

**CUSTODY AND ACCESS OF CHILDREN  
BY GAY AND LESBIAN PARENTS  
IN POST-DIVORCE SITUATIONS:  
A SOUTH AFRICAN AND COMPARATIVE ANALYSIS**

**by**

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**Submitted in part fulfilment of the requirements for the degree  
of Masters in Law in the Department of Public Law at the  
University of Natal.**

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## **Declaration**

I, Niroshini Parsee, registration number 200180487, hereby declare that the dissertation entitled

### **CUSTODY AND ACCESS OF CHILDREN BY GAY AND LESBIAN PARENTS IN POST-DIVORCE SITUATIONS: A SOUTH AFRICAN AND COMPARATIVE ANALYSIS**

is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other university.



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**Signature**

15/12/2001

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**Date**

## **ACKNOWLEDGEMENT**

**My motivation for this study was due to the uncertainties of the best interest standard as applied in custody and access disputes. The passing of the Bill of Rights inspired me to investigate the impact of the latter on gay and lesbian parents. I wish to acknowledge my gratitude to the LORD JESUS CHRIST without whose grace this study would not have been possible. I wish to also express my appreciation to the following persons:**

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## INTRODUCTION

This dissertation will deal with the issue of the award of custody and access of children on divorce to parents who are gay or lesbian.<sup>1</sup> The latter may sometimes enter into heterosexual marriages, as they attempt to appease society or because they are uncertain about their sexual orientation. Should they realize that their homosexuality is not just a phase they may terminate the marriage.<sup>2</sup> A termination of such a marriage has serious legal consequences, especially for the children of such a union.

We live in a society where homophobia is rife. The homophobic culture has had a substantial effect on gay and lesbian parents to such an extent that some lesbians have become uncertain about their own abilities as parents.<sup>3</sup> This internalized homophobia causes the lesbian mother not only to doubt her motherhood capability but to question the consequences of the absence of a father.<sup>4</sup> The reasons for such homophobia are varied. Fayer<sup>5</sup> argues that one such reason is that society has definite stereotypical roles for the male and female. Not being just homophobic, but also patriarchal, our society sees an effeminate male and a “butch”<sup>6</sup> female as being inappropriate and a threat to the norm of heterosexuality. This factor transcends into the area of child custody because as will be discussed in Chapter I, heterosexual parents are concerned about their children deviating from their particular role.

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<sup>1</sup> Anyone who is erotically attracted to members of his or her own sex. E.Cameron 'Sexual Orientation of the Constitution: A Test Case for Human Rights' (1993) *South African Law Journal* 450, at 452.

<sup>2</sup> M.A Fayer 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gays' (1992) 46 *University of Miami Law Review* 511, at 617.

<sup>3</sup> V.L Neophytou 'Lesbian Mothers'(1994) 22 *Agenda* 24, at 25 -26.

<sup>4</sup> Ibid.

<sup>5</sup> Fayer op cit note 2, at 617.

<sup>6</sup> Having a masculine appearance and way of behaving like a man The Oxford Dictionary 5ed (1995) 153.

The common law crime of sodomy perpetuated homophobia. Roman-Dutch law rendered the crime punishable by death.<sup>7</sup> Louw<sup>8</sup> refers to both Van der Linden and Van Leeuwen who specify the punishment for sodomy which was the burning of the offender to death. When the offence continued and was still very prevalent, the State of Holland resorted to punishing the offenders in public. Homophobia also has its roots in strong religious beliefs.<sup>9</sup> Burchell and Milton<sup>10</sup> submit that most conservative religions postulated sexual activity between gays and lesbians as a sin. Similarly, Roman-Dutch writers referred to sodomy as being contrary to divine laws.<sup>11</sup>

A further factor that has contributed to homophobia, is the Acquired Immune Deficiency Syndrome<sup>12</sup> epidemic, thus impacting on the rights of gay and lesbian parents. There have been some courts in America that have refused to grant custody to gay and lesbian parents because of the possible exposure to the virus. Underlying such fear is the assumption that gays and lesbians are more prone to contracting HIV than heterosexuals.<sup>13</sup> There are no data to confirm such an assumption. It is promiscuity which has allowed the virus to reach such alarming proportions, the promiscuity of both heterosexuals and gays and lesbians. Hunter<sup>14</sup> describes it as a 'behaviourally based disease'. There is a perception that gays and lesbians are unstable and promiscuous by nature, having an innate inability to form stable, permanent relationships. Yet this same society objects to these relationships and the law refuses

<sup>7</sup> R Louw 'Sexual Orientation, the Right to Equality and the Common-Law Offence of Sodomy: *S v Kampher* 1997 (2) SACR 418 (C) (1998) 11 *South African Journal of Criminal Justice* 112.

<sup>8</sup> *Ibid.*

<sup>9</sup> The Bible, Leviticus Chapter 20 verse 13 If a man lies with a man as one lies with a woman, both of them have done what is detestable.

<sup>10</sup> J Burchell and J Milton *Principles of Criminal Law* 2ed (1997) 632-4.

<sup>11</sup> *Op cit* note 7, at 112.

<sup>12</sup> Hereinafter referred to as AIDS.

<sup>13</sup> S.P Ali 'Homosexual Parenting: Child Custody and Adoption' (1989) 22 *University of California, Davis* 1009 at 1019.

to acknowledge them. It is submitted that if there were any truth to society's perceptions, the fear of the deadly virus would surely cause gays and lesbians to reconsider their position. Hence many gays and lesbians understanding the dangers of promiscuity, would be looking for more stable relationships and would be more eager to raise children.

In Chapter I, the writer examines whether environment does indeed determine one's sexual orientation. It could be argued on the one hand, that if environment influenced sexual orientation then a parent ought to have a right to control the development of his child's sexual orientation. A parent may want to bring up his or her child with certain values or beliefs to which he adheres. He or she may uphold certain religious beliefs, which he may teach and inculcate in his child. Such a parent may for example be a teetotaler and would expect the same from the other parent and would generally steer his child away from alcohol. Whether that child becomes an adult who uses alcohol, is ultimately dependent on the child, but his environment and teachings in life, would play some role in that final decision, likewise for the gay and lesbian. Upon divorce, the religion of the children is the one that the family would have followed because change is contrary to the interests of the child.<sup>14</sup> Similarly, a heterosexual parent would argue that the children ought to be in a nuclear family type to perpetuate the status quo. The reality is, is that there are very few nuclear families in South Africa. In view of the alarming statistic of divorce rates, there are many single parents and other non-traditional families. Heterosexual parents need to appreciate that we have a Constitution founded on democracy, equality and tolerance. Chapter I also

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<sup>14</sup> J Hunter 'The High Price of Homophobia : HIV Prevention Education' *HTTP: [http:// www.avert.org/gaystatu.htm](http://www.avert.org/gaystatu.htm)*.

<sup>15</sup> *Charmani v Charmani* 2 July 1979 WLD 227/79 unreported.

investigates the possibility of a homosexual environment causing gender role or gender-identity crisis.

In Chapter II the writer examines the South African laws concerning custody and access of gay and lesbian parents. A historical study was first conducted. In light of there being no historical studies on custody cases where the parent is gay or lesbian, the writer traced the development of South African custody law of heterosexuals. A comparison was drawn between custody cases where the parent is heterosexual as opposed to when the parent is homosexual. The court's denial of custody to gay and lesbian parents can only be justified if there is a rational relationship between denial of custody and access to the gay or lesbian parent and protection of the child, from harm.<sup>16</sup> Gays and lesbians have rights in terms of the Constitution<sup>17</sup> but these rights can be limited in terms of section 36 of the Constitution, if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. There is a shift in South African family law from parental rights to parental responsibility and children's rights.<sup>18</sup> In terms of section 28 of the Constitution the interests of the child are paramount. It could be argued that since parents have a legal duty to their children, does this duty not entitle them to protect their child from harm? When one of the parents in a custody dispute is gay or lesbian, the heterosexual parent usually disapproves of the other obtaining custody on the basis of his or her sexual orientation. The concerns of the parents vary and many of them are genuinely concerned for the welfare of the

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<sup>16</sup> *Harksen v Laine No and others* 1998 (1) SA 300 (CC), at 320.

<sup>17</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>18</sup> *V v V* 1998 (4) SA 169 (C) at 176 see also F.J Bosman and G.J Van Zyl Children, Young Persons and their Parents in J.A Robinson *The Law of Children and Young Persons* 1ed (1997) 50.

children. One of the concerns of the heterosexual parent is that the children would become gay or lesbian if they lived in a gay or lesbian environment.<sup>19</sup>

Chapter III , presents a comparative study of custody and access disputes of homosexual parents in foreign jurisdictions, namely Australia, Canada and America. As opposed to the latter countries, South Africa has just started to deal with such cases, it would therefore be beneficial to draw from the experience of foreign courts in setting standards and guidelines in custody disputes.

This dissertation also serves to inform and appraise all officers of the court including judges, family advocates, magistrates, child care agencies and social workers of the ability of the gay and lesbian as parents. Previously officers of the Court in ignorance have acted to the prejudice of the gay or lesbian parent. A case which illustrates this, is *Greyling v Minister of Welfare and Population Development and Others*,<sup>20</sup> a case which involved social workers and the magistrate. In Chapter II the writer investigates the myths and fears surrounding homosexuality and establishes whether such a child is indeed in “need of care.” This thesis also serves to contribute to expert evidence each time a custody dispute of this nature comes to court.

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<sup>19</sup> *Van Rooyen v Van Rooyen* 1994 (3) SA 201 (C)  
*V v V* 1998 (4) SA 169 CPD.

<sup>20</sup> Case no: 98/8197-WLD, unreported .

## CHAPTER ONE

### 1.1 Introduction

This study was undertaken because many parents fear that allowing their children to live with a gay or lesbian parent would cause the child to become gay or lesbian. Often in gay and lesbian custody disputes the latter has been an issue of concern. *Baehr v Mike*,<sup>1</sup> was an application to the Supreme Court of the United States of America to recognise same-sex marriages. Applications by the plaintiffs to the Department of Health for marriage licenses were refused. The State alleged that it had a "compelling interest to promote the optimal development of children"<sup>2</sup> This would not be achieved if the children lived in a gay or lesbian household.

In the South African case of *Van Rooyen v Van Rooyen*,<sup>3</sup> the judge was concerned that the mother's lesbianism would expose the children to "confusing signals". This suggests that there was a concern about the role that the lesbian environment would play in the child's development. Steyn<sup>4</sup> submits that there is a fear that children growing up in a gay or lesbian household would also become gay. The question ultimately is, is it within the ability of the child to assume the sexual orientation of the gay or lesbian parent. In order to develop some of the ideas, the psychological and genetic aspects of homosexuality will be discussed below.

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<sup>1</sup> 1996 WL 694235 (Hew. Cir. Ct. 1996).

<sup>2</sup> Ibid, at para 49.

<sup>3</sup> 1994 (2) SA 325 (W), at 328 C-D.

<sup>4</sup> E Steyn 'From Closet to Constitution : The South African Gay Family Rights Odyssey' 1998 *The Changing Family International Perspectives on the Family and Family Law* 405, at 428.



## 2.1 **Biological**

### 2.1.1 **Genetics**

For many years there has been a theory that predisposition to homosexuality is partly genetic. In 1986, a study by Pillard and Weinrich reported that there was a higher rate of homosexuality amongst gay and lesbian brothers.<sup>5</sup> In a more recent study by Hamer et al 114 families of gay and lesbian men were studied to determine whether sexual orientation is genetically determined. They found that there was a higher rate of homosexuality in gay men and their brothers as compared to the general population. It was also found that there was a higher rate of homosexuality amongst the maternal uncles and the sons of maternal aunts. This provided a strong case that homosexuality was linked to the X<sup>6</sup> chromosome. The chromosomes that determine sex are called X and Y. A male inherits an X from his mother and a Y from his father. A female gets an X from both parents. Researchers concluded that because homosexuality appears to be derived from the mother's side of the family, homosexuality is related to the X chromosome.

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<sup>5</sup> R.C Friedman and J Downey 'Psychoanalysis, Psychology and Homosexuality' (1993) 41 *Journal of American Psychoanalytica* 1159, at 1165.

<sup>6</sup> D.H Hamer, V.L Magnuson and A.M. Pattatucci 'A linkage between DNA markers on the X Chromosome and Male Sexual Orientation' (1993) 261 *Science* 321.

A further study of the DNA from 40 pairs of gay brothers was carried out, 33 pairs of brothers out of the 40 shared the same sequence of DNA.<sup>7</sup> Another linkage study<sup>8</sup> was carried out by Hamer *et al.*<sup>9</sup> They found that there was a linkage between the Xq28 chromosome<sup>10</sup> and sexual orientation in the gay male families but not in the lesbian families and concluded that their preliminary study<sup>11</sup> linking Xq28 to sexual orientation was confirmed. However, this is only in the case of men and not women.

However, the genetic theory has been received with mixed feelings within the scientific world and the gay community. Donald Suggs, head of the New York Chapter of Gay and Lesbian Alliance against Defamation, is perplexed that homosexuality has to be justified as if it is an abnormal human trait.<sup>12</sup> Baron expresses a doubt as to whether a single gene or a particular mechanism can explain the complexity of homosexuality.<sup>13</sup>

The linkage study has a double-edged sword; on the one hand, it proves that homosexuality is an immutable human trait like race or colour hence gays and lesbians should not be discriminated against; on the other hand because a gay's sexual orientation is determined by genes and they are in the minority,

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<sup>7</sup> Ibid.

<sup>8</sup> Investigation into a possible correlation between the X chromosome and homosexuality.

<sup>9</sup> D.H Hamer, A.M Pattatucci, C Patterson, D.W Fulker, S.S Cherny and L Kruglyak 'Linkage between Sexual Orientation and Chromosome Xq28 in Males but not in Females' (1995) 11 (3) *Nature Genetics* 248.

<sup>10</sup> Long Arm of the sex chromosome.

<sup>11</sup> Hamer op cit note 6.

<sup>12</sup> W.A Henry III 'Born Gay' (July 1993) *Times* 52, at 55.

<sup>13</sup> M Baron 'Genetic Linkage and Male Homosexual Orientation' (1993) *British Medical Journal* 337.

some will regard this difference as being pathological. This is regarded as biomedical discrimination.

If it is accepted that homosexuality is genetically determined, it may encourage the tampering of genes of individuals who are gay and it may also encourage screening in early pregnancy with a view to aborting gay or lesbian fetuses. Sinha expresses a similar fear. She maintains that in a country like India where a foetus is aborted just because the child is female, makes the future look certainly grim for a foetus, diagnosed gay or lesbian.<sup>14</sup>

Hamer's study was repeated at the University of Western Ontario and this time, no linkage was found between the X chromosome and sexual orientation. It is argued that the prevalence of homosexuality on the maternal side amounted to nothing more than the fact, that women have more knowledge of their relatives than men do, a fact that has long been established by sociologists.<sup>15</sup> There is also a fear that Hamer extracted such findings because of his own bias as he was gay himself.<sup>16</sup>

Research carried out on twins also suggests that there is a genetic influence on gay and lesbian orientation. A distinction must be made between monozygotic and dyzygotic twins.<sup>17</sup> Monozygotic twins, being identical in nature, have the

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<sup>14</sup> S Sinha 'Is Homosexuality Genetically Determined?' (1994) 7 *The National Medical Journal of India* 173, at 174.

<sup>15</sup> (October 1995) Gene Scam? 'The Guide' (on line) available HTTP:<http://www.Guide-may.comm/news-lant/Gene>.

<sup>16</sup> Ibid.

<sup>17</sup> Monozygotic twins are twins conceived from one egg both embryos from one egg Dizygotic twins – fusion of two eggs with two sperms.

same genetic composition. Studies<sup>18</sup> have shown that the concordance of homosexuality rates is higher in monozygotic twins than in dyzygotic twins, in other words, monozygotic twins generally have the same sexual orientation. They have the same genetic composition and hence the same sexual orientation. In certain instances, identical twins that were separated at birth, and reared apart displayed concordance for homosexuality. This has also suggested a genetic component for sexual orientation because it removes the argument that monozygotic twins share the same orientation because of a similar environment. In a study by Eckert *et al*, the subjects were monozygotic twins who had been raised apart.<sup>19</sup> Here again it was interesting to see the difference between female and male gays and lesbians. All the female pairs were discordant for homosexual behaviour in other words, the twins did not share their sexual orientation but were instead, heterosexual. Eckert concluded that female homosexuality may be an acquired trait and attributable to environmental factors. Juxtaposed to this, a study of the male pairs confirmed earlier research that the concordance rates for sexual orientation amongst monozygotic pairs is higher than in dyzygotic pairs even when the twins are raised apart.<sup>20</sup> This indicated that even in different environments, if one monozygotic male is gay, there is a greater probability that his twin is also gay.

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<sup>18</sup> J.M Bailey and R.C Pillard 'A Genetic Study of Male Sexual Orientation' (1991) 48 *Archives of General Psychiatry* 1089.

N Buhrich, J.M Bailey and N.G Martin 'Sexual Orientation, Sexual Identity and Sexually Dimorphic Behaviours in Male Twins' (1991) 21 *Behavioural Genetics* 75.

<sup>19</sup> E.D Eckert, T.J Bouchard, J Bohler and L.R Heston 'Homosexuality in Monozygotic Twins Reared Apart' (1986) 148 *British Journal of Psychiatry* 421.

Another research project undertaken relating to the Nature v Nurture debate is one that concerns fingerprinting. Although each individual has a unique set of fingerprints Richard Green *et al* have made some phenomenal findings.<sup>21</sup> Although both men and women have more ridges on their right hand than their left, women have fewer ridges on their right hand than men, Richard Green *et al* concluded, after an examination of 300 fingerprints of gay men, “more than a third have significantly fewer ridges on their right thumb than their heterosexual counterparts.”<sup>22</sup> Fingerprints are formed about two or three months after a baby has been conceived.

Fruit flies are the most sexually active creatures on earth hence their genetic pattern was studied to see if there was any link to homosexuality. They have the ability to produce a new generation in two weeks and are therefore often used by genetic researchers. In a study by Zhang and Odenwald, the genetic make-up of the male fruit flies was altered hence their sexual behaviour was altered. The biologists transplanted a gene (called the White gene) into the male fruit flies and this caused a need for amino acids called Tryptophan. Every cell began to absorb the Tryptophan, which caused a shortage of the amino acids in the brain, which ultimately had an effect on the levels of serotonin in the body. Serotonin is a neurotransmitter that carries messages between the nerve cells. The effect of all this was that male fruit flies formed a laager end to end with their genitals rubbing against each other. It is

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<sup>20</sup> Ibid, at 424.

<sup>21</sup> Z Brennan 'The Imprint of Your Sexuality' (5 February 1998) *Sunday Tribune* 5.

interesting to note that the experiment did not have a similar effect on female fruit flies. The transplant of the White gene did not result in lesbian activity. Serotonin is also a neurotransmitter found in human beings, hence the link between the investigation and human beings.<sup>23</sup>

### 1.2.2 Hormones and Homosexuality

Researchers into animal sexual behaviour have concluded that a prenatal androgen deficit results in male homosexuality, while a prenatal androgen excess results in female homosexuality.<sup>24</sup> Dorner conducted research on male rats. He castrated the animals at birth and injected them with the male hormone androgen in adulthood. These animals displayed gay behaviour. The female rats were injected with androgen before birth and these rats displayed lesbian behaviour as well.<sup>25</sup>

According to studies by Dorner *et al* there are different regions of the brain, which are responsible for male and female sexual behaviour. Dorner was of the opinion that altered levels of sex hormones during a critical period of brain development could influence sexual orientation.<sup>26</sup> Dorner is also of the opinion that sexual orientation is biologically determined and he discards both

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<sup>22</sup> Ibid.

<sup>23</sup> S.D Zang and W.F Odenwald 'Misexpression of the whites (w) gene triggers male-male courtship in *Drosophila*' (1995) 92 *Proc. National Academy Science*. U.S.A. 5525.

<sup>24</sup> R.C Friedman and J Downey 'Homosexuality' (1994) 331 *New England Journal of Medicine* 923, at 928.

<sup>25</sup> Ibid, at 142.

the theory of Social Learning and that of Psychoanalysis. He went to the extent of advocating prevention of homosexuality by foetal hormone treatment.<sup>27</sup>

Stress in pregnant mothers has the effect of a possible decrease of androgen levels that reaches the foetus. A study was carried out by the Stahl *et al.*<sup>28</sup> The sample used was pregnant women in Berlin during World War II over a five-year period. The males born during the period were recorded to have a higher rate of homosexuality than males born five years before or five years later.<sup>29</sup> These findings suggest that stresses during pregnancy have the ability to alter sexual orientation.

However, another view that prevails is that androgen deficiency does not automatically result in a predisposition for homosexuality. It would result in effeminate features for example small genitals. This poor male physique may deter any thought of heterosexual encounters hence leading to gay behaviour.

The girlish and pretty appearance will also draw attention from other males hence encouraging homosexuality. The position is somewhat different with the female who has an excess of androgens. They have a tendency to become

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<sup>26</sup> G Dorner, I Pappé, F Stahl, Kolzschj and R Uebelhack 'Gene and Environment Dependent Neuroendocrine Etiogenesis' (1991) 98 *Experimental Clinical Endocrinology* 141 at 142.

<sup>27</sup> Ibid, at 56.

<sup>28</sup> F Stahl, F Gotz, I Pappé, P Amendt and G Dorner 'Pre-and Early Testosterone Levels in rat and human, in hormones and brain development' edited by G Dorner, M Kawakami, Amsterdam, Elsevier, 1978 .

tomboys and they have a masculine attitude and temperament, however they enter into and maintain heterosexual relationships.<sup>30</sup>

### 1.2.3 **Brain Differences**

In 1991, Levay studied the brain tissue of eighteen gay and lesbian, sixteen heterosexual males and six heterosexual females. He looked specifically at one nucleus, the INAH3. The INAH3 is one of the cell groups found in the anterior hypothalamus. The anterior hypothalamus of the brain participates in the regulation of male-typical sexual behaviour.<sup>31</sup> He found that the size of the INAH3 was similar in women and gay men. The INAH3 was twice as large in heterosexual men than in women and gay men.<sup>32</sup> Levay maintains that the size of that particular nucleus is established in early childhood and has a direct effect on later adult sexual behaviour.<sup>33</sup>

Swaab looked at the suprachiasmatic nucleus in relation to sexual orientation. The suprachiasmatic nucleus (SDN) is located at the base of the human brain. Swaab's research indicates that the suprachiasmatic nucleus (SDN) in gay men was 1.7 times larger than the reference group of male subjects and contained 2.1. times as many cells as the latter group. Although such a

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<sup>29</sup> R Green 'The Best Interests of the Child with a Lesbian Mother' (1982) 10 *Bulletin of the AAPL* 7, at 8.

