicting good outcomes for children, not a parent's sexual orientation.²⁷⁷

CONCLUSION

To promote healthy psychological outcomes for children who are the subject of custody or visitation litigation involving a sexual minority parent, trial courts should reject the temptation presented by the heterosexual parent to accept stereotypical and unsubstantiated fears about homosexuals. The trial court should instead follow the model of the majority of the other sexual minority parenting cases, such as the same-gender marriage, foster care, and adoption cases, which accept the substantial research that sexual orientation is not a relevant factor in predicting successful mental and physical development for children. In particular, the court should refuse to impose a closet on the parent as a condition for continued contact with the children but rather should adopt the presumptions of most of the adoption cases: sexual minority parents, who are open about their sexual orientation are raising happy, healthy, and well-adjusted children. If courts were to treat sexual orientation as a neutral factor, as is done in these adoption cases, then they could properly focus on assessing each parent's child-raising abilities, investigating the nature of the parent-child relationship, and preserving the emotional attachment of the children to their parents. It is these factors, not a parent's sexual orientation, that are relevant to determining the true best interests of the children.

276. *Id.* at 1263.

277. See COOPER & CATES, *supra* note 12, at 32.