<sup>30</sup> D.G West 'Homosexuality Re-Examined' 1ed (1977) 66.

<sup>31</sup> S.A Levay 'A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men' 1991 253 *Science* 1034.

<sup>32</sup> Ibid, at 1035.

<sup>33</sup> Friedman op cit note 5, at 1177-78.



difference was recorded, Swaab was of the opinion that this was not directly linked to sexual orientation.<sup>34</sup> He disagreed with Dorner's<sup>35</sup> hypothesis that male gays have a 'female brain'. Swaab's conclusion was based on the fact that even though there was a difference found in the SDN of the gay lesbian as opposed to the other male subjects, the SDN found in males and females were the same both in volume and in the number of cells contained. Therefore, an enlarged SDN in the gay cannot possibly mean that it is tantamount to a female brain.<sup>36</sup>

### 1.3 Social Learning Theory

The social learning theory emphasizes the need of a child to have both heterosexual parents present for proper or "normal" psychosexual development. Social learning theories postulate that there is a need for both male and female models for children to acquire knowledge of gender roles.<sup>37</sup>

According to the abovementioned theory there are two psychological processes which are important for psychosexual development namely modeling or emulating adults of the same sex and secondly differential reinforcement that is rewarding children for behaviour which is appropriate to

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<sup>34</sup> D.F Swaab and M.A Hoffman 'An Enlarged Suprachiasmatic Nucleus in Homosexual Men' (1990) 537 *Brain Research* 141.

<sup>35</sup> G Dorner 'Neuroendocrine response to Oestrogen and Brain Differentiation' (1988) 17 *Archives of Sexual Behaviour* 57.

<sup>36</sup> Swaab op cit note 34, at 146.

<sup>37</sup> D.I Riddle 'Relating to Children : Gays and Role Models' (1978) 34 *Journal of Social Issues* 38, at 57.

their sex. Many estranged heterosexual parents express fears in the courtrooms that their gay and lesbian spouse will, by exposure, cause their children to become gay or lesbian. Hence the court's justification for denial of custody and access. There is, therefore, a need to look at the empirical evidence to see whether these fears are properly based.

According to social learning theorists boys in a lesbian household will have difficulties because of the absence of the father. There is no same sex model and reinforcement will be quite different.

Further, it is believed that lesbians harbour negative feelings towards men. However, as far as absence of the father or male contact is concerned, some of the children in a lesbian household do have contact with their fathers whilst others have contact with adult male friends of their mothers. This was evident in a study by Colombok et al in which a third of the cases had weekly contact with their fathers. Half the children had contact with male friends of their mothers and the majority associated with friends of their mothers who were both heterosexual and gay and lesbian.<sup>38</sup> Regarding hostility towards men, only a few of the lesbian women expressed negative attitudes in respect of men.<sup>39</sup>

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<sup>38</sup> S Colombok, A Spencer and M Rutter 'Children in Lesbian and Single Parent Households : Psychosexual and Psychiatric appraisal' (1983) 24 *Journal of Child Psychology and Psychiatry* 551, at 562, 569 and 570.

<sup>39</sup> Ibid, at 570.

It has been argued that children in a lesbian household are exposed to atypical displays of sexual behaviour hence this would lead to the child's homosexuality. However, this argument is refuted by the fact that exposure to heterosexual behaviour does not prevent homosexuality.<sup>40</sup>

Studies indicate that there is a link between gender identity, gender role behaviour and sexual orientation. Apart from such correlation, straight parents are concerned that a homosexual environment would cause their children to be confused about their gender identity. Gender identity is the child's identification or self-awareness of being male or female. Gender role behaviour is the behaviour of that child which best differentiates that child as being male or female in a particular culture. Sexual orientation refers to a person's choice of sexual partners.<sup>41</sup> Although subject to some controversy, data suggests that gender-role behaviour is linked to sexual orientation. If a child has a gender identity disorder and wishes to be of the opposite sex and displays stereotypical cross-gender behaviours then there is a higher than average possibility of bisexual or homosexual behaviour in adulthood.<sup>42</sup>

KirkPatrick *et al* in their study found that there were no differences in gender development between children reared in a lesbian household and those who were reared by a heterosexual mother. However, she cautioned that gender

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<sup>40</sup> Colombok op cit note 38, at 553.

<sup>41</sup> R Green 'The Best Interests of the Child with a Lesbian Mother' (1982) 10 *American Academy of Psychiatry and Law* 7, at 11.

<sup>42</sup> Ibid.

identity and future sexual role could not be clearly established in childhood.<sup>43</sup> Colombok *et al* in a similar study found no evidence of cross-sex-typed behaviours in both the lesbian and single parent households.<sup>44</sup> Colombok and Tasker submitted that empirical studies are indicative of the fact that there are no observable differences between the “lesbian offspring” and the “heterosexual offspring”.<sup>45</sup>

In determining acquisition of sex role behaviour, Colombok conducted interviews with the mothers and children of both the lesbian and heterosexual household. Colombok maintains that even at a time when sex roles are not as traditional as they used to be, in that more boys now do ballet and cook and more girls play soccer, there are definite sex differences in children’s behaviour. However, she found that there were no differences in gender role behaviour in both groups.<sup>46</sup> Green *et al* found some differences between the two groups in toy and activity choice. There was more flexibility in the lesbian household for female children in respect of traditional toys and other activities, like rough and tumble play. But, Green maintains that this atypical behaviour is not unusual for many other girls of the same age.<sup>47</sup> Hoefffer’s study is indicative of the extent of the mothers’ influence on their children’s decisions. The children from both groups were not very different in their choice. The

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<sup>43</sup> M Kirkpatrick, C Smith and R Roy, 'Lesbian Mothers and their Children : A Comparative Survey' (1981) 51 *American Journal of Orthopsychiatry* 545, at 551.

<sup>44</sup> Colombok op cit note 38, at 561, 562 and 570.

<sup>45</sup> F.L Tasker and S Colombok 'Children Raised by Lesbian Mothers' (1991) *Family Law* 184, at 186.

<sup>46</sup> Colombok op cit note 38, at 568.

boys preferred same-gender sex-typed toys whilst the girls preferred more neutral toys. The reason for this cross-gender choice is because boys are prohibited or less encouraged to play with toys that are considered to be feminine.<sup>48</sup> In America, gender role behaviour for boys is strictly laid down.<sup>49</sup> In the Hoeffler study both groups of mothers encouraged play with neutral toys. The choice of the children was different from that of the mothers. A majority of the mothers conceded that it was their children's peers rather than themselves that influenced the children's decisions. The aforementioned is in keeping with the Social Learning theory that various factors, and not necessarily the parents, that influence the acquisition of sex role traits.<sup>50</sup> It must also be borne in mind that a child does not live in isolation and his parents are not the only contact with the real world. Most children are avid television viewers. Gottman conducted a study between three different groups of adult females who were daughters of heterosexual mothers who divorced and remarried, heterosexual mothers who divorced but did not remarry and lesbian mothers to ascertain gender role preferences and found no differences between the three groups.<sup>51</sup>

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<sup>47</sup> R Green, H Gray and C Smith 'Lesbian Mothers and Their Children : A Comparison with Solo Parent Heterosexual Mothers and their Children' (1986) 15 *Archives of Sexual Behaviour* 167, at 176, 177 and 180.

<sup>48</sup> B Hoeffler 'Children's Acquisition of Sex Role Behaviour in Lesbian - Mother families' (1981) 51 *American Journal of Orthopsychiatry* 536, at 543.

<sup>49</sup> R.C Friedman 'Contemporary Psychoanalysis and Homosexuality' (1991) 98 *Experimental Clinical Endocrinology* 155, at 159.

<sup>50</sup> Hoeffler op cit note 48, at 543.

<sup>51</sup> J.S Gottman 'Children of Gay and Lesbian Parents' (1990).

KirkPatrick *et al* after looking at the history of play preferences and sexual interest reported no differences in gender development.<sup>52</sup> Patterson concluded that as far as psychosexual development is concerned, there are no differences between children of a lesbian household as compared with children of a heterosexual household. The lesbian offspring usually develops a typical psychosexual identity, being heterosexual in nature.<sup>53</sup>

Cross-gender behaviour has been linked to sexual orientation. Green studied forty-four effeminate boys and found that of the forty-four, seventy five percent later became gay or bisexual.<sup>54</sup> Other studies have similar findings. Some lesbians have indicated that they have also displayed in their childhood, cross gender behaviour. However, studies indicate that there are more males as opposed to females, exhibiting cross-gender behaviour who later become gays.<sup>55</sup>

Isay in his clinical studies submits that just as a heterosexual boy emulates his father in order to attract the attention of his mother and later in life someone like his mother, a gay boy exhibits cross gender behaviour to gain the attention

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<sup>52</sup> Kirkpatrick et al op cit note 43, at 551.

<sup>53</sup> C.J Patterson 'Children of Lesbian and Gay Parents' (1992) 63 *Child Development* 1025, at 1030 and 1031.

<sup>54</sup> M.D Zuger 'Homosexuality in Families of Boys with Early Effeminate Behaviour : An Epidemiological Study' (1989) 18 *Archives of Sexual Behaviour* 155, at 163.

<sup>55</sup> Green et al op cit note 47, at 181.

and favour of the father.<sup>56</sup> Friedman confirms that cross gender behaviour is linked to sexual orientation.<sup>57</sup>

The empirical evidence on the role that the lesbian household plays in respect of a child's sexual preference, provided no definite answers thus far because studies have concentrated on children of school going age. Colombok *et al* concluded that the children of their study were not very young. However, there seemed to be no atypical behaviour as the majority had heterosexual crushes.<sup>58</sup>

One gay father said,

“My straight parents failed to make me straight, so there's no reason to believe I would succeed in doing the reverse with [my son] even if I wanted to. He will be whatever he is. Gay or straight is okay as long as he's happy. I'll love him. Relatives will blame me if he's gay and say, it's a miracle if he's straight. Either way they will give me no credit, so I have stopped worrying about it. Therefore, if he is gay, it might bring us even closer, and he would not have to go through the lonesome struggle I did in accepting myself. He would be one of few kids who could tell his dad without fear. That is a big plus”.<sup>59</sup>

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<sup>56</sup> Friedman op cit note 49, at 158.

<sup>57</sup> Friedman op cit note 49, at 159.

<sup>58</sup> Colombok et al op cit note 38, at 564.

<sup>59</sup> B Miller 'Gay Fathers and their Children' (1979) 28 *Family Coordinator*, at 547.

#### 1.4 Psychoanalysis

Psychoanalysts have various theories regarding the origins of homosexuality. One theory is the persistent prohibition against heterosexual sexual encounters or physical intimacy. When it comes to boys, parents are constantly monitoring activity with girls whilst activity with boys is left uncensored. Hence, in the flight from women, they turn to men. Some psychoanalysts view homosexuality as “an impairment of an individual’s inner controls.”<sup>60</sup>

Freud maintains that had it not been for our own inhibitions we would all become gays and lesbians, incestuous and bisexuals.<sup>61</sup> No systematic studies have been conducted in this area. However, what we have evolves from the years of clinical experience of psychoanalysts. Psychoanalysis maintains that most people have cross gender fantasies. However, they do not all agree that we are all inherently bisexual.<sup>62</sup>

According to the Freudian theory, every boy has sexual fantasies, the object of such being his mother. There is the desire to be rid of the father so that the son can take his place. This instils extreme feelings of guilt and hence these feelings are repressed. They want to punish themselves by castration. West maintains that the gay therefore regards any attraction that he may have for the

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<sup>60</sup> J Marmor *Homosexual Behaviour A Modern Reappraisal* (1980) 9.

<sup>61</sup> West op cit note 30, at 96.

<sup>62</sup> Friedman op cit note 5, at 1182.



opposite sex as being wrong as it brings to the fore his incestuous guilt.<sup>63</sup> Friedman maintains that all children irrespective of their sexual predisposition probably experience the oedipal complex, which has at its focal point castration anxiety.<sup>64</sup>

According to Payne *et al*, this oedipal conflict is experienced by children of both the sexes between the ages of three and five years. They prefer or love the parent of the opposite sex and wish the other parent dead. The child deals with these fantasies and emerges from the process loving and accepting both parents. If the parent of the same sex removed himself from the life of the child, the child would be guilt ridden, as he would feel that he caused the separation and he would thus have difficulty with the developmental process in reaching adulthood. A family that is kept intact and which does not go through the process of divorce helps to resolve this conflict in the child.<sup>65</sup> Hence, there is a need for an ongoing relationship with both parents.

According to Kleber *et al*, the psychoanalytical theory suggests that a gay or lesbian parent-child relationship disrupts the oedipal process resulting in confused gender identity and inappropriate sex-typed behaviour.<sup>66</sup>

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<sup>63</sup> West op cit note 30, at 96.

<sup>64</sup> Friedman op cit note 5, at 1186.

<sup>65</sup> J.D Payne and K.L Khallish 'A Behavioural Science and Legal Analysis of Access to the Child in the Post - Separation / Divorce Family' (1981) 13 *Ottawa Law Review* 215, at 216 and 217.

<sup>66</sup> D.J Kleber and R.J Howell 'The Impact of Parental Homosexuality on Child Custody Cases: A review of the literature' (1986) 14 *Bulletin of the American Academy of Psychiatry Law* 81, at 82.

When one looks at the family backgrounds of gays or lesbians one usually finds a dominating seductive mother and a father who plays little or no role. It is this poor father-son relationship which results in the son forming a close relationship with his mother which results in later homosexuality.<sup>67</sup> Isay lays down the poor father-son relationship, to anxiety expressed by the gay because of the attraction that he feels towards his father.<sup>68</sup>

It is apparent that there is no clear-cut answer as to why one child in the family chooses a sexual orientation, which differs, from his siblings. If the social learning theory was credible then homosexuality would not flourish in a society where heterosexuality is the “norm” or more prevalent. Similarly, psychoanalysis offers little clarity. It would seem therefore that the origin of homosexuality is more genetic. Friedman *et al* concludes that a prenatal biological effect, which is probably hormonal, influences sexual orientation.<sup>69</sup>

## **CONCLUSION**

The scientific and the social science research is contradictory, inconclusive and unconvincing. There seems to be a leaning towards the genetic biological argument but it is not conclusive for example, the gene sequencing in the Hamer investigation and the fingerprinting research by Green and the research of the monozygotic twins, the hypothesis supported the male gay but not the female. The Social Learning

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<sup>67</sup> Marmor op cit note 60, at 10.

<sup>68</sup> Friedman op cit note 49, at 158.

Theory is incoherent because most gays and lesbians are raised in heterosexual families and most homosexual families still produce heterosexual children. Biological and social research results point to the probability that the construction of an identity as a gay and lesbian is a complex, multi-faceted process, currently underdefined and misunderstood. This confusion and incoherence also means that we cannot look to biological and social research for the 'formula to settle, the child custody issue, scientific discoveries cannot settle moral dilemmas. We need to look at the principles of transformation, egalitarianism, pluralism and multi-culturalism. In other words, we have to look at the kind of world we want to live in, to our respect for the human dignity of marginalised, rogue and outcast identities, and for the non-exploitative "lifestyles" we will tolerate and respect. This question of whether homosexuality is genetically or environmentally determined may also be a question, which is offensive to gays because by asking this question we are inferring that homosexuality is pathological. After all, do we ask what makes heterosexuals, heterosexual? The *Nature v Nurture* debate offers no definite answers and in fact seems quite pointless, because in defining women's rights one does not look to the size of the brain, etcetera. Similarly in establishing the protectoral rights of parents to have custody of their children, an examination of their biological structure does not offer the solution.

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<sup>69</sup> Friedman op cit note 5, at 1179.

## CHAPTER TWO

### THE SOUTH AFRICA LAW CONCERNING CUSTODY AND ACCESS

#### 2.1 Historical Overview

A study of the history of early South African law indicates no reference or mention of custody or access where the parents are gay and lesbian. According to Roman–Dutch law the father had custody of the children.<sup>1</sup> Since the male had dominion over the wife (and her property), and over servants, it was a simple continuation of male privilege that the father would have legal authority over the child, even if the child care per se was with the mother. This patriarchal nature of Roman Dutch law has extended into the concept of homosexuality. It could explain the strong opposition that gays and lesbians have always experienced.

In the 1937 case of *Cook v Cook*,<sup>2</sup> the court referred to Voet who postulated that the determination of the awarding of custody of the child in post divorce situations was left to the discretion of the judge. However, in exercising this discretion, the courts would have due regard to the best interests of the child, as well as the interests of the innocent spouse.<sup>3</sup> According to Voet, judges favoured the innocent spouse, unless it was contrary to the interest of the child.<sup>4</sup>

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<sup>1</sup> I.D Schafer *The Law of Access to Children* 1ed (1993) 25-26 .

<sup>2</sup> 1937 AD 154, at 162.

<sup>3</sup> *Calitz v Calitz* 1939 AD 56.

<sup>4</sup> *Ibid*, at 162.

In *Cook v Cook*, the father sought custody on the basis of desertion and adultery. As far as the adultery was concerned, the court held that it was not proved that the wife committed adultery and even if it was proved “she did so in circumstances which excluded all possibility of the moral contamination of the children”.<sup>5</sup> The judge added that the innocent spouse rule although applicable in such cases was not a hard and fast rule and was subject to many exceptions. He acknowledged that the most important factor was the best interest of the children.<sup>6</sup>

Contrary to the innocent spouse rule, Van Leeuwen was of the view that the court had the discretion to award custody to the father or the mother, and he considered the mother to be the best choice for the custodian parent.<sup>7</sup> In the 1939 case of *Calitz v Calitz*,<sup>8</sup> responding to counsel’s citation of Van Leeuwen, Tindall JA referred to de Haas, who rejected the view of Van Leeuwen. According to de Haas, Van Leeuwen incorrectly cited Code (5:49) and Digest (27.2.1) which in effect discussed the position of children who had lost their father.<sup>9</sup> Thereafter the courts have for many years applied the maternal preference rule or the tender years doctrine. This is where the custody of girls of any age and young children are awarded to the mother. The courts only looked to the father where the mother was found to be morally,

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<sup>5</sup> Ibid, at 160.

<sup>6</sup> Ibid, at 163.

<sup>7</sup> J.G Kotze (1921) *Simon Van Leeuwen’s Commentaries on Roman Dutch Law* 21.

<sup>8</sup> 1939 AD 56.

<sup>9</sup> 1939 AD 56, at 60.

physically or emotionally unfit.<sup>10</sup> Adolescent boys were usually awarded to the father.<sup>11</sup>

## 2.2 Analysis of Case Law and Legislation

### 2.2.1 Awards of Custody in Respect of Heterosexual Parents.

In terms of the Guardianship Act,<sup>12</sup> both parents have equal guardianship. Guardianship is the capacity of the parent to administer the estate and to assist in juristic acts of the child.<sup>13</sup> Both parents can act independently and without consent from the other save for the specified exceptions.<sup>14</sup> Upon divorce, unless the court makes an order to the contrary, both parents retain guardianship.<sup>15</sup>

Custody is that part of parental power which relates to the child's daily personal life. It relates to the day-to-day activities and relates to the child's health care and to religious and educational activities.<sup>16</sup> Upon divorce the court as upper guardian of the child, decides which parent is to have sole<sup>17</sup> custody of the child. Where it is in the best interests of the child the court has also awarded joint custody. This is where the care and control of the child is shared by both parents and the child would live in both households usually for

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<sup>10</sup> A Hoffman and B. K Pincus *The Law of Custody* 1ed (1989) 33.

<sup>11</sup> P.Q.R Boberg *Law of Persons and the Family* 2ed (1999) 536-537.

<sup>12</sup> 192 of 1993.

<sup>13</sup> F.J Bosman G.J van Zyl *Children and Young Persons* in J.A Robinson *Children and Young Persons* 1ed (1997) 53.

<sup>14</sup> Section 2 of Guardianship Act 192 of 1993.

<sup>15</sup> Boberg op cit note 11, at 505.

<sup>16</sup> Bosman and Van Zyl op cit note 13, at 54.

<sup>17</sup> This is where one parent is responsible for the day-to-day care of the child.

an equal amount of time.<sup>18</sup> Various criticisms have been levelled against the award of joint custody which includes the issue of stability and practicality.<sup>19</sup>

Our courts in recognition of the need for a continuous relationship between the child and parent have awarded access to the non-custodian parent. Even where the divorce order is silent on the issue, rights of access are automatic.<sup>20</sup> The courts favour "reasonable" access, which would usually be alternate weekends and alternate school holidays. Parents would usually come to an arrangement regarding the logistics of access. Where no agreement can be reached, the court would define access.<sup>21</sup>

The roles of mothers and fathers have been stereotypically divided. This is evident from King J, in *McCall v McCall*, when he stated that "the respondent is a good woman and a good mother. What she offers Rowan is the loving, nurturing, rearing of a child which is the traditional and natural role of a mother and the respondent has done it well. I believe, however, that Rowan has now reached the stage of his development, at the doorstep of puberty, where his need for discipline of a father is greater than his need for the protectiveness of a mother."<sup>22</sup> However this stereotype seems to be altering because courts are recognising that fathers are also fulfilling the nurturing role.<sup>23</sup> More recently in *Van der Linde v Van der Linde*,<sup>24</sup> the mother applied

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<sup>18</sup> Boberg op cit note 11, at 551.

<sup>19</sup> See also Boberg op cit note 11, at 555 and *V v V* 1998 (4) SA 169 (C), at 179.

<sup>20</sup> Schafer op cit note 1, at 31.

<sup>21</sup> Bosman and Van Zyl op cit note 13, at 62.

<sup>22</sup> 1994 (3) SA 201 (C), at 206 J.

<sup>23</sup> Bethel v Bland 1996 (2) SA 194 (W), at 202 J - 203 B.

<sup>24</sup> 1996 (3) SA 509 (O).

for custody of her fourteen-year-old son and nine-year-old daughter or alternatively just for the custody of her daughter.

It was found that it was in the son's best interest that he remained with his father. If the 'maternal preference rule' dictated, the mother would have been awarded custody of the girl. However, the court held that the concept of "mothering" was a function which either parent could perform and was not determined by gender.<sup>25</sup> The same view was taken in *Madiehe v Madiehe*<sup>26</sup> where the court said that "custody of a young child is a responsibility as well as a privilege and it has to be earned. It is not a gender privilege or right." An application of the 'maternal preference' rule discriminates against men and is unconstitutional.<sup>27</sup> Goldstone J, in *President of the Republic of South Africa and Another v Hugo*<sup>28</sup> accepted the submission that mothers shouldered more responsibility than fathers in raising children. He also accepted that there were many instances where the father would be the primary caregiver. He stated that even though mothers shared an unequal burden in bringing up children, it would be unfair to discriminate between women and men.<sup>29</sup>

In a concurring judgment Mokgoro J said, that the motivation for releasing mothers and not fathers from prison, was because of the nurturing role that mothers played in child rearing. However, she said that to deny men early release, "on the basis of stereotypical assumptions concerning men's aptitude

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<sup>25</sup> *Ibid.*, at 514 H-515 B.

<sup>26</sup> 1997 2 All SA 153 (B) see also F.J. Bosman and G.J van Zyl in J.A Robinson *The Law of Children and Young Persons* 1ed (1997) 60 and G.E Devenish *A Commentary on the South African Bill of Rights* 1ed (1999) 392.

<sup>27</sup> Section 9 of Constitution 108 of 1996.

<sup>28</sup> 1997 (6) BCLR 708 (CC).



at child rearing is an infringement upon their equality and dignity".<sup>30</sup> *Ex Parte Critchfield and Another*<sup>31</sup> was an application for a variation order. At the time of the application both parents shared joint custody. According to the judge, "it would not amount to unfair discrimination for a court to have regard to maternity as a fact in making a determination as to the custody of young. However, it would amount to unfair discrimination if a court were to place undue weight upon this factor when balancing it against relevant factors".<sup>32</sup> The court found that the father was a more stable parent and stability was an important factor in awarding custody. The court also found that he had adequately performed his nurturing role whilst exercising joint custody. It was therefore in the children's interest that custody be awarded to the father.

In terms of Section 6(1) of the Divorce Act,<sup>33</sup> a decree of divorce shall not be granted unless the court is satisfied, that the provisions made, for the welfare of the children are satisfactory or are the best that can be effected in the circumstances.<sup>34</sup>

In *Fletcher v Fletcher*,<sup>35</sup> the Appellate Division formulated the best interest rule, which considers the interest of the child as paramount. The best interest rule has subsequently been followed by the courts.<sup>36</sup> In exercising the best

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<sup>29</sup> Ibid, at 727 F.

<sup>30</sup> Ibid, at 747 G - 748 A.

<sup>31</sup> 1999 (3) SA 132 (W), at 143 B-C.

<sup>32</sup> Ibid at 143 B-C.

<sup>33</sup> Divorce Act 70 of 1979.

<sup>34</sup> *Hoy v Hoy* 1994 (1) SA 89 E

*Zorbas v Zorbas* 1987 (3) SA 436, at 439 I-J

*Ex Parte Critchfield and Another* 1999 (3) SA 132, at 143 H-I

<sup>35</sup> 1948 (1) SA 130 (A).

<sup>36</sup> *Fortune v Fortune* 1955 (3) SA 348 (A)

*Shawzin v Laufer* 1968 (4) SA 657 (A)

interest rule the court has acted as upper guardian of all children.<sup>37</sup> Unlike other jurisdictions South Africa does not have legislation that defines or provides guidelines for the best interest rule.<sup>38</sup> What would be in the best interests of a particular child in a particular case would obviously depend on the circumstances of the case. Over the years our courts have given guidelines as to what is in the best interests of the child.<sup>39</sup>

In considering what is in the best interests of the child our courts look at the individual needs of the child. What follows is a determination of the suitability of the parents to fulfil those needs. *McCall v McCall*<sup>40</sup> provided the following list of factors which the court ought to consider in custody disputes:

- (a) The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) The ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing

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*Van Oudenhove v Gruber* 1981 (4) SA 857 (A)

*B v S* 1995 (3) SA 571 (A).

<sup>37</sup> A Cockrell The Law of Persons and the Bill of Rights in *Bill of Rights Compendium* 1ed (1996) 3E-33.

<sup>38</sup> *K v K* 1999 (4) SA 691 (C), at 709 A-B.

<sup>39</sup> *French v French* 1971 (4) SA 198 (W).

and other material needs - generally speaking, the provision of economic security;

- (f) The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) The mental and physical health and moral fitness of the parent;
- (i) The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) The desirability or otherwise of keeping siblings together;
- (k) The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 ... should be placed in the custody of his father; and
- (m) Any other factor which is relevant to the particular case with which the court is concerned.

The capabilities, character and temperament of the parents was assessed in *Ex Parte Critchfield and Another*.<sup>41</sup> The court found that the mother was unstable and often displayed emotional outbursts and made aggressive, derogatory remarks against the father and the children. The court found that the father on

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<sup>40</sup> 1994 (3) SA 201 (C).

<sup>41</sup> 1999 (3) SA 132(W).

the other hand, was a far more stable parent<sup>42</sup> and that he would endeavour to help the children develop to their optimum.<sup>43</sup> On the other hand in *McCall v McCall*<sup>44</sup> the father's temper and dishonesty did not render him an unsuitable father.<sup>45</sup>

The ability to provide the child with all the material needs is a factor which is taken into account in conjunction with all the relevant factors. This factor would only feature as being decisive if all the other factors are balanced.<sup>46</sup> In *Shawzin v Laufer*<sup>47</sup> the mother was awarded custody even though the father was able to provide a lifestyle of a higher standard.

The child's cultural and religious environment was an issue in *Chamani v Chamani*.<sup>48</sup> The mother was a Satsangi and the father was a Jew. The children had grown up in the Jewish faith. The court was of the view that it would be in the best interest of the children to grow up as Jews. The mother undertook that she would ensure that the children would be brought up in the Jewish faith. The court found that the mother was a committed Satsangi and concluded that despite the undertaking, the mother's "beliefs and practices would inevitably impinge themselves on the children".<sup>49</sup> Likewise it is a common perception that the attitudes and lifestyle of the gay and lesbian

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<sup>42</sup> Ibid, 144 H-I.

<sup>43</sup> Ibid, at 145.

<sup>44</sup> 1994 (3) SA 201 (C).

<sup>45</sup> See also *Martens v Martens* 1991 (4) SA 287 (T).

<sup>46</sup> Boberg op cit note 11, at 549.

<sup>47</sup> 1968 (4) SA 657 (A), at 669 B.

<sup>48</sup> 2 July 1979 WLD 227/79 unreported, quoted in A Hoffman and B.K Pincus, *The Law of Custody* 1ed (1989) 20-23.

<sup>49</sup> Ibid, at 106.

parent would influence children to such an extent that the latter would become gay or lesbian themselves.<sup>50</sup>

It is important in a divorce dispute that siblings remain together. A divorce involves much transition and usually there is an absence of one parent except when access is being exercised. Although the status quo ought to be maintained,<sup>51</sup> circumstances may dictate a move of house or school. The bond between siblings might be the only constant factor and would give the children a sense of security.<sup>52</sup> In *Van der Linde v Van der Linde*<sup>53</sup> the mother applied for custody of her two children, a boy aged fourteen and a girl aged nine. During the trial, the mother conceded that it would be in the best interests of the boy that he remained with his father. The custody of the daughter was in issue. The court reaffirmed that siblings should not be separated and a separation would only be an advantage if the child is being neglected or maltreated.<sup>54</sup>

The preferences of older children are taken into account. A reference to “older” children is a reference to maturity and not age.<sup>55</sup> In *McCall v McCall*,<sup>56</sup> the judge said that the preference of the child would be taken into account if the child has the “necessary intellectual and emotional maturity” and is able “to make an informed and intelligent judgment”.<sup>57</sup> This test is very subjective because the judge has to make an assessment of the maturity of the

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<sup>50</sup> *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).

<sup>51</sup> *McCall v McCall* 1994 (3) SA 201 (C).

<sup>52</sup> Hoffmann and Pincus op cit note 10, at 38.

<sup>53</sup> 1996 (3) SA 509 (O).

<sup>54</sup> Ibid, at 514 B-C and E.

<sup>55</sup> Hoffmann and Pincus op cit note 10, at 50.

child.<sup>58</sup> In contrast, in *Greenshields v Wyllie*<sup>59</sup> the court did not attach much significance to the wishes of the twelve and fourteen year old girls.<sup>60</sup>

In its application of the best interest rule, the judge has to rely on a value system to decide what is good or bad for the child. In many instances there is little clarity on which values to adopt and the common law rule has been criticised for having no uniform clear guidelines.<sup>61</sup> The court inevitably has to look at societal values. The factors looked at therefore reflect judicial and community values and prejudices, and will vary over time, space and culture.<sup>62</sup> It would appear that there is a uniform best interest standard which prevails but which changes from time to time as societal views and values alter.<sup>63</sup>

The judge has a wide discretion in deciding which factors would influence the interest of the children. This could result in cases with similar facts having markedly different judgments. The best interest rule is also fraught with uncertainty because the courts have to make a current decision which would affect the future of a child.<sup>64</sup>

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<sup>56</sup> 1994 (3) SA 201 ( C ).

<sup>57</sup> Ibid, at 207 H-J.

<sup>58</sup> Boberg op cit note 11, at 541. See also *French v French* 1971 (4) SA 298 (W).

<sup>59</sup> 1989 (4) SA 898 (W).

<sup>60</sup> See also *Stock v Stock* 1981 (3) SA 1280 (A).

<sup>61</sup> A Pantazis 'Children's Rights' in Chaskalson, Kertridge, Klaaren, Marcus, Spitz and Woolman *Constitutional Law of South Africa* 1ed (1996) 33-1.

<sup>62</sup> E Bonthuys 'Of Biological Bonds, New Fathers and the Best Interests of Children' (1997) 4 *South African Journal of Human Rights* 623.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, at 636.

### 2.2.2 Award of Custody and Access in respect of Gay and Lesbian parents.

With the background of how our South African courts view custody and access by the heterosexual parent, I now seek to delve into the area where the litigant is a gay or lesbian parent. Considering the "moral and legal climate predating the transitional constitution",<sup>65</sup> it is not surprising that the first case to come before the South African courts was only the 1994 case of *Van Rooyen v Van Rooyen*.<sup>66</sup>

This was a case in which a lesbian mother sought access to her two children, aged 11 and 9½ years. The parties had been divorced for six years during which time, the mother exercised liberal rights of access. The mother subsequently formed a lesbian relationship with another woman whom she moved in with. The latter relationship caused a change in the father's attitude towards the applicant mother and her rights of access. The mother in an attempt to define her rights of access sought relief from the courts. In defining access, Flemming J stated that it was not the suitability of the mother but her lesbianism that was in question. The court stated that the views of the custodian parent were significant and would be taken into account.<sup>67</sup> The court considered the reports of the family counsellor and two psychologists. The submissions of the family counsellor were dismissed because it dealt with the "suitability" of the mother and not the "desirability of access".<sup>68</sup> The expert witnesses did not oppose the idea of sleep-over access, however the

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<sup>65</sup> C Lind 'Sexual Orientation, Family Law and the Transitional Constitution (1995) 112 *South African Law Journal* 481, at 488.

<sup>66</sup> 1994 (2) SA 325 (W).

<sup>67</sup> Ibid, at 327 D.

judge was concerned that the children "may obtain confusing signals"<sup>69</sup> with regard to sexuality.<sup>70</sup> Even in the absence of the expert evidence the judge had formulated his own opinions.

"What the experts say is to me so self-evident that, even without them, I believe that any right-thinking person would say that it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop".<sup>71</sup>

A constraint was also placed on the mother when she had to choose between her lifestyle and her children.<sup>72</sup> That children should stay away from "confusing or wrong signals" occupied much of Flemming J's discussion.<sup>73</sup> He stated that children that witness gay and lesbian relationships would be confused about gender identity. Wrong signals would be connoted if the applicant and her lesbian partner shared a bed,<sup>74</sup> displayed affection or wore male apparel.<sup>75</sup> The lesbian mother was awarded access subject to the condition that the applicant and partner were not to share a bedroom during the weekends. In addition, the mother and children were not to "sleep under the same roof" as the mother's partner during holidays.<sup>76</sup> According to Flemming J, a weekend with the mother's partner being in the same house, although in a different room, was not so detrimental to the children. He was of the view that

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<sup>68</sup> Ibid, at 327 G-H.

<sup>69</sup> Ibid, at 328 C-D.

<sup>70</sup> Ibid, at 329A.

<sup>71</sup> Ibid, at 328 I- 329 A.

<sup>72</sup> Ibid, at 329 F-G.

<sup>73</sup> Ibid, 328 C-D, 328 I - 329 A and 329 I - 330 C.

<sup>74</sup> Ibid, at 329 I-J.

<sup>75</sup> Ibid, at 330 B-C.

<sup>76</sup> Ibid, at 331 F-H.



the latter is counterbalanced by the children spending the remaining twenty nine days with their father, under whom they would have proper guidance regarding “normal sexuality”.

The judge acknowledged that the relationship between the mother and children was in the best interest of the children,<sup>77</sup> but nevertheless he limited access by the lesbian mother. Ironically, the mother had enjoyed access for the five or six years preceding the trial and the court found that there was no “negative impact”.<sup>78</sup> On the one hand, it was stated that the interests of the mother must be respected but on the other hand, by limiting her rights of access, the judge was dictating to her as to how she should live.<sup>79</sup> One of the conditions of the court order was that the lesbian mother was “to take all reasonable steps and do all things necessary in order to prevent the children from being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism.”<sup>80</sup> According to Bonthuys,<sup>81</sup> the judge seemed to be presuming that the applicant did wear male apparel although there was no evidence to this effect. There is also a presumption that the children would have easy access to pornography.<sup>82</sup>

It is argued by the writer that heterosexuals may also possess pornographic material. However parents, whether heterosexual or gay, should be cautious to

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<sup>77</sup> Ibid, at 326.

<sup>78</sup> Ibid, 328 H.

<sup>79</sup> Ibid, at 329 G.

<sup>80</sup> Ibid, at 332 C-D.

<sup>81</sup> Bonthuys op cit note 62.

<sup>82</sup> Ibid.

expose their children to pornography because of the negative effects thereof. The judge's denial of access to the aforementioned material would be understandable if it related to pornographic material or if he had any evidence of it.

The court had ordered that the applicant was not to share a bedroom or "sleep under the same roof" with her partner.<sup>83</sup> Singh<sup>84</sup> questions whether constraints placed upon a lesbian mother would really be in the best interests of the child. She maintains that there is a degree of emotional attachment, which exists between the lesbian mother and her lover. Enforced deprivation would negatively affect the mother's emotional stability thus affecting the interests of the child hence the ricochet effect.

Clark<sup>85</sup> submits that the decision in *Van Rooyen v van Rooyen*<sup>86</sup> presumes that the gay or lesbian parent is unfit and reflects the subjective moral views of judges, generally.

De Vos<sup>87</sup> submits that throughout the judgment, it becomes clear that the judge regarded homosexuality as "abnormal" and contagious. Hence children should be protected from exposure to the ills of homosexuality. These conclusions were unsubstantiated because they were based on assumption rather than scientific evidence. The judge's opposition and hostility to homosexuality was

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<sup>83</sup> Ibid, at 331 F-H.

<sup>84</sup> D Singh 'Discrimination against Lesbians in Family Law' (1995) 2 *South African Journal on Human Rights* 571.

<sup>85</sup> B Clark 'Competing Custody Rights : New Concepts of "Family" and the Best Interests of the Child' (1998) xxxi *CILSA* 288, at 292.

<sup>86</sup> 1994 (2) SA 325 (W).

based on societal prejudices. According to Flemming J, his views reflect those of any "right thinking person".<sup>88</sup> De Vos submits that the latter would refer to "the average heterosexual white male in South Africa". Further, Flemming J's discrimination of the lesbian mother violates section 8 of the Constitution.<sup>89</sup>

It is submitted that we cannot deny custody or access because it runs parallel to the perceptions of society. The role of the court as upper guardian of children is to protect the interests of children and not to advance the views of society.

Mosikatsane<sup>90</sup> makes reference to the following statement in *Van Rooyen v Van Rooyen*, "the fact is that many people, as least as right thinking as the applicant, would frown upon the idea of calling the relationship created on the basis of two females a family".<sup>91</sup> He submits that the latter statement endorses the concept of the traditional heterosexual family, with the mother being the primary caregiver.<sup>92</sup> The ratio of the court suggests that a gay or lesbian is incapable of being a good parent. It is uncertain as to what the belief is attributed to. It could be the mother's failure to "overcome her homosexuality or the presence of the gay partner could pose as a problem".<sup>93</sup>

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<sup>87</sup> P de Vos 'Sexual Orientation Family Law and the Transitional Constitution' (1995) 12 *South African Law Journal* 687, 690-691.

<sup>88</sup> 1994 (2) SA 325 (W), at 328 I - 329 A.

<sup>89</sup> Of the Republic of South Africa of 1993.

<sup>90</sup> T.L Mosikatsane 'Gay and Lesbian Adoptions and the Best Interests Standard : A Critical Analytical Perspective' in *R Keightley Children's Rights* (1996) 114, at 120.

<sup>91</sup> 1994 (2) SA 325 (W), at 326 I-J.

<sup>92</sup> Mosikatsane op cit note 90.

<sup>93</sup> Mosikatsane op cit note 90, at 129.

The judge was concerned about the "wrong signals" that the mother's conduct would send to the children.<sup>94</sup> Flemming J was assuming that social factors and the child's home environment would be responsible for the sexual orientation that a child adopts. This assumption contradicts empirical research.<sup>95</sup> Steyn<sup>96</sup> also acknowledges that there seems to be a fear that the children would turn out to be gays or lesbians but emphasises that there is no scientific evidence to support such a theory.

Flemming J seemed to have rubber stamped the views of the two psychologists. Even in the absence of expert evidence the judge had formulated his own opinions.<sup>97</sup> This reeks of subjectivity and bias in the courtroom, a litigant's greatest fear. The use of the words "right thinking person" by the learned judge is a reference to the attitude of the heterosexual and what he considers to be normal. It would seem that majoritarian values are the norm and any deviation from such is intolerable and labelled as being confusing. In keeping with the spirit of the Constitution irrespective of ones own subjective views one needs to be tolerant of persons who are different.

A case which followed *Van Rooyen v Van Rooyen*<sup>98</sup> and which was decided after the Constitution of 1996, was *V v V*.<sup>99</sup> The parties in the latter case had two children aged twelve and thirteen years. Since their separation they had shared joint custody. However during divorce proceedings the father claimed

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<sup>94</sup> 1994 (2) SA 325 (W), at 328 C-D.

<sup>95</sup> See chapter 1, at 16-22.

<sup>96</sup> E Steyn 'From Closet to Constitution : The South African Gay Family Rights Odyssey' 1998 *The Changing Family International Perspectives on the Family and Family Law* 405, at 428.

<sup>97</sup> Ibid, at 328 J - 329 A.

<sup>98</sup> 1994 (2) SA 325 (W).

sole custody on the basis of the mother's lesbianism and mental disorder. The court had to determine the mother's suitability as a parent. The plaintiff husband was very concerned that the children would be exposed to the lesbian relationship and objected to the defendant having any contact with her partner whilst the children were present.<sup>100</sup> The experts called in by both parties did not regard the mother's sexual orientation as being relevant or of issue.<sup>101</sup> However, Foxcroft J stated that this does not mean "that the plaintiff is not entitled to believe it may present a problem. He is fully entitled to protect his children against what he perceives to be harmful influences". However, it had to be established whether those fears were real and sound.<sup>102</sup> The plaintiff also expressed concern that the defendant was not a fit mother because of her mental condition. However the judge concluded that it was the mother's lesbianism and not her mental condition which was the plaintiff's cause of concern and the basis of his application for sole custody.<sup>103</sup> He stated further that had the latter been an issue of concern, the plaintiff would not have agreed to the earlier joint custody arrangement.<sup>104</sup> The plaintiff relied on *Van Rooyen v Van Rooyen*.<sup>105</sup> However, Foxcroft J maintained that it was politically incorrect to regard homosexuality as being "abnormal" in view of the equality clause as contained in section 9 of the Constitution.<sup>106</sup> The court found that the mother, despite her history of child abuse and a mental condition, was a strong and capable person and was a good and suitable mother and should therefore be awarded access. He stated that to limit the mother's visits because

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<sup>99</sup> 1998 (4) SA 169 (C).

<sup>100</sup> Ibid, at 181.

<sup>101</sup> Ibid, at 182.

<sup>102</sup> Ibid, at 182 D-E.

<sup>103</sup> Ibid, at 187.

<sup>104</sup> Ibid, at 188.

of her lifestyle would be unfair to her and also to her children. "They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other".<sup>107</sup> The father was deeply angered by his wife's breach of an earlier agreement because she cohabited with her partner whilst the children were present in the home. However the court held that the father's anger did not justify the children being deprived of mothering. The interest of the children was paramount and the defendant could not be punished at the expense of the children's interest.<sup>108</sup> The relationship between the parents was far from cordial, considering the accusations the father made regarding the mother's instability and lesbianism. Notwithstanding, joint custody was awarded.<sup>109</sup>

*V v V*<sup>110</sup> could be hailed by some as a victory for gay parents however I have some reservations. *V v V*<sup>111</sup> has not overruled *Van Rooyen v Van Rooyen*.<sup>112</sup> The court applied the best interest rule by reference to the criteria in *McCall v McCall*.<sup>113</sup> The court also acknowledged the mother's right to equality and that she should not be unfairly discriminated against on the basis of her sexual

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<sup>105</sup> 1994 (2) SA 325 (W), at 329 I-330 B.

<sup>106</sup> Act 108 of 1996 hereinafter referred to as the Constitution.

<sup>107</sup> *Ibid.*, at 192 A-E.

<sup>108</sup> *Ibid.*, at 192.

<sup>109</sup> See *Schlesbusch v Schlesbusch* 1988 (4) SA 548 (E)  
*Pinion v Pinion* 1994 (2) SA 725 (D).

<sup>110</sup> 1998 (4) SA 169 (C).

<sup>111</sup> *Ibid.*.

<sup>112</sup> 1994 (2) SA 325 (W).

orientation.<sup>114</sup> The judge accepted that the mother was a capable and fit parent but went on to state that the mother should not be deprived of a relationship of her children because of her "lifestyle". To do that would cause the children to grow up with the belief "that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction". Despite the expert's report that the mother's lesbianism did not constitute a moral or a psychological threat to the children,<sup>115</sup> the judge's aforementioned statement suggests a distinction between parental fitness and a lesbian lifestyle. It would appear that notwithstanding the Bill of Rights he was still of the view that the mother's lifestyle would negatively influence the children. The judge suggests that the mother's lesbianism would cause possible harm, when he states that the children can decide later in life, as to which lifestyle would cause more harm. The judge leaves the decision to the children. This is alarming considering the best interest rule and also that the court is upper guardian of all children.

In *Mohapi v Mohapi*<sup>116</sup> the mother who had legal custody, applied for the return of her daughter. She was living in a lesbian relationship and she alleged that her daughter had a good relationship with her partner. Although the father had objected to the mother's sexual orientation, the court held that the latter was not a factor to be taken into account.

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<sup>113</sup> 1994 (3) SA 201 (C).

<sup>114</sup> 1998 (4) SA 169 (C), at 189.

<sup>115</sup> Ibid, at 182.

<sup>116</sup> WLD 1998, unreported. quoted in R. Louw 'Gay and Lesbian Partner Immigration and the Redefining of Family: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*' (2000) 16 *South African Journal of Human Rights* 313, at 315.

In *Greyling v Minister of Welfare and Population Development*<sup>117</sup> the applicant had been divorced for three years and had obtained custody of the minor daughter. The applicant's parents objected to her lesbian relationship and applied to the court for the child to be removed from their daughter and to be placed with them. The magistrate removed the child from the mother on the basis that the child would suffer psychological harm. Section 13 of the Child Care Act<sup>118</sup> authorises the magistrate to cause such removal if the child is in "need of care". The court overturned the decision of the court *a quo* and returned the child to the lesbian mother.

*Van Rooyen v Van Rooyen*<sup>119</sup> came before the courts once again. The daughter, Karen who was now seventeen years old, experienced problems with her father and expressed a desire to live with her mother. It was discovered from her diary that she had formed an intimate relationship with her boyfriend. The father adopted strict disciplinary measures, which included termination of social as well as extramural school activities. This resulted in the daughter suffering from depression and the latter impacted negatively on her studies. The psychologist that the applicant had consulted concluded that Karen was suffering from emotional abuse. He stated that for Karen to remain with her father would be contrary to her interests. Bertelsmann J, relied on the criteria set out in *McCall v McCall*<sup>120</sup> and held that it was in the best interests of the child that the mother be awarded custody. The outcome of the decision would mean that Karen would be separated from her sibling. However the judge said

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<sup>117</sup> Case no: 98/8197 - WLD, unreported.

<sup>118</sup> 74 of 1983.

<sup>119</sup> Case no: 20311/2000 unreported.

<sup>120</sup> 1994 (3) SA 201 (C), at 204 J - 205 G.



that this problem could be resolved by an access arrangement where both the children could spend time together. The sexual orientation of the mother was not in issue. When commenting on Flemming J's concern of the children being exposed to "confusing signals",<sup>121</sup> Bertelsmann J stated, that it was unconstitutional to regard a lesbian relationship as being abnormal. It is interesting to note that notwithstanding Flemming J's fear of future scars, the minor had formed a heterosexual relationship.

The father's homosexuality was brought to the attention of the court in *Ex Parte Critchfield and Another*.<sup>122</sup> The court heard that the father had homosexual encounters both before and after his marriage. The court discarded this factor in the custody determination. Willis AJ said, "certainly in a society such as ours which proscribes discrimination on the basis of sexual orientation, these encounters can be viewed in no more serious a light than conventional adultery."<sup>123</sup> The latter would be a concern if it threatened the welfare of the children.<sup>124</sup> The judge found that there was no "risk of the so-called confusing signals"<sup>125</sup> that was referred to in *Van Rooyen v Van Rooyen*.<sup>126</sup> The judge linked a gay and lesbian lifestyle to adultery. The latter constitutes a breach of trust and is viewed by many as immoral. The judge's comments suggest that he is still labouring under the perception that a gay and lesbian lifestyle may expose children to "confusing signals". This judgment reflects that not much has changed since the *Van Rooyen* case.<sup>127</sup>

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<sup>121</sup> Ibid, at 328 I - 329 A.

<sup>122</sup> 1999 (3) SA 132 (W), at 139 B-C.

<sup>123</sup> Ibid, at 139 E.

<sup>124</sup> Ibid.

<sup>125</sup> 1999 (3) SA 132 (W), at 139 F.

<sup>126</sup> 1994 (2) SA 325 (W), at 328 D.

Although the judges are compelled by the Constitution to recognise the rights of gays and lesbians<sup>128</sup> their remarks reflect prejudice and homophobic attitudes. "The fact that a particular judge would choose to raise her own children with a different set of moral beliefs, or that the judge does not approve of a parent's moral beliefs should not constitute harm to a child".<sup>129</sup>

The courts need only to consider the sexual conduct of the gay or lesbian parent in so far as they prejudice the interest of the children. Clark maintains that any sexual conduct that is harmful to a child, be it of a homosexual or a heterosexual parent must be taken into account. She distinguished between intimate and affectionate conduct indicating that the latter would educate the child concerning relationships whilst the former might prove to be harmful. Unlike Flemming J in *Van Rooyen v Van Rooyen*,<sup>130</sup> Clark submitted that there was no substantiated evidence, that affection displayed between lesbians would cause harm. Another factor to be taken into account is the character of the third party with whom the parent has informed a relationship. Character traits which would adversely affect the child, may be taken into account, for example drug addiction, but not characteristics such as race, religion or sexual orientation.<sup>131</sup> According to Clark<sup>132</sup> the court should rely on conclusive evidence that harm has been caused. There must be proof of immediate, definite, defined harm and not harm which is described in general terms and based on speculation. Because of misconceptions about what harms children,

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<sup>127</sup> 1994 (2) SA 325 (W).

<sup>128</sup> Section 9 of Constitution 108 of 1996.

<sup>129</sup> Clark op cit note 85, at 305.

<sup>130</sup> 1994 (2) SA 325 (W).

<sup>131</sup> Clark op cit note 85, at 303.

<sup>132</sup> Clarke op cit note 85, at 304.

gay and lesbian parents have often been placed in the precarious position of balancing what their children need against what society and the courts would allow.

The underlying concerns and deep - seated fears expressed for the children of homosexual parents vary. They are as follows:

- i) Homosexuality is a mental illness and children should be kept away from gays and lesbians

For many years homosexuality has been equated with mental illness and mental instability.<sup>133</sup> This perception had been held, not only in America but also throughout the western world. This perception had a dramatic effect on custody cases, which involved gay and lesbian parents because it was for the benefit and interests of the child if they steered clear from a group of mentally unstable parents<sup>134</sup>.

However, in 1980 the American Psychiatric Association removed homosexuality from its list of mental illnesses.<sup>135</sup> Notwithstanding the removal of the latter from the list of mental illnesses, some courts have been slow to accept the information.

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<sup>133</sup> S Susoeff 'Assessing Children's Best Interests When a Parent is Gay or Lesbian: Towards a Rational Custody Standard' (1985) 32 *University of California, Los Angeles Law Review* 852, at 877.

<sup>134</sup> Ibid.

<sup>135</sup> R Green 'The Best Interests of the Child with a Lesbian Mother' (1982) 10 (1) *Bulletin of American Psychiatry and the Law* 715.

## ii) Sexual Molestation of Children

No studies have been undertaken in South Africa regarding sexual molestation of children by gay and lesbian parents.

In *re J.S and C*, the New Jersey Supreme Court expressed the fear that gay fathers who obtained custody would molest their sons especially those fathers who have younger sons.<sup>136</sup> In *re Appeal Prima County, Juvenile Action*, the court was so bold as to ask a bisexual man, who was applying for the adoption of a child, whether he would molest the child or convert him to homosexuality.<sup>137</sup>

In the case of *J.L.P. (H) v D.J.P.*<sup>138</sup> the court did not grant stay over access to the gay father for fear of the child being molested. Lesbians are also targeted for being molesters, even though women commit only 3% of child molestation.<sup>139</sup> In *N.K.M. v L.E.M.*, a ten- year- old girl was removed from the custody of her mother and she was placed with her father. The court rationalized this, by highlighting the child's fondness and close relationship with the mother's lover, which the court linked to child molestation.<sup>140</sup>

According to the empirical evidence, there is a greater possibility that heterosexuals as opposed to gays and lesbians would molest children.<sup>141</sup>

Wishard maintains that sexual molestation cases where the perpetrator was a gay or lesbian, are few and far between and certainly not sufficient to conclude

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<sup>136</sup> 129 N.J. Super. 489, 324 A.2d 90 (Law. Div. 1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div.).

<sup>137</sup> B-10489, 15 Ariz. 335, 727 P.2d 830 (1986).

<sup>138</sup> 643 S.W. 2d 865 (Mo. Ct. App. 1982).

<sup>139</sup> H Curry and A Clifford *A Legal Guide for Lesbians & Gay Couples* 3<sup>rd</sup> ed (1985) 131.

<sup>140</sup> 606 S.W. 2d 179, 183 (Mo. Ct. App. 1980).

that gays and lesbians are child molesters. He submits that it is a myth that homosexuality is created when a “young man is seduced by an older man.”<sup>142</sup> Molestation can be committed by women and men but is more often committed by men than women. The man could be heterosexual or gay, however, evidence indicates the former. According to Curry and Clifford, 97% of child molesters are heterosexual males and 87% of the victims are females.<sup>143</sup>

In 1961 a study indicated that child molestation was more prevalent among heterosexuals. According to a 1978 survey of clinical psychologists and psychiatrists over a period of 300 years in practice, there was not even a single incident of child molestation where the perpetrator was gay.<sup>144</sup> As far as the child is concerned, the perpetrator makes no distinction in relation to the gender of the child.<sup>145</sup>

From the evidence above it would appear that there is also no correlation between child molestation and homosexuality.

## ii) Teasing, Taunting and Harassment of Children

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<sup>141</sup> D.R Wishard 'Out of the Closet and into the Courts: Homosexual Fathers and Child Custody' (1989) 93 *Dickinson Law Review* 401, at 411.

<sup>142</sup> Ibid.

<sup>143</sup> Curry and Clifford op cit note 139, at 131.

<sup>144</sup> Suseoff op cit note 133, at 881.

<sup>145</sup> P Patterson and M.B King 'Homosexuality and Parenthood' (1991) 303 *British Medical Journal* 295, at 296.

In *V v V*<sup>146</sup> the issue of teasing, taunting and harassment of the children by their peers was raised. The court held that the children were comfortable with their mother's lifestyle and this was reflected by the children inviting their friends for sleepovers whilst both the mother and partner were present in the house.

Lind advises that a greater acceptance of gays and lesbians would prevent ridicule by society. He adds that "prejudice itself cannot be an acceptable basis for pursuing discrimination of this kind".<sup>147</sup> The courts cannot ignore the possibility that the child will be harassed by his peers and society generally. It must be questioned whether social stigma is sufficient to deny custody or access? This aspect was first argued in *Palmore v Sidoti*,<sup>148</sup> where a decision of the trial court placed custody of the child with the white father. The mother had since married a black man and the trial court feared that the presence of a black stepfather would cause the child to be teased. The United States Supreme Court recognized that by denying custody it would be condoning or even promoting society's prejudices and biases. It was very succinctly put by the court "...the Constitution cannot control prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect."<sup>149</sup>

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<sup>146</sup> 1998 (4) SA 169 (C), at 190.

<sup>147</sup> Lind op cit note 65, at 498.

<sup>148</sup> 466 U. S. 429 (1984).

<sup>149</sup> Ibid, at 433.

The court in *M.A.B v R.B.*<sup>150</sup> followed the decision of *Palmore v Sidoti*.<sup>151</sup> In *casu*, the court acknowledged that there would be adverse criticisms and social pressures, which the boy would face. Notwithstanding, the court held that denying custody would not remove these social pressures in any way.<sup>152</sup>

In *M.P v S.P.*, the New Jersey Court took a similar view in awarding custody and held that harassment would be present and would not simply disappear if custody were denied to the gay and lesbian parent. The court went so far as to say that teasing, taunting and harassment was good for a child and would assist and equip the latter in dealing with society and in the formation of his or her own perceptions.<sup>153</sup> That the child would be subjected to jeering and taunts by his peers and by society generally is real and must be faced up to. Firstly, there is a need to look at the extent of social harassment. Secondly, the courts have to examine the harm that such harassment causes to the child. Finally, before denying custody the court must be satisfied that such denial will eliminate the harassment.

iii) That the Children of Gay and Lesbian Parents would also become Homosexual

There is no empirical study that substantiates this notion.<sup>154</sup>

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<sup>150</sup> 134 Misc. 2d 317, 324, 510 N.Y.S. 2d 960, 963 – 64 (1986).

<sup>151</sup> 466 U. S. 429 (1984).

<sup>152</sup> *M. A. B. v R. B.*, at 323.

<sup>153</sup> 169 N.J. Super. 425, at 436-39, 404 A.2d 1256, 1262 –63 (App. Div 1979).

## 2.3 Sexual Orientation and the Constitution

### **Sexual Orientation of the Gay and Lesbian Parent**

There are various sections of the Constitution which are relevant to and which guarantee the rights of gay and lesbian parents. Section 7 of the Bill of Rights reaffirms South Africa's commitment to equality and democracy. Section 7 (1) reads, " this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".<sup>155</sup>

#### 2.3.1 Section 9

The equality clause contained in the Bill of Rights is a core provision of the Constitution.<sup>156</sup>

Section 9 stipulates:

- (1) "Everyone is equal before the law and has  
the right to equal protection and benefit of  
the law.

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<sup>154</sup> See Chapter 1, at 16-22.

<sup>155</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>156</sup> G Carpenter 'Motifs inscribed on our Social Fabric : Equality in *Brink v Kitshoff*' (1997) 13 *South African Journal of Human Rights* 304, *National Coalition of Gay and Lesbian Equality v Minister*



(2) Equality includes the full and equal enjoyment

of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must

be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

The phrase “equal benefit” of the law was obtained from the Canadian Charter of Rights <sup>157</sup>. However, persons in different circumstances might require different treatment. Sometimes the needs and interests of a certain category of persons demand different treatment.<sup>158</sup> According to the Aristotelian model equals must be treated equally and unequals, unequally. The question posed by Cachalia is, who are the equals?<sup>159</sup> The Canadian courts have used the similarly situated test.<sup>160</sup> This test is not watertight because in *Andrew v Law Society of British Columbia*,<sup>161</sup> the court said there was no criteria for determining who was similarly situated and who was not. In *President of the Republic of South Africa and Another v Hugo*,<sup>162</sup> the court said “we need therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by

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<sup>157</sup> Schedule B to the Constitution Act of 1982, Part I, Canadian Charter of Rights and Freedoms hereinafter referred to as Canadian Charter of Rights or the Charter.

<sup>158</sup> M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman *Constitutional Law of South Africa* 1ed (1996) 14 - 3.

<sup>159</sup> A Cachalia, H Cheadle, D Davis, N Haysom, P Maduna and G Marcus *Fundamental Rights in the New Constitution* Juta, Cape Town 1ed (1994) 26.

<sup>160</sup> Ibid.

<sup>161</sup> 1989 56 DLR (4<sup>th</sup>) 1, at 11-13.

<sup>162</sup> 1997 (4) SA 1 (CC); 1997 (6) BCLR 708; at para 41.

insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context." The law cannot accord equal rights to gays and lesbians because to do that would ignore the differences and would result in inequality. Currently gays and lesbians are excluded from marriage. In order for gays and lesbians to have equal benefit and protection of the law there has to sometimes be a different set of rules to achieve equality. To recognise the union of members of the same sex there has to be an application of different rules to that which is applicable to heterosexuals. Yet it would result in equal treatment.<sup>163</sup> It is submitted that the sanctioning of same-sex unions would result in positive attitudes towards gay parenting.

The provisions of section 9(2) applicable to disadvantaged groups justify different treatment to remedy past discrimination.

According to Devenish<sup>164</sup> a person claiming that his right to equality has been violated must prove the following:

- 1) that the applicant has been treated differently;

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<sup>163</sup> Lind op cit note 65, at 494.

<sup>164</sup> G. E Devenish *A Commentary on the South African Bill of Rights* 1ed (1999) 42.

2) that there is no rational connection between the means and the objective.

Devenish further argues that if the section 9 (1) enquiry fails, the applicant must prove “unfair discrimination”. To show unfair discrimination, the applicant must prove that:

- 1) he has been treated differently;
- 2) he has been differentiated against based on one of the grounds as enumerated by section 9 (3)<sup>165</sup>

*Harksen v Lane NO and Others*<sup>166</sup> is a good illustration of how an applicant can challenge laws with an equality based approach. The applicant in this matter was Mrs Harksen, who was married out of community of property to Mr Harksen. In terms of section 21 (1) of the Insolvency Act 24 of 1936 "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate, and to empower the master or trustee to deal with such property accordingly ..."<sup>167</sup> By virtue of the aforementioned section, the property of Mrs Harksen was attached. Mrs Harksen referred to section 28 of the interim

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<sup>165</sup> Ibid, at 42 and 43.

<sup>166</sup> 1998 (1) SA 300 (CC).

<sup>167</sup> Ibid, at 309 B.

Constitution,<sup>168</sup> which referred to property rights and in particular to section 28 (3). In terms of section 28 (3) any property expropriated in terms of any law must be duly compensated for. Mrs Harksen alleged that she did not receive such compensation. The purpose of section 21 was to ensure that property which belonged to the insolvent remained in the estate.<sup>169</sup> Goldstone J held that the effect of section 21 could not be regarded as an expropriation.<sup>170</sup> Hence section 21 did not contravene section 28 (3) of the Constitution.

The applicant also contended that section 21 was in contravention of the equality clause. In developing the equality jurisprudence<sup>171</sup> the court set out the following test which is followed by the courts.<sup>172</sup> The first stage of the enquiry is whether the impugned provision differentiates between people or categories of people. If it is answered in the affirmative, the second stage of the enquiry is that there must be a rational connection between the differentiation and the legitimate governmental purpose which the differentiation seeks to achieve.

If the differentiation does not constitute a violation of section 8 (1) it may still constitute a contravention of section 8 (2), if it amounts to unfair discrimination.

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<sup>168</sup> 200 of 1993 hereinafter referred to as the interim Constitution.

<sup>169</sup> 1998 (1) SA 300 (CC), at 318 E.

<sup>170</sup> Ibid, at 318 F.

<sup>171</sup> "The equality jurisprudence and analysis developed by the court in relation to section 8 of the interim Constitution is applicable equally to section 9 of the 1996 Constitution notwithstanding certain differences in the wording of these provisions".

<sup>172</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

If the second stage of the enquiry for section 8 (1) is answered in the affirmative, that is, if there is a rational connection to a legitimate governmental purpose, it becomes necessary to conduct an enquiry in terms of section 8 (2). This step is necessary to establish that irrespective of the existing legitimate governmental purpose, the differentiation amounts to unfair discrimination.<sup>173</sup>

Section 8 (2) also has a two stage enquiry namely; whether the differentiation amounts to discrimination. Secondly, if answered in the affirmative whether the discrimination is unfair.<sup>174</sup> If the discrimination relates to a specified ground, unfairness is presumed. If the discrimination relates to an unspecified ground, unfairness must be established before a breach of section 8 (2) is proved.

The court in the *Harksen* case,<sup>175</sup> held that section 21 differentiated between the solvent spouse of an insolvent estate and creditors or persons who have had business dealings with the insolvent. However Goldstone J stated, that there was a rational connection between the differentiation and the legitimate governmental purpose. The object of section 21 was to assist the trustee to determine which property belonged to the insolvent estate and to prevent collusion to the detriment of creditors.<sup>176</sup> The court concluded that section 21 did not violate section 8 (1). The provisions of section 21 discriminated

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<sup>173</sup> 1998 (1) SA 300 (CC), at 321 D-E.

<sup>174</sup> Ibid, at 321 E-F.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid, at 325.

against the solvent spouse of an insolvent, however it did not constitute unfair discrimination.

The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>177</sup> is an example of the first application of the test contained in section 9 of the 1996 Constitution. An application was made to confirm the constitutional invalidity of section 20A of the Sexual Offences Act<sup>178</sup> and the inclusion of sodomy as an item in two other statutes.<sup>179</sup> The High Court had also declared the common law crime of sodomy and the commission of an unnatural sexual offence to be unconstitutional.<sup>180</sup> Section 20A<sup>181</sup> prohibited any conduct which "stimulates sexual passion or gives sexual gratification"<sup>182</sup>. Ackermann J in displaying his total disapproval of the section gives the following example, if a gay couple in an expression of love share a passionate kiss, they would be guilty of an offence. A similar display of affection by a lesbian or heterosexual couple would be disregarded by the law. This is discriminatory and sexual orientation being a specified ground, is presumed to be unfair. Although the constitutional validity of the common law offence of sodomy was not before the court, it was found that the latter was incidental to the question of its inclusion to Schedule 1 of the Criminal Procedure Act and to the Schedule to the Security Officers Act.<sup>183</sup> The court held that the common law crime of sodomy was constitutionally invalid in its entirety. The

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<sup>177</sup> 1999 (1) SA 6 (CC).

<sup>178</sup> Of 1957.

<sup>179</sup> Schedule 1 of the Criminal Procedure Act, 1977,  
Schedule to the Security Officers Act, 1987.

<sup>180</sup> 1998 (6) BCLR 726 (W).

<sup>181</sup> Of Sexual Offences Act, 1957.

<sup>182</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), at 43 G-H.

<sup>183</sup> Of 1977.

inclusion of the common-law offence of sodomy in the aforementioned statutes<sup>184</sup> was held to be inconsistent with the provisions of the Constitution.

Section 9 (3) makes reference to direct and indirect discrimination. Both types of discrimination are proscribed by section 9 (3). Direct discrimination is when a person is discriminated against because of some characteristic or because of a characteristic attached to a certain group.<sup>185</sup> An example of direct discrimination would be that gay and lesbian parents, were to be denied custody of their children.

Indirect discrimination is when a neutral law, like one covering the requirements of a civil marriage, is applied to all persons and it has consequences on a group of persons which are discriminatory.<sup>186</sup> Marriage in South African law is currently a union between "one man and one woman" to the exclusion while it lasts of all others.<sup>187</sup> The institution of marriage applicable to all citizens, excludes gays and lesbians because the latter form unions with members of their own sex.

Marital status was not included in the interim Constitution but was specifically alluded to in section 9 (3). We live in a society where heterosexuality is the norm. Marriage is a "legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."<sup>188</sup> This definition bars the gay and lesbian from marriage. South Africa has a diverse

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<sup>184</sup> Of 1987.

<sup>185</sup> Schedule 1 of the Criminal Procedure Act, 1977.  
Schedule to the Security Officers Act, 1987.

<sup>186</sup> D Davis, H Cheadle and N Hayson *Fundamental Rights in the Constitution* 1ed (1997) 55.

<sup>187</sup> H. R Hahlo *The South African Law of Husband and Wife* 2ed (1963) 31.

<sup>188</sup> J. D Sinclair *The Law of Marriage* (1996) 305.



multi-cultural society and boasts a kaleidoscope of people. A narrow definition of marriage would not survive the current political climate. "The traditional legal definition has become outmoded and unacceptable to a large proportion of the population".<sup>189</sup> In *Dawood and Another, Shalabi, Thomas v Minister of Home Affairs*,<sup>190</sup> the court in emphasizing the importance of marriage and the family unit stated " ... we must take care not to entrench particular forms of family at the expense of other forms".<sup>191</sup> The case of *Langemaat v Minister of Safety and Security*,<sup>192</sup> was one which dealt with a contravention with section 9 (3). The applicant a woman, a member of the South African Police, had been living in a relationship with M, also a woman. Although not legally allowed to marry, they conducted their relationship as if it were a marriage. They owned a house and operated their finances jointly. Miss Langemaat applied to Polmed to register her partner as a dependant of the medical aid scheme. The application was refused. The applicant sought relief from the High Court. The issue before the court was whether the nature of the relationship between the applicant and M created a legal duty to maintain each other.<sup>193</sup> In terms of Regulation 30 (2) (b) of the South African Police Service Regulations, a dependant is "the legal spouse or widow or widower or a dependant child". The applicant's partner was excluded from this definition. The applicant contended that this exclusion was a contravention of section 9 (3) of the Constitution. Roux J, after an analysis of the Roman-Dutch law, concluded that a duty of support existed between gay and lesbian

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<sup>189</sup> Ibid.

<sup>190</sup> 2000 (8) BCLR 837 (CC).

<sup>191</sup> Ibid, at 859 (B).

<sup>192</sup> 1998 (3) SA 312 (T).

<sup>193</sup> Ibid, at 315 G-H.

couples.<sup>194</sup> The respondents on the other hand based their argument on section 36. They feared that if the court granted the application it would create a precedent for other unmarried persons. The court dismissed this argument and stated that a new precedent for unmarried persons would not necessarily be set because each application would be decided on its merit.<sup>195</sup> The *Langemaat* decision is hailed as a progressive decision which entrenched gay and lesbian rights. The judge acknowledged that gay and lesbian relationships were stable and were no different from heterosexual marriages.<sup>196</sup> At the same time, the court's analysis of the law in arriving at its conclusion is poor and incorrect. The court did not deal adequately with the challenged constitutional provisions. According to Louw,<sup>197</sup> the judge based his case on Roman-Dutch law instead of the Constitution.<sup>198</sup> The applicant relied on the specified grounds as enumerated in section 9(3). In this regard the court ought to have directed itself to *Harksen v Lane* NO<sup>199</sup> in which a detailed enquiry was set out. Instead the court chose to ignore the challenged constitutional provision. The Regulation<sup>200</sup> did differentiate between married and unmarried persons. It also discriminated between opposite-sex married couples and same-sex couples. The next stage of the enquiry is whether there is a rational connection between differentiation and the legitimate governmental purpose. According to Louw, in establishing whether there is a legitimate governmental purpose, one of the reasons that can be advocated is that of a financial

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<sup>194</sup> *Ibid*, at 314 E.

<sup>195</sup> *Ibid*, at 316 H-I.

<sup>196</sup> *Ibid*, at 317 D-F.

<sup>197</sup> R Louw '*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) : A Gay and Lesbian Victory but a Constitutional Travesty' (1995) 15 *South African Journal of Human Rights* 393, at 399.

<sup>198</sup> *Ibid*, at 316 F-G.

<sup>199</sup> 1998 (1) SA 300 (CC).

<sup>200</sup> 30 (2) (b) of the South African Police Service Regulations.

consideration. However he maintains that "for the fiscal constraint argument to succeed", there must be clear evidence on the financial impact that Polmed would suffer if the membership were to be extended.<sup>201</sup> Louw also questions the rationality of the exclusion to particular groups only. Although customary marriages were not recognised until 1998, the first spouse and children were admitted as dependants to the Scheme.<sup>202</sup> If the court finds that there was a rational connection between the differentiation and the legitimate governmental purpose, it could still amount to unfair discrimination if it contravenes section 9 (3). The enquiry is whether the discrimination was unfair. In *President of the Republic of South Africa v Hugo*,<sup>203</sup> the court stated that in determining whether the discrimination was unfair "it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination".<sup>204</sup> The court in the *Langemaat* case<sup>205</sup> ignored all these stages of the enquiry and focussed instead on Roman Dutch law. The decision is progressive in that it advances gay rights but lacks sound constitutional analysis.

Another case which dealt with the definition of family and marriage is that of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.<sup>206</sup> The applicants in this matter were gays and lesbians who had entered into "same-sex life partnerships". The applicants argued that their

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<sup>201</sup> Louw op cit note 197, at 399.

<sup>202</sup> Ibid.

<sup>203</sup> 1997 (4) SA 1 (CC).

<sup>204</sup> Ibid, at para 43.

<sup>205</sup> 1998 (3) SA 312 (T).

<sup>206</sup> 2000 (2) SA 1 (CC).

relationships were not recognised by the Aliens Control Act.<sup>207</sup> In terms of the Act, Home Affairs could facilitate the immigration of spouses of permanent South African residents. Gays and lesbians were not allowed to marry hence gay and lesbian foreign nationals that had entered into permanent relationships with South African citizens could not obtain temporary or permanent residence permits. The court had to decide whether the definition of spouse in the Aliens Control Act<sup>208</sup> extended to the gay or lesbian partner in a permanent same-sex union.

In defining family, the courts looked at the ability of the parents to procreate.<sup>209</sup> The court examined the various reasons why parents do not have children or choose to adopt. Sometimes spouses are unable to procreate, have no interest in sexual relations or choose to remain childless. The judge stated that the latter couples cannot be excluded from the definition of family. To do so would be demeaning to the parties especially in the case where the inability to procreate is beyond their control.<sup>210</sup> The court concluded that the ability to procreate was not a defining characteristic of marital relationships.<sup>211</sup> The court stated further that "homosexuals are capable of constituting a family, whether nuclear or extended, and of establiship, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses". The respondent argued that the object of the state was the protection of the traditional institution of marriage.<sup>212</sup> The court found that

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<sup>207</sup> 96 of 1991.

<sup>208</sup> *Ibid.*

<sup>209</sup> 2000 (2) SA 1 (CC), at 31 E.

<sup>210</sup> *Ibid.*, at 32 A - B.

<sup>211</sup> *Ibid.*, at 31 G.

<sup>212</sup> *Ibid.*, at 33.

there was no rational connection between the extending of benefits contained in section 25 (5)<sup>213</sup> and the protection of the institution of marriage. Court accordingly held that section 25 (5)<sup>214</sup> amounted to unfair discrimination and was unconstitutional.

In *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs*,<sup>215</sup> the court acknowledged that gays and lesbians constituted a family notwithstanding the fact that the institution of marriage was not available to them. Louw disapproves of the manner in which the court dealt with the issue of gay marriages. The court avoided dealing with the status of same-sex relationships. Louw also warns against the usage of the term "permanent same-sex life partnership". Some may regard this recognition of gay relationships as being progressive, but Louw cautions against its far reaching consequences. The introduction of such a term connotes that same-sex relationships although sanctioned, are different from other legal marriages and runs parallel to them.<sup>216</sup>

### 2.3.2 Section 10

Section 10 provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected”

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<sup>213</sup> Of the Aliens Control Act 96 of 1991.

<sup>214</sup> Ibid.

<sup>215</sup> 2000 (2) SA 1 (CC), at 35 E-G.

<sup>216</sup> R Louw 'Gay and Lesbian Partner Immigration and the Redefining of Family : *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*' (2000) 16 *South African Journal of Human Rights* 313, at 320-322.

South Africa has a history of discrimination not only on the basis of race but also on the basis of gender and sex. The majority of South African citizens "were treated as not having inherent worth, as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity."<sup>217</sup>

Section 10 may be interpreted as providing gays and lesbians with the right to be treated with human dignity in child custody disputes. This section also gives the gay or lesbian the concomitant right not to be stigmatized and excluded from their dignity as parents because of their sexual orientation. In *Dawood and Another, Shalabi and Another, Thomas and Another v Minister of Home Affairs and Others*,<sup>218</sup> the court said that in view of South Africa's apartheid history the concept of dignity is of core value and is entrenched in the Constitution.<sup>219</sup> Various applicants sought immigration permits. In all of these cases, one of the spouses was a South African citizen. The applicants applied to the High court to have various provisions of the Alien's Control Act<sup>220</sup> declared unconstitutional because they were inconsistent with the Constitution of the Republic of South Africa.<sup>221</sup> "The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal

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<sup>217</sup> *Prinsloo v Van de Linde and Another* 1997 (6) BCLR 759 (cc).

<sup>218</sup> 2000 (8) BCLR 837 (cc).

<sup>219</sup> 860 E-F.

<sup>220</sup> Alien's Control Act 96 of 1991.

<sup>221</sup> Act 108 of 1996.

fulfillment in an aspect of life that is of central significance".<sup>222</sup> According to the court in *Dawood*, any legislation which prohibits a marriage relationship or which prevents the spouses from honouring their obligations to each other is an infringement of the right to dignity.<sup>223</sup> The effect of section 25 (9) (b) was that the spouses would not be able to cohabit or honour their obligations to each other or their children. The applicants argued that their right to dignity had been violated. They argued further that "the right of children to family or parental care" contained in section 28 of the Constitution was violated.<sup>224</sup> The South African Constitution does not expressly protect the right to family life. However the rights are protected by various Human Rights law.<sup>225</sup> The court declared that section 25 (9) (b) violated the rights of dignity of foreign spouses who were married to South African citizens.

In *S v Makwanyane and Another*<sup>226</sup> it was stated that "the rights to life and dignity are the most important of all human rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value, these two rights above all others".<sup>227</sup> The court acknowledged that when a prisoner goes to prison his or her right to dignity is to a certain extent impaired. However, the right to dignity is maintained and not lost altogether.<sup>228</sup>

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<sup>222</sup> 2000 (8) BCLR 837 (CC), at 861 E-F.

<sup>223</sup> Ibid, at 861 F-G.

<sup>224</sup> Ibid, at 856 G-H.

<sup>225</sup> Article 16 of the Universal Declaration of Human Rights,  
Article 23 of the International Covenant on Civil and Political Rights,  
The African Charter on Human and Peoples Rights.

<sup>226</sup> 1995 (3) SA 391 (CC).

<sup>227</sup> Ibid, at 451 C-D.

<sup>228</sup> Ibid, at 450 F.

In *National Coalition of Gay and Lesbian Equality v Minister of Justice*, the court stated that the rights of dignity and equality are closely related. Although the applicants challenged the crime of sodomy on the basis of equality, Ackermann J advocated that it was also a violation of section 10 of the Constitution. Sodomy was a criminal stigma which associated gay men with common criminals and "degraded and devalued" them and was a violation of their dignity.<sup>229</sup>

The concept of dignity is linked to unfair discrimination. Discrimination was prohibited by the Constitution so as to protect the dignity of all citizens.<sup>230</sup> In *Hugo's* case, the Presidential Act was passed in which mothers of children under twelve, received a remission of sentence and early release from prison. The court stated that this Act<sup>231</sup> did not bar male prisoners from individually applying for State pardons. The court acknowledged that the Act<sup>232</sup> afforded certain privileges to mothers, that were denied to fathers but concluded that the dignity of the fathers was not impinged on.

There is another facet to the concept of dignity. In order for one to maintain his or her dignity there must be freedom of choice. Every individual has a will and in order to fully develop as human beings they need to exercise that will, without fear of being hindered. Freedom is inseparably linked to dignity.<sup>233</sup> According to Ackermann J, in *Ferreira's* case the court said, "our society must be one where persons are free to develop their personalities and skill, to

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<sup>229</sup> 1999 (1) SA 6 (CC), at 29.

<sup>230</sup> 1997 (4) SA 1 (CC), at 729 A-B.

<sup>231</sup> Presidential Act 17 of 1994.

<sup>232</sup> Ibid.



seek out their own ultimate fulfillment, to fulfil their own humanness and to question all received wisdom without limitations placed on them by the State".<sup>234</sup> It is submitted that the gay and lesbian parents' rights to dignity ensures that they have the freedom of choice in the lifestyle that they choose and at the same time may enjoy all the benefits of parenthood.

### 2.3.3 Section 14

Section 14 stipulates:

"Everyone has the right to privacy, which includes the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed."

Although not explicitly stated, the right to privacy includes the right to sexual privacy between consenting adults, the right to lifestyle privacy and the right to family privacy. In the case of *Van Rooyen v Van Rooyen*,<sup>235</sup> Flemming J ordered, that when the mother had access to the children on weekends, she was not to share a bedroom with her lover, and when she had access to them for the school holidays she was not to "sleep under the same roof" as her lover.<sup>236</sup> In making this order the judge crossed the barrier of privacy and delved into the domestic realm. Such an intrusion violates one's right to privacy. According

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<sup>233</sup> Ferreira 1996 (1) SA 1984 (CC), 1996 (1) BCLR 1 para 47-49.

<sup>234</sup> Ibid, at 29 C-D.

<sup>235</sup> 1994 (2) SA 325 (W).

<sup>236</sup> Ibid, at 331 G - H.

to Cameron, this argument for respect of privacy has another leg, it presupposes that homosexuality is disgusting and improper and should only be accepted if it is left to the confines of one's room.<sup>237</sup> According to Louw,<sup>238</sup> Katz's analysis of Cameron is that the latter is incorrect in his submission because all sexual activity is kept out of the public arena and no individual has obtained rights to engage in sexual activity in public.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackermann J said that one should note the context in which Cameron made those remarks. It was made at a time just before the inception of the Constitution. Cameron was strategising on ways in which the rights of the gays and lesbians ought to be protected. Cameron was in favour of sexual orientation being enumerated as a ground for non-discrimination. He did not believe that the privacy argument on its own would suffice as protection of gay and lesbians.

An individual has a certain degree of autonomy with regard to his or her own identity and family life. When the individual steps out of his personal boundary into the business and social sphere, this autonomy decreases.<sup>239</sup> Sexual preference and intimacy is protected by the right to privacy. If adults consensually engage in sexual relations, any external interference with that relationship would violate the constitutional right to privacy.<sup>240</sup> The court in

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<sup>237</sup> E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *South African Law Journal* 450, at 453.

<sup>238</sup> R Louw 'Sexual Orientation, Criminal Law and the Constitution: Privacy versus Equality' (1998) 11 *South African Journal of Criminal Justice* 375, at 383.

<sup>239</sup> *Bernstein v Bester* 1996 (2) SA 571 (CC).

<sup>240</sup> *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), at 30

*National Coalition of Gay and Lesbian Equality v Minister of Justice* in considering the constitutionality of inter alia the inclusion of sodomy in various statutes did not only examine the discrimination based on the right to equality but also on the right to privacy.

Louw<sup>241</sup> submits that Katz is incorrect in his interpretation, in that Cameron regards sexual orientation as encompassing much more than sexual relations and that it impacts on various issues such as employment and family relationships. Louw advocates that privacy includes the concept of identity. This suggests that a gay or lesbian has a right to his or her identity, an identity, which is not only to be tolerated but also to be accepted, and a right, which the state cannot interfere with. Notwithstanding Louw, in making reference to South African<sup>242</sup> as well as foreign case law<sup>243</sup> concludes that a privacy-based approach was weak and not adequate to challenge the laws.<sup>244</sup>

#### 2.3.4 Section 15

Section 15 stipulates:

“Everyone has the right to freedom of  
conscience, religion, thought, belief and  
opinion”

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A-C.

<sup>241</sup> Ibid.

<sup>242</sup> *Bernstein v Bester* 1996 (2) SA 571 (CC), at para 65.

<sup>243</sup> *Bowers v Hardwick* 29 L Ed 2d 140.

<sup>244</sup> *Baehr v Lewin* 74 Haw 530 (1993).

On the basis of the aforementioned section a gay or lesbian is entitled to his or her belief in the lifestyle that has been adopted as well as to the participation in the identity or cultural group of gays and lesbians.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>245</sup> the court had to consider the constitutional validity of section 20A of the Sexual Offences Act of 1957 and the inclusion of sodomy in certain statutes.<sup>246</sup> Sexual relationships between males were disapproved of by the majority of society because of religious beliefs and because some believed that sexual intercourse should only be engaged in for the purpose of procreation. Even though the objectives might be sincere the court drew attention to the fact that freedom of religion, belief and opinion were protected by the Constitution.<sup>247</sup>

The heterosexual parent may disapprove of the other parent's homosexuality and may also object to the children having any contact with such gay parent. The disapproval might be on religious grounds and he therefore would not want the children exposed to homosexuality. The gay or lesbian parent has recourse to the courts on the basis of section 15 like the applicants in *Christian Education SA v Minister of Education*.<sup>248</sup>

In the latter case, the applicants challenged the abolition of corporal punishment in schools, which they believed was a tenet of Christian religion.

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<sup>245</sup> 1999 (1) SA 6 (CC), at 32 B-E.

<sup>246</sup> Schedule 1 of the Criminal Procedure Act, 1977

Schedule to the Security Officers Act, 1987.

<sup>247</sup> 1999 (9) BCLR 951(SE).

Hence the abolition violated the rights of Christian parents in terms of the Constitution. The court enquired as to whether corporal punishment did form part of the Christian religion and if it did, the sincerity of the person in that belief. The court found that the applicants did not have a sincere belief that children in schools should receive corporal punishment. The applicants did not approve of girls in secondary schools receiving corporal discipline and acknowledged that there were other methods of chastisement.<sup>249</sup>

On the other hand the gay or lesbian parent may argue that he does not ascribe to these religious beliefs and that on the basis of section 15 he also has a right to freedom of religion. Such a parent might be an atheist or agnostic. In *Wittmann v Deutscher Schulverein, Pretoria and Others*,<sup>250</sup>

the court said that atheism was the very antithesis of religion and therefore one could not claim a right to freedom of religion on that basis. "Freedom of religion did not mean freedom from religion." However the applicant could still have constitutional protection on the basis of the latter part of section 15 and that is freedom of thought, belief and opinion. The applicant mother in the aforementioned case had enrolled her child at a private German school. The mother objected to her daughter attending religious classes.

From the above it can be seen that both the heterosexual and the gay and lesbian parent have competing rights, both protected by the Constitution. There has to be a balancing of these rights under section 36 which is the limitations clause.<sup>251</sup>

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<sup>248</sup> Ibid.

<sup>249</sup> Ibid, at 959.

<sup>250</sup> 1998 (4) SA 423 (T).

<sup>251</sup> Ibid, at 424 B-C.

One of the reasons why custody or access is denied to the gay or lesbian parent is because such a placement would affect the moral standards of the child.<sup>252</sup>

However, Bonthuys maintains that such an argument will not pass constitutional muster in view of section 15 of the Constitution.<sup>253</sup> The former argument presupposes that homosexuality is immoral. This assumption is unconstitutional because everyone has a right to their own belief. Majoritarian morality is not necessarily the correct position.

#### 2.3.5 Section 28:

Section 28 stipulates:

"(1) Every child has the right -

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(2) A child's best interests are of paramount importance in every matter concerning the child."

The common-law best interest rule has been constitutionalized in section 28 (2).<sup>254</sup> Both the South African Constitution<sup>255</sup> as well as international law regard the interest of children as being paramount in all matters concerning children. Article 3 (1) of the United Nations Convention on the Rights of the

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<sup>252</sup> J de Waal, I Currie and G Erasmus - *The Bill of Rights Handbook* 3 ed (2000) 265.

<sup>253</sup> E Bonthuys 'Awarding Access and Custody to homosexual Parents of Minor Children : A Discussion of *Van Rooyen v Van Rooyen*' (1994) *Stellenbosch Law Review* 298, at 310.

<sup>254</sup> Of the Constitution of the Republic of South Africa 108 of 1996.

Child provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".<sup>256</sup> As already discussed earlier,<sup>257</sup> the best interest rule lacks clarity and the application thereof, lacks uniformity. Section 28 also failed to provide the factors which the court ought to take into account when considering the best interests of the child. However it is clear, that the purpose of the clause is to protect the interest of children and not the right of parents.<sup>258</sup> *K v K*<sup>259</sup> applied the provisions of section 28 (2). The parties were both from the United States. They had divorced, in terms of which, the mother was awarded custody of their son and the father, liberal access. The mother subsequently prohibited the father from seeing the child on the basis of alleged sexual abuse. The father sought relief from the York County Family Court. The mother did not attend the hearing but instead abducted the child and moved to South Africa. The father who had not seen the child for two and a half years, applied to the South African Court. The court had to decide whether it was in the boy's interests to render a judgment regarding custody or to return him to the United States where the court *a quo* would hear the matter. The court was not satisfied that the child was settled in his new environment.<sup>260</sup> It was also not convinced that the child would be exposed to the dangers of physical or psychological harm.<sup>261</sup> The Hague Convention was premised on the assumption that the abduction of a child to another country is

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<sup>255</sup> Ibid.

<sup>256</sup> Of 1989 ratified by South Africa on 16 June 1995.

<sup>257</sup> See Awards of Custody in respect of Gay and Lesbian Parents.

<sup>258</sup> *SW v F* 1997 (1) SA 796 (O).

<sup>259</sup> 1999 (4) SA 691 (C), at 709 A-B.

<sup>260</sup> Ibid, at 707 B-C.

generally contrary to a child's interest. Van Heerden A J, stated that it would seem then that the court where the child resides and not the foreign court where the child is taken to, which is best qualified to decide the dispute.<sup>262</sup> The court concluded that the alleged sexual abuse occurred in the United States, the expert witnesses, both parties and their families were in the United States. Hence the mother was directed to go back to the United States so that the matter could be heard there.

The court could have adjourned the matter until the evidence was sent to South Africa. But the court doubted whether such a delay would be in Z's interests. The best interests of Z as envisaged by section 28 (2) was the paramount consideration. The court in an endeavour to ensure that the child was protected until the court in the United States of America could act as guardian, stipulated a list of conditions to be undertaken by both parties.

Section 28 (2) does not add to the common law best interest rule but merely serves to emphasize that the interests of the child is paramount.

In terms of section 28 (1) (b) a child is entitled to family or parental care. A child should not be separated from his or her parents unless it is in his or her interests, for example where the child has been abused or neglected. Devenish submits that the said section can be used by parents in support of an order for

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<sup>261</sup> Ibid, at 707 C-D.

<sup>262</sup> Ibid, at 706 B-C.



joint custody.<sup>263</sup> Section 28 (1) (b) can also be used in support of access rights because it acknowledges the benefit of a child-parent relationship.

### 2.3.6 Section 36

Section 36 stipulates:

- "(1) The rights in the Bill of Rights may be limited only in terms of the law of general application.
- (2) Limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
- (3) To determine whether limitations are reasonable and justifiable, all relevant factors must be taken into account including:
  - a. the nature of the right;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the relation between the limitation and its purpose; and
  - e. less restrictive means to achieve the purpose."

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<sup>263</sup> Devenish op cit note 164, at 392.

- (i) 36(1) Only in terms of a law of general application

The law limiting the right must be of general application. This means that the limitation may not be directed at specific individuals or applicable to a single set of circumstances. If the courts deny custody and access to the gay and lesbian parent on the basis of their homosexuality, they would undoubtedly be targeting specific individuals. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*,<sup>264</sup> the applicant argued that the common law crime of commission of an unnatural sexual offence was too vague to constitute a “law of general application” as is required by Section 36. By virtue of the law being vague, it also failed to fulfil the requirement of reasonableness. It was contended that an “unnatural sexual offence” is not clearly defined. A citizen needed to know exactly what the proscribed conduct was, and he had to be aware of the consequences when he violated such a law.<sup>265</sup>

In *President of the Republic of South Africa and Another v Hugo*,<sup>266</sup> the majority held that the Presidential Act which granted early release to mothers of young children did not violate the right to equality. Mokgoro J, in her concurring judgment, held that the Presidential Act amounted to unfair discrimination but that it was justified under section 33 (1) of the Constitution.<sup>267</sup> She stated that the Presidential

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<sup>264</sup> 1998 (6) BCLR 726 (W).

<sup>265</sup> Ibid, at 741 H-J.

<sup>266</sup> 1997 (6) BCLR 708 (CC).

<sup>267</sup> Of the Republic of South Africa 200 of 1993.

Act was a law of general application.<sup>268</sup> Kriegler J, also in a dissenting judgment, disagreed. He stated that the state award of early release to certain prisoners was an executive act of the government and did not amount to law. In addition it was not of "general application" because it was directed at specific individuals.<sup>269</sup>

- (ii) The limitation must be reasonable and justifiable in an open and democratic society based on freedom and equality. In determining what is justifiable, the courts must have regard to the dignity of an individual as well as to the good of society by taking into account various beliefs and lifestyles in our multicultural, heterogeneous society.<sup>270</sup> Our courts would therefore in many instances have to make value judgments by striking a balance between two interested parties, usually the State and the individual. In *S v Makwanyane and Another*<sup>271</sup> the court laid down certain factors that need to be taken into account when determining whether the limitation is reasonable and justifiable. These factors were adopted in the final Constitution and are now included in section 36.

I now propose to discuss these factors:

- (a) The Nature of the Right

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<sup>268</sup> 1997 (6) BCLR 708 (CC), at 752 G.

<sup>269</sup> 1997 (6) BCLR 708 (CC), at 745.

<sup>270</sup> Cachalia op cit note 159, at 115.

<sup>271</sup> 1995 (3) SA 391 (CC).

The courts have to establish the importance of the right, some rights weigh more heavily than others.<sup>272</sup> With regard to the gay and lesbian parent, when one looks at the nature of the right one sees that the rights that are being protected are basic human rights entrenched in almost every Constitution. When the right that is being limited is closely connected to the spirit and the purpose of the Constitution, which is promoting human dignity, equality and freedom, then the courts ought not to be too eager to limit such a right.<sup>273</sup> The right to equality and dignity falls in this category.

(b) Importance of the Purpose of the Limitation

The purpose of the limitation must be consistent with the objectives of the State, which is to “promote values that underlie an open and democratic society based on human dignity, equality and freedom.”<sup>274</sup> It could be argued that the purpose of limiting the rights of the gay and lesbian parent to custody and access is to protect the interest of the children.<sup>275</sup> It is submitted that there must be clear evidence before the court that the gay or lesbian lifestyle has exposed the child to harm. It would not suffice to limit the parent's right so as to protect the moral values of one sector of society.<sup>276</sup>

(c) Nature and Extent of the Limitation

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<sup>272</sup> De Waal, Currie and Erasmus op cit note 252, at 144.

<sup>273</sup> Davis op cit note 186, at 319.

<sup>274</sup> Section 39.

<sup>275</sup> *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).

<sup>276</sup> De Waal, Currie and Erasmus op cit note 252, at 146

After establishing what the right is, the court has to examine the limitation and its severity. The limitation must do no more than is necessary to protect the right.<sup>277</sup> The courts in adopting the rationality test should ask the question, is the objective of protecting the interests of the children directly proportional to the harm caused to the parent in the denial of custody and access?

(d) Less Restrictive means to Achieve the Purpose

This test is linked to (c) above and enquires whether the individual would suffer harm and whether there is some other means, which is less restrictive.<sup>278</sup> This thesis serves to document that a limitation is not necessary at all.

(e) The Relationship between the Limitation and its Purpose

The means employed must be necessary to achieve the objective.<sup>279</sup> In applying the aforementioned principle, the enquiry is, whether the denial of custody or access protects the interests of the child and if in the affirmative, whether the protection of the interests of the child warrants the gay parent's right to equality, to be outweighed. If the objective is sufficiently important, then the issue is whether the means employed are appropriate and whether they are proportional to the object of the limitation.<sup>280</sup> There must be a rational connection between the means and the objective. In *National Coalition for Gay*

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<sup>277</sup> Ibid, at 147.

<sup>278</sup> Davis op cit note 186, at 320.

<sup>279</sup> *R v Oakes* 26 DLR (4<sup>th</sup>) 200.

<sup>280</sup> De Vos op cit note 87, at 692 - 693.

*and Lesbian Equality and Others v Minister of Justice and Others*,<sup>281</sup> the means employed were laws which discriminated against gays and lesbians but the State did not provide any rational basis for the discrimination or the objectives for such a law. The means would not be proportional to the objective where it is based on prejudice and bias. If parents are denied custody or access simply on the basis of their orientation, the courts would be taking into account society's prejudices and homophobic attitudes.<sup>282</sup>

The effect of the limitation clause was discussed in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.<sup>283</sup> In the latter case the applicants were gays and lesbians who claimed that their unions were not recognised by the Aliens Control Act.<sup>284</sup> Section 25 (5)<sup>285</sup> which provided for immigration of spouses of permanent South African residents, did not extend to homosexual couples in a permanent relationship. It could be argued that the limitation served a governmental objective which was to protect the traditional marriage relationship. However, the court held that availing section 25 (5) to gay and lesbian partners did not impinge on the governmental objective. The court accordingly held that there was no justification for the limitation.

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<sup>281</sup> 1999 (1) SA 6 (CC).

<sup>282</sup> De Vos op cit note 87, at 693.

<sup>283</sup> 2000 (2) SA 1 (CC), at 34.

<sup>284</sup> 96 of 1991.

<sup>285</sup> Of Alien Control Act 96 of 1991.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>286</sup> the court stated that the criminalisation of sodomy, places severe limitations on the gay's right to equality. A gay person would not be able to give expression to his love.<sup>287</sup> It interferes with his normal functioning as a human being.<sup>288</sup> The fact that gay sexual relations were associated with a crime resulted in negative societal attitudes and perpetuated further discrimination.<sup>289</sup> To balance the interests, the court then examined the purpose of the limitation. The respondent did not advance any reasons for the limitation. The court found that there was no legitimate governmental purpose for the limitation. The limitation was unjustified.

*Dawood and Another, Shalabi and Another, Thomas and Another v Minister of Home Affairs and Others*<sup>290</sup> also dealt with the Aliens Control Act.<sup>291</sup> Section 25 (9) (b)<sup>292</sup> extended certain privileges to foreign spouse and children of permanent South African citizens. Foreign spouses were awarded immigration permits to live in the country. Whilst waiting for their immigration permits they could remain in South Africa provided that they were in possession of valid temporary residence permits. The purpose of this section was to protect marriage and family life. Section 25 (9) (b) refers to spouses and does not apply to gays and lesbians. The effect of section 25 (9)

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<sup>286</sup> 1999 (1) SA 6.

<sup>287</sup> Ibid, at 31.

<sup>288</sup> Ibid, at 28.

<sup>289</sup> Ibid, at 31G.

<sup>290</sup> 2000 (8) BCLR 837 (CC).

<sup>291</sup> 96 of 1991.

(b) is that it limits the right of the gay and lesbian to dignity. The right to dignity protected the right to cohabit and marry. According to the court, the limitation of the right to dignity, protected ones right to cohabit and marry.

In *President of the Republic of South Africa and Another v Hugo*,<sup>293</sup> the purpose of the Presidential Act was to serve the interest of the children. The issue was whether the goal of promoting the interest of the children was proportionate to the discrimination of those fathers of children under twelve? The court stated that the fathers were not barred altogether and they could make application for remission. It would not have been possible to release all prisoners because it would have been too large a number. It would not have been practical to evaluate each parent's case individually because of the time and costs involved in administration. It at least benefitted some of the children, if some of the parents were released. The discrimination against the imprisoned fathers was justified in terms of section 33 (1) of the Constitution.<sup>294</sup>

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<sup>292</sup> Of the Aliens Control Act 96 of 1991.

<sup>293</sup> 1997 (4) SA 1 (CC), 1997 (6) BCLR 708, at 752.

<sup>294</sup> 200 of 1993.



## CONCLUSION

The best interest rule is flexible and allows for a wide discretion by judges. It is also dictated to by the fluctuating norms and values of society. Hence the case law lacks consistency. This proves to be more problematic in custody cases involving gay and lesbian parents because often the beliefs and values of society and judges may differ from those of gay and lesbian parents.

*Van Rooyen v Van Rooyen*<sup>295</sup> was a decision which was discriminatory and which was based on prejudice. It included factors over and above those that were laid down in *McCall v McCall*.<sup>296</sup> In the former case, the court granted access with a string of conditions. In justifying each of the conditions no substantial evidence was offered by the court. The writer addressed these justifications. The only issue, which has any substance, is the issue of teasing, taunting and harassment. However *M.P v S.P.*,<sup>297</sup> pointed out that the latter could prove advantageous for a child. It is submitted that negative responses from the community would add to the character of a child. The court maintained further that the denial of custody or access does not mean that the teasing would be eliminated. Moreover it was settled in *Palmore v Sidoti*<sup>298</sup> that the courts cannot endorse the intolerances of society by denying custody and access to gay and lesbian parents.

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<sup>295</sup> 1994 (2) SA 325 (W).

<sup>296</sup> 1994 (3) SA 201(C).

<sup>297</sup> 169 N J Super, 425, at 436 – 39, 404 A.2d 1256, 1262 – 63 (App. Div 1979).

<sup>298</sup> 466 U. S. 429 (1984).

Since the advent of the Constitution there is no marked difference in the current judicial attitudes. *Ex Parte Critchfield and Another*<sup>299</sup> relied on *Van Rooyen*<sup>300</sup> and concluded that the children were not exposed to "confusing signals". This was in spite of there being no empirical evidence to substantiate the theory that a homosexual lifestyle would expose a child to confusing signals. In *V v V*,<sup>301</sup> Foxcroft J's reference to the mother's lifestyle suggests that there is something inherently wrong with a lesbian lifestyle. On the pretext of protecting the best interest of the children, joint custody was awarded. The court ultimately left the decision for the children to consider as to which parent's lifestyle would be more harmful. It could be argued that the criticism levelled against awards of joint custody, that it is an easy way out of relieving the Court from making a decision on the question of sole custody,<sup>302</sup> is applicable in this instance.

The Bill of Rights in the South African Constitution affords protection to the gay or lesbian parent. There are various sections available to challenge discriminatory laws namely; the right to dignity;<sup>303</sup> the right to freedom of religion, belief and opinion;<sup>304</sup> the right to privacy;<sup>305</sup> and the right to equality. It would appear that the right to privacy does not adequately challenge discrimination towards gays and lesbians. The equality-based approach seems to be the better approach. There must be a rational basis when persons or categories of persons are treated differently and such differentiation must be connected to a legitimate government purpose. If the gay or lesbian parent were unsuccessful at this point then it would have to be proved that he

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<sup>299</sup> 1999 (3) SA 132 (W), at 139 B-C.

<sup>300</sup> 1994 (2) SA 325 (W)

<sup>301</sup> 1998 (4) SA 169 (C).

<sup>302</sup> *V v V* 1998 (4) SA 169 (CC), at 179.

<sup>303</sup> Section 10.

<sup>304</sup> Section 15.

or she was discriminated against on the basis of sexual orientation, which is specifically included as a ground in Section 9(3).<sup>306</sup> The gays' or lesbians' right to equality may be curtailed by the limitation clause contained in Section 36. In order to establish whether the limitation is reasonable and justifiable it has to be established *inter alia* that there is a rational connection between the objective of protecting the interests of the child and the means employed, which is denying the gay or lesbian parent custody or access. It must be conclusively proven that the homosexuality of the parent is harmful to the child.

The writer cautions that in as much as we have a Constitution, which entrenches the rights of the gay and lesbian parent, each case must be looked at individually. If it is found that a particular child is unable to adapt to a gay or lesbian household or is having difficulties in accepting his or her parent's homosexuality, it is a factor which cannot be ignored.

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<sup>305</sup> Section 14.

<sup>306</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice* 1998 (6) BCLR 726 (W).

## CHAPTER THREE

### **A COMPARATIVE STUDY OF FOREIGN JURISDICTIONS**

#### **3.1 Child Custody and Access of Homosexual Parents in Australia**

An examination of custody cases in Australia involving gay or lesbian parents, shows that, there is no set pattern in the decisions of the judges. Although in many cases the sexual orientation of the litigants was emphasized and a great degree of negativity expressed by judicial officers towards gay and lesbian parents, each decision seems to vary according to the attitudes of the various judges. In the 1977 case of *In the Marriage of N*,<sup>1</sup> in an appeal from the Supreme Court of New South Wales Family Law Division, Evatt CJ maintained that homosexuality was a factor to be weighed when determining issues of custody and she expressed the view that the parents' gay or lesbian relationship was relevant if it was to the detriment of the children. She maintained further that the real crux of the matter was to make a comparison between the mother's household and the father's household in order to ascertain which of the two was the better environment for the child to grow up in.

At the same time, *In the Marriage of Spry*,<sup>2</sup> where the children were two girls aged ten and seven, Murry J said "It is my view that lesbianism per se does not make a mother unfit to have custody, but it is a factor which cannot be ignored

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<sup>1</sup> (1977) F.L.C. 90-208.

<sup>2</sup> (1977) 3 Fam.L.R. 11, 330.

and must be taken into account with other factors that make up the total situation.”<sup>3</sup> The court ordered that a psychologist’s report be presented before the court. The court was concerned about the children being exposed to lesbianism if they were to be placed with their mother. The psychologist’s report indicated that these girls would not be growing up in a totally lesbian environment. Evidence indicated that 50% of the mother’s friends were heterosexual and 50% were gay and lesbian.<sup>4</sup> The younger daughter was confused about the roles of her mother and her lover. This does indicate a certain degree of confusion regarding gender identity. In any event, the psychologist submitted that the lesbian environment did not automatically lead to “deviant behaviour” of the child.<sup>5</sup> Custody of the children was awarded to the father. The mother was, however, allowed liberal access. Included, in this provision of liberal access was a condition that the mother and her lover would not display any sexual affection in front of the children.<sup>6</sup>

*In the Marriage of O’Reilly*,<sup>7</sup> was a case in which the court was faced with the issue of whether to award custody to the lesbian mother or to an irresponsible alcoholic father. The court considered the mother’s homosexuality and concluded that her sexual orientation did not detrimentally affect the children. Custody was awarded to the mother with no restrictions or conditions imposed. One should not draw too much attention to an award, favouring the lesbian mother because of the choices available. The court had to choose

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<sup>3</sup> Ibid, at 11 334.

<sup>4</sup> Ibid, at 11 333.

<sup>5</sup> Ibid, at 11 334.

<sup>6</sup> Ibid see *Van Rooyen v Van Rooyen* 1994 (2) SA (W) 325, at 331 where a similar restriction was imposed.

<sup>7</sup> (1977) F.L.C. 90-300.

between a lesbian mother and an irresponsible alcoholic. In view of the general thinking of the courts at the time,<sup>8</sup> one could remark that the court had to make a choice between the lesser of the two 'evils'.

Also in 1977 in *In the Marriage of Brook*,<sup>9</sup> two lesbian women who had separated from their husbands were living together with their five children from their respective marriages. The husband of one of the women, in applying for custody of the children, alleged that his wife's relationship would have a negative effect on the children's normal growth and development. According to the psychiatric evidence, the court found that there was no evidence to confirm or support the husband's allegations.<sup>10</sup> However the court advocated three factors which would allegedly be detrimental to the interests of children namely, firstly, that it would cause the lesbian mother to be incapable of caring for her children.

This is a questionable assumption as there is no evidence indicative of a correlation between homosexuality and the nurturing or care of a child.<sup>11</sup>

Secondly; that the instability of the lesbian mother's relationship could cause emotional harm to the children.

Thirdly, that the parent's lesbian relationship would subject the children to teasing and taunting by their peers. This is a valid argument but as discussed

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<sup>8</sup> *In the Marriage of N* (1977) F.L.C. 90-208.

*In the Marriage of Spry* (1977) 3 Fam. L.R.

<sup>9</sup> (1977) 3 Fam. L.N. No.81; [1977] F.L.C. 90-325.

<sup>10</sup> (1977) F.L.C. 90-325.

earlier it does not warrant denial of custody and access to gay and lesbian parents.<sup>12</sup>

To avoid social ostracism, custody was awarded to the mother subject to the undertaking that there would be no display of affection between the women in the presence of the children and in public.<sup>13</sup> In *In the Marriage of Brook*<sup>14</sup> reflects the same homophobic attitudes and prejudices as the South African case of *Van Rooyen v Van Rooyen*.<sup>15</sup> The judge in, *In the Marriage of Brook*<sup>16</sup> made many assumptions about the capabilities of a lesbian parent without any evidence to substantiate them. The judge included a condition that there was to be no display of affection between the mother and her partner before the children or the public. This suggests that the judge was of the view that there was something inherently wrong with homosexuality and that it should be concealed. This was very similar to the condition imposed in the *Van Rooyen v Van Rooyen* case because the judge was concerned about the children being exposed to "confusing signals".<sup>17</sup>

The court in *In the Marriage of Cartwright*,<sup>18</sup> recognized that there was a close bond between the lesbian mother and her children especially since the eldest child, who was fourteen years old, chose to stay with his mother. Here again, a condition was imposed that there would be no display of the couple's lesbian relationship to the children.

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<sup>11</sup> *Baehr v Miike* 1996 WL 694235 (Hew.Cir.Ct.).

<sup>12</sup> See Chapter 2

<sup>13</sup> (1977) 3 Fam. L.N. No. 81; [1977] F.L.C. 90-325, at 90-325-326.

<sup>14</sup> (1977) 3 Fam. L.N. No. 81; [1977] F.L.C. 90-325.

<sup>15</sup> 1994 (2) SA 325.

<sup>16</sup> (1977) 3 Fam. L.N. No. 81; [1977] F.L.C. 90-325.

In *In the Marriage of Schmidt*,<sup>19</sup> the child in question, who was also fourteen years old expressed the desire to live with her lesbian mother. Evatt CJ maintained that homosexuality per se was not a disqualifying factor in the determination of a custody application. It would only be relevant if the parenting abilities of the gay or lesbian parent were affected in any way.<sup>20</sup> The judge went on to say that it was understandable that the father expressed concerns and fears because he regarded the mother's lifestyle as abnormal and deviant. However, these fears were held by the court to be unsubstantiated.<sup>21</sup> It was also apparent from the evidence that the mother was not "fanatical about her homosexuality."<sup>20</sup> She indicated that it was her desire that the child would be heterosexual as it would be "easier in terms of community acceptance."<sup>21</sup> The court seemed to have approved of the mothers' attitude of keeping her relationship discreet.

In the 1992 case of *C and JA Doyle*,<sup>22</sup> the custody dispute involved two boys aged nine and thirteen respectively. The father was living in a gay relationship. The elder child was living with his father and the younger child with his mother. During one of his holidays with his father, the younger child decided that he also wanted to live with his father. Hence, the mother commenced custody proceedings in the Family Court for the custody of the younger child, J. The father in his cross application sought custody of both his sons L and J. As the mother consented to the father having custody of L, the

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<sup>17</sup> 1994 (2) SA 325 (W), at 328 C, 329 J and 330 A.

<sup>18</sup> (1977) F.L.C. 90-302 in (1977 - 1978) 3 F.L.R.N 55.

<sup>19</sup> (1979) 5 Fam. L.R. 421.

<sup>20</sup> Ibid, at 424.

<sup>21</sup> Ibid, at 428.

<sup>22</sup> Ibid, at 424.



only issue remaining, was the custody of the younger son J. Justice Hannon referred to the 1983 case of *L and L*,<sup>23</sup> which expounded the essential and relevant issues to be considered in a custody dispute, involving a gay or lesbian parent. The judge regarded the following eight factors laid down in the case of *L and L* by Baker J as a very useful checklist:

1. The first issue was whether children would become gay or lesbian themselves if gay and lesbian parents raised them.
2. The court then considered the possibility that the children would be subjected to teasing, taunting or ostracism.
3. The third issue in *L v L*<sup>24</sup> was whether the gay or lesbian parent was capable of giving the child the same love and affection as a heterosexual parent and whether the gay or lesbian parent would be just as responsible as the heterosexual parent.
4. Another issue considered was whether the child would receive a balanced sex education from the parent.
5. A further issue, considered by the court was whether the children ought to have had access to knowledge of their parent's sexual orientation.

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<sup>21</sup> Ibid, at 424.

<sup>22</sup> (1992) 15 Fam.L.R. 274.

<sup>23</sup> (1983) F.L.C. 91-353.

<sup>24</sup> Ibid.

6. The court then considered whether the children needed a parent of the same sex to emulate.
7. The issue whether the child needed a male and a female parent was also considered.
8. Lastly Baker J considered the parent's attitude towards religion.

In respect of the first factor, the judge concluded that this possibility was not scientifically substantiated.

With regard to the second factor, the court held that the fact that one of the parties had a deviant lifestyle is not relevant in itself. It is only relevant in so far as it directly or indirectly affects the welfare of the child. The possibility that the child would be subjected to ostracism was directly linked to the welfare of the child.<sup>25</sup>

In a separate case being that of *Jarman v Lloyd*<sup>26</sup> the issue of peer teasing and taunting was also considered. The court stated that the fact that the mother was a lesbian was an undisputed fact and one which the court had no capacity to change by any order that it made. Neither could an order of court change the character of some of the nasty community members.<sup>27</sup> The court maintained further, that teasing, jeering and taunting was an integral part of a child's growing up process. A child must enable himself to deal with such

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<sup>25</sup> Ibid, at 277.

<sup>26</sup> (1982) 8 Fam.L.R. 878.

issues in order to develop into a well-adjusted adult and should not be shielded from certain realities of life. The judge was therefore more in favour of the lesbian mother's approach of endeavouring to maintain an open-minded, comfortable relationship with her children so that they would be able to overcome problems together. The judge regarded the father's approach of wanting to shield his children from possible ostracism as unconstructive.<sup>28</sup> Similarly, in *Spry v Spry*,<sup>28</sup> Murray J stated that the children had to acknowledge their parent's sexual orientation and they had to come to terms with it. In *C and JA Doyle*, the court stated that in dealing with the question of negative community attitudes towards homosexuality and its impact on the children, the important issue was the awareness of the gay or lesbian parent of the problem and the manner in which they would cope with it. The extent to which a parent supports his or her child would be taken into account. In this particular case the judge stated that the father and his lover were aware of the possibility of negative community attitudes and they had taken the necessary steps to ensure that their relationship was discreet. The court found that the duration of the father's relationship with his lover and the fact that the children were comfortable with it would make it easier for them to cope with external negative attitudes.<sup>29</sup> Otłowski<sup>30</sup> in his analysis of the *Doyle*<sup>31</sup> case, commended the court for this approach. Goodman<sup>32</sup> maintains that whenever courts are faced with child issues involving a minority group, be it racial,

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<sup>27</sup> Ibid, at 890.

<sup>28</sup> Ibid, at 891.

<sup>28</sup> (1977) F.L.C. 76, 447.

<sup>29</sup> Op cit note 22, at 278.

<sup>30</sup> M Otłowski 'Family Court Awards Custody, to Homosexual Father' (1992) 11:2 *University of Tasmania Law Review* 261, at 267.

<sup>31</sup> (1992) 12 Fam. L.R. 274.

<sup>32</sup> E Goodman 'Homosexuality of a Parent : A New Issue in Custody Disputes' (1979) 5 *Monarch University Law Review* 305, at 312 and 313.

religious or otherwise, then the possibility of ostracism would always be raised. He submits that the parent in the less dominant culture is at a disadvantage and punishment of the latter cannot be justified on the pretext that it is in the interests of the child. He submits that there must be clear evidence that the child is “uncomfortable in his environment” before denying custody to the non-conforming parent.

Thirdly, the court in *C and JA Doyle* found that the father had a deep genuine love for both his sons.<sup>33</sup> It is submitted that the requirement that a parent must be capable of providing love and affection is not unique in that its applicability is general and also applies to heterosexuals.<sup>34</sup> The question that the court should have asked is which parent is more capable of providing love and affection and not whether a gay or lesbian parent can provide the love that a heterosexual parent can.

Fourthly, a balanced sex education is important for the child’s normal sexual development. It requires a great degree of objectivity from the parent. This requirement of a balanced sex education can only be answered by looking at the facts of each particular case. In *Doyle’s*<sup>36</sup> case there was no evidence to prove the contrary.

Fifthly, with regard to the children being exposed to the knowledge of their parent’s sexual orientation, the court stated that the children in *Doyle’s* case

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<sup>33</sup> (1992) 12 Fam. L.R. 274.

<sup>34</sup> See *McCall v McCall* 1994 (3) SA 201 (c).

<sup>36</sup> (1992) 12 Fam. L.R. 274, at 279.

possessed the knowledge that their father was gay and they were not uncomfortable about it.<sup>37</sup>

With regard to whether children needed a parent of the same sex to emulate and whether children needed a male and a female parent figure. In *C and JA Doyle*<sup>38</sup> the judge stated that in a society with many imperfections and flaws, it is difficult to ascribe to the latter. It is submitted that with the current divorce statistics many children inevitably grow up in single parent households. In addition there are parents who don't marry. The single parent may be male or female. In such an instance the child does not have the benefit of a male and female parent, neither does the child have a same sex parent to emulate. On the other hand being raised in a single parent household does not exclude opposite gender role models for the child because of contact with relatives and friends. Additionally, in the case of divorce, access rights ensure the continuity of relationship with the non-custodian parent.

Lastly, the aspect of religion was dismissed by the judge in *C and JA Doyle*<sup>39</sup> as being irrelevant in the custody dispute.

After considering each of the above factors, Justice Hannon held that the evidence indicated that the father's lifestyle did not affect the children detrimentally. A significant factor was that the boy, J, expressed a genuine desire to live with his father. The mother had contended that her biggest fear was that J would be placed in moral danger. However the court found that she

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

was quite amenable to her elder son staying with his father which was clearly inconsistent with her contention.<sup>35</sup> Custody was awarded to the father. Interestingly, unlike many of the aforementioned cases,<sup>36</sup> no undertakings were required of the father. Goodman questions the applicability of an undertaking. He argues that the latter are discriminatory in that they are not universally imposed. In addition, there is always the problem of enforceability. It would be almost impossible to monitor a relationship between two people, let alone a sexual relationship. Thirdly, he advocates that these undertakings equip the non-custodian parent with a tool for constantly alleging a breach of the order.<sup>37</sup>

In the 1995 decision of *In the Marriage of A and J*,<sup>38</sup> the court found that the lesbian mother and the father had always shared parenting, and that there were times when the father had contributed more to the caretaking of the child, than the mother. The mother confirmed that regular contact with the father was necessary for the child and that he was the appropriate role model for the child. The court looked at the welfare of the child rather than the mother's lesbianism. It was evident that the child had a good relationship with both his parents and that both parents were able to provide the child with material comforts as well as meet his emotional needs adequately. It is apparent from the latter two cases that the parent's sexual orientation would only be relevant

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<sup>39</sup> Ibid.

<sup>35</sup> Ibid, at 283-284.

<sup>36</sup> *In the Marriage of Spry* (1977) 3 Fam.L.R.11, 330.

*In the Marriage of Brook* (1977) F.L.C. 90-325.

*In the Marriage of Cartwright* (1977) F.L.C. 90-302.

<sup>37</sup> Goodman op cit note 32, at 315.

<sup>38</sup> (1995) 19 Fam.L.R. 260.

to the extent that they impinge on the welfare of the child. The courts focused on the welfare of the children and not on the parents' homosexuality.

## **CONCLUSION**

A study of the cases in Australia in the 1970's indicates the conservative attitudes of the judges. In *In the Marriage of Schmidt*,<sup>39</sup> Evatt CJ reiterated the remarks made in *In the Marriage of N*,<sup>40</sup> in that a parent's homosexuality is only relevant if it were to the detriment of the child. In *Spry v Spry*,<sup>41</sup> although the mother was denied custody she received liberal access. However, the court was concerned about the children being exposed to their mother's lesbianism and imposed certain conditions. Similarly a condition was imposed in *In the Marriage of Cartwright*.<sup>42</sup> In *In the Marriage of Brook*<sup>43</sup>, the court imposed a condition that there was to be no display of affection between the women before the children or in public.<sup>44</sup> The court however acknowledged the suitability of the mother as a parent and awarded custody to her.<sup>45</sup> It would appear that the attitudes of the judges at the time were conservative and that they held many fears and reservations regarding gays and lesbians. One observes a trend of awards tempered with caution. Conditions were imposed to ensure that gay relationships were kept discreet. Gays and lesbians were not barred from custody and access altogether. But, the case studies suggest that the judges were not comfortable with the gay and lesbian lifestyle, they would not encourage it nor propagate it.

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<sup>39</sup> (1979) 5 Fam. L.R. 421.

<sup>40</sup> (1977) F.L.C. 90-208.

<sup>41</sup> (1977) 3 Fam. L.R. 11,330.

<sup>42</sup> (1977) F.L.C. 90-302 in (1977-1978) 3 F.L.R.N. 55.

<sup>43</sup> (1977) 3 Fam. L.N. No. 81 : [1977] F.L.C. 90-325.

<sup>44</sup> Ibid, at 90-325-326.

<sup>45</sup> Ibid.

A decade later the case of *L v L*,<sup>46</sup> also included stereotypes *inter alia*, whether the children would become gay or lesbian and whether the gay or lesbian parent would provide the same love and affection as a heterosexual would. The checklist suggests that the courts were not satisfied with the capabilities of gay and lesbian parents. In 1992, in *C and J A Doyle*<sup>47</sup>, the court dismissed the stereotype that the children in gay or lesbian households would also become homosexual because it was scientifically unsubstantiated. The court applied each of the eight factors contained in *L v L*<sup>48</sup> objectively and without prejudice. Custody was awarded to the father and no conditions were imposed.<sup>49</sup> It is submitted that Justice Hannon made a decision on the merits of the case and did not allow his decision to be clouded by society's perceptions. Similarly in *In the Marriage of A and J*,<sup>50</sup> the court did not focus on the mother's lesbianism but looked instead at the best interests of the child. There seems to be no uniformity in the decisions of the courts. In the last two cases, there appears to be a move, although uncertain towards an objective, unprejudiced examination of the facts of the case, with a view to ensuring the best interests of the child.

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<sup>46</sup> (1983) F.L.C. 91-353.

<sup>47</sup> (1992) 15 Fam. L.R. 274.

<sup>48</sup> (1983) F.L.C. 91-353.

<sup>49</sup> (1992) 15 Fam. L.R. 274.

<sup>50</sup> (1995) 19 Fam. L.R. 260.



### 3.2 An Investigation into Custody and Access of the Homosexual Parent in Canadian Family Law

#### 3.2.1 Canadian Charter of Rights and Freedoms<sup>51</sup>

The effect that the *Canadian Charter of Rights* has had on gay and lesbian custody and access issues in Canada, is significant because South Africa in developing its Bill of Rights has borrowed heavily from the *Canadian Charter of Rights*.<sup>52</sup>

Section 15 (1) of the Canadian Charter stipulates:

(1) “Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) <sup>53</sup>Subsection (1) does not preclude any law, programme or activity that has at its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic

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<sup>51</sup> Schedule B to the Constitution Act of 1982, Part 1, Canadian Charter of Rights and Freedoms hereinafter referred to as Canadian Charter of Rights or the Charter.

<sup>52</sup> Ibid.

origin, colour, religion, sex, age or mental or physical disability.”<sup>54</sup>

According to *R v Turpin*<sup>55</sup> the purpose of section 15 is to protect groups who are disadvantaged socially, politically and legally. In an attempt to define equality, the court in *R v Turpin*<sup>56</sup> stipulated that the demands and burdens that the law placed on its people must be the same for all persons. All persons must be afforded the same benefits and opportunities of the law. In applying this test to gays and lesbians any law which treats gays and lesbians differently or “more harshly” would constitute a breach of the equality clause.<sup>57</sup> In *Andrew v Law Society of B.C.*,<sup>58</sup> the plaintiff proved that he was denied access to the legal profession whilst others possessing the same qualification were allowed access. Hence he proved that he suffered a disadvantage.

The next step in establishing whether there has been a breach of section 15 is to enquire whether the prohibitory law is discriminatory.<sup>59</sup> Section 15 guarantees equality without discrimination and, in particular, “without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>60</sup> *Andrews v Law Society of B.C.*<sup>64</sup> reflects the importance of proving discrimination. Andrews applied for admission to the legal profession. His admission was denied on the basis that

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<sup>54</sup> Ibid.

<sup>55</sup> (1989) 1 S.C.R. 1296, at 1333.

<sup>56</sup> Ibid, at 1329.

<sup>57</sup> Ibid, at 1329-30.

<sup>58</sup> (1989) 1 S.C.R. 146.

<sup>59</sup> Ibid, at 182.

he was not a Canadian citizen. Andrews established discrimination hence he was able to prove a breach of section 15.” In order to establish discrimination one has to prove discrimination on the basis of one of the characteristics stipulated in section 15. Like the equality clause in the American Bill of Rights, sexual orientation is not enumerated as a ground in the Charter. The question then posed is, whether sexual orientation, being a ground which is not enumerated, falls under the umbrella of protection under section 15? In order to answer this there is a need to look at the groups, which are specifically included. Some of the characteristics of the listed groups are the following:

- (a) They have endured a history of discrimination<sup>61</sup>
- (b) They are a minority group, disadvantaged socially, legally and lacking political power.<sup>62</sup>
- (c) Immutability of the personal characteristics.

It is submitted that gays and lesbians “have endured a history of discrimination” and they are a minority group and have been disadvantaged socially, legally and politically. The issue of immutability was discussed in *Vuysey v Correctional Services of Canada*.<sup>63</sup> In the latter case, the court made reference to the various grounds specifically mentioned in section 15, for example race, nationality or ethnic origin, colour and age, highlighting that

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<sup>60</sup> Of the Charter.

<sup>64</sup> (1989) 1 S.C.R. 146.

<sup>61</sup> Ibid, at 175.

<sup>62</sup> B Ryder 'Equality Rights and Sexual Orientation : Confronting Heterosexual Family Privilege' (1990) 9 *Canadian Journal of Family Law* 39, at 175.

<sup>63</sup> (1990) 29 F.T.R. 74, at 78.

these were immutable characteristics. The court regarded gays and lesbians as being analogous to all these disadvantaged groups because homosexuality is also immutable. The aforementioned case seems to indicate that immutability of the personal characteristics is a requirement under section 15. In all of these listed characteristics, namely race, colour etcetera there is no element of choice but rather something “inherent”. In other words, this is something that goes to the core of a person. Immutability is a reference to the very essence of a person and not a reference to what the person does. Homosexuality, then because of its immutability is a reference to a person’s inner being as opposed to his or her conduct.<sup>64</sup> Therefore a judgment ordering a gay or lesbian parent to restrict his or her lifestyle or lose custody of the children is unjustified. Homosexuality has all the characteristics of the listed groups, namely, a history of discrimination, a disadvantaged minority group and immutability. It can therefore be regarded as analogous, thus deserving protection. Superficially, the rights of gay and lesbian parents appear to be protected by section 15 and section 2 of the Charter.

Section 2 stipulates:

“everyone has the following fundamental freedoms:

- (a) Freedom of thought, belief, opinion and expression
- (b) Freedom of association”

However, this equality and freedom can be curtailed by the limitation clause contained in section 1 of the Charter.

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<sup>64</sup> P.W Hogg *Constitutional Law of Canada* 3<sup>rd</sup> ed (1992) 1167-1168.

Section 1 provides:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”

The case of *R v Oakes*<sup>65</sup> illustrates the dynamics of section 1. The accused was found in possession of narcotics. In dealing with whether the violation was permissible in terms of section 1, the court raised two important issues:

- a) the objective of the limitation must be of sufficient importance to outweigh the rights;
- b) the means employed to serve the purpose must be reasonable and justifiable<sup>66</sup>

The court found that the objective of protecting society from the dangers associated with drugs was sufficiently important to override the constitutional right as contained in section 11 (d)<sup>67</sup> of the Charter.<sup>68</sup> The next step is to test the reasonableness of the objective. To determine the reasonableness the court used the proportionality test which is threefold and which requires the following:

- (a) there must be a rational connection between the means and the objective;

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<sup>65</sup> (1986) 26 DLR (4<sup>th</sup>) 200.

<sup>66</sup> Ibid, at 227.

<sup>67</sup> S11 (d) stipulates : 'Any person charged with an offence has the right, to be presumed innocent until proven guilty'.

- (b) the limitation must interfere with the right as little as possible; and
- (c) there must be a proportionality between its effects and its objective

The court found that the first requirement of there being a rational connection between the means and the objective was not met. The court held that possession of a small quantity of drugs could not lead to an inference of possession for the purpose of trafficking.<sup>69</sup> In other words the presumption contained in section 8 of the Narcotic Control Act was not rational in that it included all possession of narcotics irrespective of its quantity. When the rational connection test failed, the section 1 enquiry was stopped.

The second requirement that the limitation must interfere with the right as little as possible can be literally understood and is the one requirement which many of the laws fail to meet.<sup>70</sup>

The third requirement is a test to establish whether there is a correlation between what the law has set out to do and what the law was really accomplishing.

Canada has a Bill of Rights wherein gays and lesbians although not specifically included in the equality clause, but being an analogous group, receive protection. In *Egan v Canada*,<sup>71</sup> the applicants were living in a permanent, stable same-sex relationship since 1948. Egan received certain benefits under

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<sup>68</sup> (1986) 26 DLR (4<sup>th</sup>) 200, at 229.

<sup>69</sup> Ibid, at 229-230.

<sup>70</sup> Ibid, at 878.

<sup>71</sup> (1995) 124 DLR (4) 617.

the Old Age Security Act, which provided for an allowance to persons of a certain income category, from the age of 60 to 65. When Egan became a pensioner at age 65, his partner applied for the 'spousal allowance' but the application was rejected. The allowance was only available to persons living in heterosexual relationships, for more than a year. The court held that although gays and lesbians were not specifically protected by the Charter, they were an analogous group and received protection. Gay and lesbian parents may then argue that the constitutionally entrenched right to equality guarantees their right to custody and that they should not be discriminated against. However this right can be limited in terms of section 1 of the Charter. The objective in denying gay and lesbian parents custody or access would be to protect the interest of children. The interest of children is of paramount importance, but can the courts justify discriminating against gay and lesbian parents, to safeguard the interest of children? The courts would only be able to justify discrimination against gay and lesbian parents if there was sufficient evidence to prove that the latter posed a real danger to the children.

### 3.2.2 Custody and Access Disputes of the Gay and Lesbian Parent

On the one hand there is a Bill of Rights protecting the rights of the gay and lesbian parent and on the other, there is a best interest rule which protects the rights of the child. In Canadian law, section 16 (18) of the Divorce Act<sup>72</sup> stipulates that the custody of a child is awarded solely on the basis of the "best interests" of the child. In the case of *Young v Young*,<sup>73</sup> the court held that the

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<sup>72</sup> Of 1985.

<sup>73</sup> (1993) 4 S.C.R. 3, 49 R.F.L. (3d) 117, B.C.L.R.

wording of section 16 (8)<sup>74</sup> requires the court to look only at the “best interests of the child.” Consequently no consideration is to be given to parental preferences and “rights”.

Section 16 (10)<sup>75</sup> which provides for access stipulates:

“a child of a marriage should have as much contact with each spouse as is consistent with the best interests of the child and for that purposes, [the court] should take into consideration the willingness of a person for whom custody is sought to facilitate such contact.”

The Ontario Children’s Law Reform Act<sup>76</sup> stipulates that in maintaining the best interest rule the judge shall consider “all the needs and circumstances of the child.” In ensuring the best interest of the child the judge has wide discretionary powers. The exercise of such powers could prove to be detrimental to the welfare of the child if abused. The judge must ensure that he does not base his decision on his or her moral standards in response to the parent’s conduct, values or lifestyle. The judge must only enquire into such if it is in the child’s interest to do so.<sup>77</sup> Certain factors taken into account can operate contrary to the interests of the gay and lesbian parent. Contained in such section is a provision that the custodian parent must provide a permanent

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<sup>74</sup> Of the Divorce Act of 1985.

<sup>75</sup> Of the Divorce Act of 1985.

<sup>76</sup> R.S.O. 1990 C.C. 12, 24.

<sup>77</sup> W.L. Gross ‘Judging the Best Interests of the Child: Child Custody and the Homosexual Parent’ (1986) 1 *Canadian Journal of Women and the Law* 505, at 508.



and stable family unit.<sup>78</sup> Canadian law prevents gays and lesbians from providing such a family unit because same-sex marriage is prohibited.<sup>79</sup> There are also no statistics to prove that gay and lesbian relationships are impermanent and unstable because of the numerous undisclosed gay and lesbian relationships and the difficulty of obtaining a proper census. Some gays and lesbians are still very secretive and some would even lie, denying vehemently their homosexuality for fear of losing their children.<sup>80</sup> In *Ewankiw v Ewankiw*<sup>81</sup> the court's finding was that the lesbian mother lied about her sexual orientation and a negative inference was drawn from this. Joint custody was granted and the father was given primary care and control

In Canada homosexuality per se is not a bar to custody.<sup>82</sup> However, it appears that the decision hinges on how discreet a gay and lesbian is about his or her relationship. This issue was discussed in the 1974 decision of *Case v Case*,<sup>83</sup> the first Canadian case involving a gay and lesbian parent. After expressing that homosexuality was not a bar in itself, the court made reference to the mother's political activities. The mother held office as vice president of a gay club. She had also invited members of the club to her home. The judge feared that the children would have too much contact with people of "abnormal tastes and proclivities".<sup>85</sup> The mother was denied custody of her two children.

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<sup>78</sup> Ibid.

<sup>79</sup> *Ladyland v Ontario* (Minister of Consumer and Commercial Relations) (1993), 104 D.L.R. (4<sup>th</sup>) 214 (Ont.Gen.Div.).

<sup>80</sup> S.B Boyd 'Lesbian (and gay) Custody Claims: What Difference does Difference make?' (1997) 15 *Canadian Journal of Family Law* 131, at 137-138.

<sup>81</sup> (1994) 99 Man.R. (29) 302 Q.B. (Fam.Div.).

<sup>82</sup> *Case v Case* (1974) 18 R.F.L. 132 (Sask Q.B.).

*Bezaire v Bezaire* (1980) 20 R.F.L. (2d) 361 (Ont. C.A.).

<sup>83</sup> (1974) 18 R.F.L. 132 (Sask Q.B.).

Two years later, in sharp contrast to the *Case v Case*<sup>85</sup> decision, was the case of *K v K*.<sup>86</sup> Mrs K unlike Mrs Case led a very private life and was not a gay rights activist. The judge was reassured that the relationship between Mrs K and her lesbian lover would be a discreet one.<sup>87</sup> The judge also dealt with the issue of community attitudes and negativity expressed by other children. He acknowledged that there was a problem, but that it was no different from one experienced by children of a home where the parents were of different races.<sup>89</sup>

It is apparent from both *Case v Case*<sup>88</sup> and *K v K*,<sup>89</sup> that a distinction was drawn between the lifestyle of the two lesbian mothers. Where the mother had led a discreet life and kept her lesbianism a secret from the community, she had a better chance of obtaining custody of her children.

Brownstone submits that from the two aforementioned cases, it appears that participation by gay and lesbian parents in gay liberation activities would be viewed negatively by the Canadian courts. However he submits further that such participation should not automatically bar gay parents from custody. The conduct of parents who are gay rights activists should only be a determining factor where it is to the detriment of the child.<sup>90</sup>

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<sup>85</sup> Ibid, at 136.

<sup>85</sup> (1974) 18 R.F.L.132 (Sask Q.B.).

<sup>86</sup> (1976), 2 W.W. R 462 (Alta. Prov. Ct.).

<sup>87</sup> Ibid, at 468.

<sup>89</sup> Ibid, at 467.

<sup>88</sup> (1974) 18 R.F.L. 132 (Sask Q.B.).

<sup>89</sup> (1976), 2 W.W.R. 462 (Alta. Prov. Ct.)

<sup>90</sup> H Brownstone 'Homosexual Parent in Custody Disputes' (1980) 5 *Queens Law Journal* 199, at 218.

Another important distinction that can be drawn from these two cases is that in the *Case v Case*<sup>91</sup> decision, the wife's lover failed to testify and the court drew a negative inference from this. In *K v K*,<sup>92</sup> the mother's lover did testify and the court was confident that the couple would provide a loving home for the child. Where the parent has formed another relationship it is important for that third party to testify so that the court can make an informed decision regarding custody, as that third party acts as a surrogate parent. Failure of that third party to testify would lead a court to draw a negative inference therefrom, more so if that parent happens to be gay or lesbian.<sup>93</sup> A comparison between the *Case v Case*<sup>94</sup> decision and that of *Re Reid and Reid*<sup>95</sup> needs to be drawn. The latter case was one, which involved heterosexual parents. One parent had his common law spouse testify in court whilst the other did not. The court ordered that the children have separate legal representation. Failure of one surrogate parent to testify was not sufficiently material to deny custody but was rectified by the appointment of independent legal counsel, who would have the interest of the children at heart. However, in the *Case v Case*<sup>96</sup> decision, failure to testify was fatal and there was no ordering of separate representation.

This "open-discreet test", dependant on whether the gay or lesbian openly displays his or her sexual orientation was also applied in cases, where the father was gay. In the 1978 case of *D v D*,<sup>97</sup> the court was very pleased that the father was someone who was discreet about his homosexuality and who

<sup>91</sup> (1974) 18 R.F.L. 132 (Sask Q.B.), at 136.

<sup>92</sup> (1976), 2 W.W.R. 462 (Alta. Prov. Ct.), at 469.

<sup>93</sup> Brownstone op cit note 90, at 221.

<sup>94</sup> (1974) 18 R.F.L. 132 (Sask Q.B.).

<sup>95</sup> (1976), 11 O.R. (2d) 622 (HC).

<sup>96</sup> (1974) 18 R.F.L. 132 (Sask Q.B.), at 136.

promised that he would not bring his children into much contact with gays and lesbians. The testimony of the father's partner was also a contributing factor. Although the mother was an unsuitable parent and the father had *de facto* custody, the court was very concerned about the father's suitability because of his homosexuality.

The "open-discreet test" was applied in the 1980 decision of *Barkley v Barkley*.<sup>98</sup> The lesbian mother was very discreet about her relationship. She was of the opinion that her daughter would become heterosexual. She obtained custody of her daughter. A case which followed *Case v Case*<sup>99</sup> and one which went before the Court of Appeal, is the 1980 case of *Bezaire v Bezaire*.<sup>100</sup> The mother had breached various provisions of the original order; the most important being that she was to live alone. The judge of the Court of Appeal emphasized that homosexuality was not in itself a bar to custody but the determining factor was the effect of that sexual orientation on the welfare of the child. The judge took into account that the children would be subjected to teasing and taunting because of their parent's homosexuality and awarded custody to the father.<sup>101</sup> In 1992, in *N v N*,<sup>102</sup> a visitor who frequented the home of the mother, testified that the mother did not openly exhibit her lesbianism. The mother was successful in her application. Notwithstanding the mother's success, it must be noted that reference was made to the father's "traditional

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<sup>97</sup> (1978), 20 O.R. (2d) 722 (Co. Ct).

<sup>98</sup> (1980) 28 O.R. (3d) 141 (Prov. Ct.).

<sup>99</sup> (1974) 18 R.F.L. 132 (Sask Q.B.).

<sup>100</sup> (1980) 20 R.F.L. (2d) 361 (Ont. C.A.).

<sup>101</sup> *Ibid.*, at 365.

<sup>102</sup> (1992) B.C.J. No. 1507 (QL) (S.C.).

attitudes" and the concerns of the father.<sup>103</sup> Although the evidence led settled these concerns, there was an onus on the mother to ensure that the father and the children were not offended by her sexual orientation.<sup>104</sup> Section 24<sup>105</sup> stipulates that "the past conduct of a person is not relevant to a determination of an application ... unless the conduct is relevant to the ability of the person to act as a parent of a child." Gross<sup>106</sup> approves of the Nexus approach. This approach takes into account the parent's homosexuality, only to the extent that it causes harm to the children concerned. She considers the approach to be a safeguard against possible abuse of judges of their wide discretionary powers. In *D v D*,<sup>107</sup> although the mother was an unsuitable parent and the father was already exercising custody, the court was concerned about the father's homosexuality. According to Gross, the court should not have speculated but should have established whether real harm would be caused to the children. She maintains that the court ought to have examined the following factors namely; the sexual orientation of the children, the effect of peer pressure regarding the relationship and the effect of the father's homosexuality on the relationship between the children and their father.<sup>108</sup> The court in *D v D* awarded custody because the father did not openly "flaunt" his homosexuality.<sup>109</sup> The court did not meet the Nexus requirement in establishing that the father's homosexuality would not prejudice the interests of the child. Instead the court without examining evidence concerning the child, speculated that the father's discreteness of his sexual orientation adequately

<sup>103</sup> Ibid, at para 7-8.

<sup>104</sup> Boyd op cit note 80, at 141.

<sup>105</sup> Of Children's Law Reform Act of Ontario.

<sup>106</sup> Gross op cit note 77, at 509.

<sup>107</sup> (1978), 20 O.R. (2d) 722 (Ont. Co. Ct.).

<sup>108</sup> Gross op cit note 77, at 526.

protected the child's interests. Gross submits that the court in *Barkley v Barkley*<sup>110</sup> followed the same pattern as *D v D*.<sup>111</sup> The judge gave a list of unsubstantiated factors which he took into account in his award of custody. He did not state how factors such as militancy of the gay parent or disclosure of the homosexuality would harm the child.<sup>112</sup> I agree with Gross that there has to be evidence of real harm to the child. The acceptance of the court of the mother's opinion that her daughter would choose a heterosexual lifestyle is also questioned. Firstly, the mother is not a psychological expert. Secondly, even if it were true, does it mean that the court would have refused custody if the mother had thought otherwise. This trend of thought suggests a rejection of the gay or lesbian lifestyle and an assumption that a heterosexual lifestyle is the correct choice. According to Gross it is not really in the interests of the child that the gay or lesbian parent is secretive about his or her sexual orientation. According to research<sup>113</sup> a lesbian mother who freely expressed her homosexuality was psychologically healthier. Expression would include "having a relationship with a female partner, cohabiting with a lover, disclosure of sexual orientation to a significant number of people, being active in the feminist political movement, and being in frequent contact with the lesbian community. This would impact positively on the mother's relationship with her children. It has been found that mothers who have accepted their

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<sup>109</sup> Ibid.

<sup>110</sup> (1980) 16 R.F.L. (2d), 13 (Ont. Prov. Ct.).

<sup>111</sup> (1978), 20 O.R. (2d) 722 (Ont. Co. Ct.).

<sup>112</sup> Gross op cit note 77, at 526.

<sup>113</sup> C. Rand, D.L.R. Graham and E.I. Rawlings 'Psychological Health Factors the Court seeks to Control in Lesbian' Mother Trials *Journal of Homosexuality* '8 (1982) 27, quoted in W.L. Gross at 529.

homosexuality, could more adequately assist their children in overcoming problems such as teasing by peers.<sup>114</sup>

In response to the "open discreet test" applied in the cases, Arnup submits that it is apparent that those mothers, notwithstanding their lesbianism, who would bring up their children in accordance with 'traditional values' were awarded custody.<sup>115</sup> The court in *K v K*, granted K custody, "with some degree of assurance that her child would be socialized in accordance with the dominant values of society."<sup>116</sup> According to Arnup, there is a perception that the lesbian mother threatens the social structures of society and the concept of capitalism. In order for capitalism to survive, individuals in society must fit neatly into roles. Men were the sole breadwinners and women were the child care-givers. Now that the position has changed and more women have entered the workforce, women are still the primary care-givers. However, she maintains that lesbian mothers do not fundamentally upset the latter structure. In as much as women do not care for husbands, they are still fulfilling their roles as mothers in taking care of their children.<sup>117</sup>

## **CONCLUSION**

Through the last three decades in Canada, one sees little development in the custody and access cases involving the gay or lesbian parent. The general approach of the Canadian courts is based on the "open-discreet test". The overt nature of the conduct

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<sup>114</sup> Gross op cit note 77, at 529.

<sup>115</sup> K. Arnup 'Mothers Just Like Others : Lesbians, Divorce and Child Custody in Canada' 1989 (3) *Canadian Journal of Women and the Law* 18, at 30).

<sup>116</sup> Ibid.

of the gay or lesbian resulted in the denial of custody and access or in the imposition of conditions. In this test of ascertaining whether a homosexual openly displays his or her sexual orientation belies a homophobic attitude based on prejudice.

Like the Australian courts, Canadian courts did not automatically bar gay and lesbian parents from custody and access, but they were intent on keeping the gay and lesbian lifestyle from the public arena. Gay parents who were discreet about their lifestyle were rewarded with custody or liberal access rights.<sup>118</sup> The “open-discreet test” was taken to absurd lengths in the case of *Bezaire v Bezaire*.<sup>119</sup> In an earlier decision the mother was ordered to live alone. It is submitted that this was not merely a case of the mother being discreet about her sexual orientation but the judge was instructing her as to how she was to live. By declaring that the mother was to live alone he was in effect curtailing a meaningful or a permanent gay and lesbian relationship.

The Canadian Charter has not had any dramatic impact on custody and access cases of gay and lesbian parents. This is evident from the case of *Ewankiw v Ewankiw*.<sup>120</sup> The Charter preceded this case and it is interesting to note that despite the constitutionally protected rights contained in the Charter, the mother and her lesbian lover chose to deliberately lie to the court so that their homosexuality could be concealed. The fact that the lesbian mother chose to lie indicates that gay and lesbian parents do not feel sufficiently protected by the Bill of Rights.

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<sup>117</sup> Ibid, at 30.

<sup>118</sup> *K v K* (1976), 2 W.W. R 462 (Alt. Prov. Ct.).  
*D v D* (1978), 20 O.R. (2d) 722 (Co. Ct.).  
*Barkley v Barkley* (1980) 28 O.R. (3d) 141 (Prov. Ct.).  
*N v N* (1992) B.C.J. No. 1507 (Q.L.) (S.C.).

<sup>119</sup> (1980), 20 R.F.L. (2d) 361 (Ont. C.A.).



In the majority of the cases mentioned above, the courts have held that homosexuality per se is not a bar to custody. However Boyd argues that it may be all very well that homosexuality per se is not a bar in itself, but the test is not neutral. This is because heterosexuality is perceived as being the norm and gays and lesbians are perceived as challenging the norm.<sup>121</sup>

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<sup>120</sup> (1994) 99 Man.R. (2d) 302 Q.B. (Fam.Div.).

<sup>121</sup> Boyd op cit note 80, at 131.

### **3.3 An Investigation Into Custody And Access Of The Homosexual Parent In American Family Law**

In this discussion the writer proposes to investigate the tests used in custody and access disputes through the last three decades and thereafter to examine the relevant provisions of the American Constitution in order to establish the current trend, in judicial decisions.

#### **3.3.1 The Best - Interest - Rule**

According to the Uniform Marriage Divorce Act,<sup>122</sup> the best interest rule of the child is used in custody disputes. The “best interest” test includes the following:

- (1) the wishes of the child’s parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved

This best interest rule is used both in homosexual and heterosexual custody cases. However, in gay and lesbian custody cases, in addition to the best

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<sup>122</sup> S402, 9A U. L. A.561 (1987).

interest rule, courts apply their own standards of morality.<sup>123</sup> The judge has to make a decision on intimate family relationships based on information presented by lawyers and expert witnesses. In making this decision, the best interest's rule allows the judge flexibility and a wide discretion.<sup>124</sup>

In America, before the 1970 s, lesbian mothers were afraid to disclose their sexual orientation to the court for the obvious reason that it would be detrimental to their claim for custody. However in the 1970 s more lesbian mothers were disclosing heir homosexuality. Evan submits that the change in family law and custody was a direct result of the conduct of gays and lesbians as they began to affirm their constitutional rights<sup>125</sup> Hunter and Polikoff give varied reasons for such "coming out", the one being that the feminist movement had bonded women together.<sup>126</sup> In the 1970 s, in the midst of gay rights activism, the courts were still disposed to discrimination on the basis of sexual orientation. Legal representatives were advised to encourage their gay clients to avoid litigation by settlement out of court.<sup>127</sup> There were significant changes, which impacted, on the rights of gay and lesbian parents in 1976. The American Psychological Association passed a resolution, that custody, adoption or foster parenting determinations would not depend on sexual orientation.<sup>128</sup> In the late 1970 s, researchers published the first empirical

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<sup>123</sup> S.P Ali 'Homosexual Parenting: Child Custody and Adoption' (1989) 22 *University of California, Davis* 1009, at 1012.

<sup>124</sup> S Susoeff 'Assessing Children's Best Interests when a Parent is Gay or Lesbian: Towards a Rational Custody Standard' (1985) 32 *University of California, Los Angeles Law Review* 852, at 853 - 854.

<sup>125</sup> M.W Evans 'Parent and Child' M.J.P.: An analysis of the Reliance of Parental Homosexuality in Child Custody Determinations' (1982) 35 *Oklahoma Law Review* 633.

<sup>126</sup> N. D Hunter and N. D Polikoff 'Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy' (1976) 25 *Buffalo Law Review* 691, at 691-692.

<sup>127</sup> Ibid, at 715.

<sup>128</sup> J.J Conger 'Proceedings of the American Psychological Association Inc, for the Year 1976'(1997) 32 *American Psychology* 408,at 432.

study, dispelling the myths of homosexuality.<sup>129</sup> The decisions handed down by the Judges varied. The application of the same best-interest rule resulted in various, often opposing judgements. This will become evident in the later discussion of the approaches adopted by the American courts.

During the 1980 s biases of the judges continued, despite recognition of domestic partnership agreements.<sup>130</sup> The best-interest rule bestowed a wide discretion upon judges. In most instances, off course, the judiciary bore the assumption that a parent's homosexuality was detrimental to the child<sup>131</sup>

### **3.3.2 The Approaches Adopted By Courts in Custody and Access Disputes Involving the Gay and Lesbian Parent**

According to Evans, there were three approaches adopted by the courts: (i) there were some courts which held that there was an irrebuttable presumption that a gay and lesbian parent was unfit; whilst (ii) other courts accepted the need for such children to maintain an ongoing relationship with their parents but curtailed the gay and lesbian relationship by imposing conditions; and (iii) there were courts which adopted the Nexus approach, in other words an enquiry was held, as to the effect of the parents' sexual orientation on the children.<sup>132</sup>

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<sup>129</sup> D Hitchens and B Price 'Trial Strategy in Lesbian Mother Cases : the Use of Expert Testimony' (1978-1979) 9 *Golden Gate University Law Review* 451.

<sup>130</sup> D.L Chambers and N.D Polikoff ' Family Law and Gay and Lesbian Family Issues in the Twentieth Century' (1999) 33: 3 *Family Law Quarterly* 523, at 526.

<sup>131</sup> R. G Bagnall, P. C Gallagher and J. L Goldstein 'Burdens on Gay Litigants and Bias in the Court System : Homosexual Panic, Child Custody and Anonymous Parties' (1984) 19 *Harvard Civil*

(i) **The Irrebuttable Presumption Approach**

This presumption is based on the stereotypical perceptions of society, that gays and lesbians are inherently inadequate and unfit parents. However Evans maintains that the courts must act objectively and not be swayed by societal prejudices.<sup>133</sup>

1. The irrebuttable presumption of the unfitness of gay and lesbian parents is evidenced by the following cases, which the writer proposes to discuss. In *Nadler v Superior Court*,<sup>134</sup> the California Court of Appeals held for the first time that homosexuality alone did not render a gay parent unfit. This was restated in the case of *In Re Marriage of Cabalquinto*.<sup>135</sup> However eight years later, in *Chaffin v Frye*<sup>136</sup>, another Californian case, the court held that the mother's lesbianism rendered her unfit as a parent. In the trial court decision, the court officer found that the mother was a capable parent. Notwithstanding, custody was awarded to the grandparents. This decision was reaffirmed on appeal, even though the children expressed a desire to live with their mother and gave evidence that they had seen no signs of any sexual conduct. Almost a decade later, despite heightened gay advancement, a court in the same state, made a decision declaring the mother unfit, solely on the basis of her lesbianism.

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*Rights - Civil Liberties Law Review* 497.

<sup>132</sup> Evans op cit note 125, at 642.

<sup>133</sup> Ibid.

<sup>134</sup> 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

<sup>135</sup> 100 Wash.2d 325, 699 p.2d 866 (1983).

<sup>136</sup> 45 Cal. App.3d 3a, 119 Cal. Rptr. 22 (1975).

In *L v D*<sup>137</sup> the facts weighed heavily against the father. The children expressed the desire to live with their mother and complained of their father being unaffectionate. They had formed a good relationship with their mother's lover as opposed to having a poor relationship with their stepmother.<sup>138</sup> Notwithstanding substantial expert evidence in favour of the mother, the trial court denied custody and granted access subject to the imposition of conditions. The Appellate court confirmed the decision, without giving any substantiated reasons for its answer, on the basis of the presumption of unfitness of the lesbian mother.<sup>139</sup>

In the case of *Roe v Roe*<sup>140</sup>, the court held that the father's homosexuality rendered him an unfit and improper custodian parent.

This presumption of unfitness has emerged from perceptions that homosexuality is immoral. In the case of *J.P v P.W*, the gay father's right to access was restricted in that he and the children were subject to adult supervision.<sup>141</sup> A social worker appointed by the court to act as curator ad litem gave evidence that the gay father was a conscientious, responsible, loving and caring person.<sup>142</sup> Notwithstanding such evidence, the court concluded that the father's sexual orientation would have a negative impact on the moral development of the child

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<sup>137</sup> 630 S.W. 2d 240 (MO. Ct. App. 1982).

<sup>138</sup> *Ibid.*, at 242.

<sup>139</sup> *Ibid.*

<sup>140</sup> 228 Va. 722, 324 S.E. 2d 691 (1985).

<sup>141</sup> 772 S.W. 2d 786 (MO. Ct. App. 1989).

<sup>142</sup> *Ibid.*, at 791.

and saw the need to protect minors from exposure to a gay and lesbian lifestyle.

In the case of *Collins v Collins*,<sup>143</sup> the court also expressed the view that a link existed between a parent's homosexuality and a child's moral development. In this particular case the lesbian mother's stability could be questioned because she had engaged in four different lesbian relationships over a ten-year period as opposed to the father who had maintained a single heterosexual relationship for nine years. The court concluded that homosexuality was immoral and it was not a lifestyle that children should choose.<sup>144</sup>

There are some courts, which instead of upholding the irrebuttable presumption of unfitness of the gay or lesbian parent require the gay or lesbian parent to rebut the presumption that they are unfit.<sup>145</sup> Both the irrebuttable and the rebuttable presumption are a mockery of the best-interest rule. In adopting either presumption, the courts automatically barred a gay or lesbian parent instead of establishing who would be the most suitable parent. Hence the child's interests of the child are not served.

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<sup>143</sup> 1988 Tenn. App. Lexis 123 (Tenn. App. Mar. 30, 1988).

<sup>144</sup> Ibid, at 17.

## (ii) The Nexus Approach

When adopting the Nexus approach a court has to establish whether a parent's homosexuality has any adverse effect on the child. In the discussion of the cases to follow, one sees a balanced examination of the facts, leading to favourable decisions for the gay and lesbian parent. Amongst the first courts to apply the nexus test was a Michigan Appellate court in *People v Brown*, in which case no nexus was found.<sup>146</sup>

In *Leonard v Leonard*,<sup>147</sup> the mother sought to curtail the access rights of the gay father. The court found that the child had suffered no harm. In *Smith v Smith*,<sup>148</sup> custody was awarded to the lesbian mother because the child was in excellent care whilst with the mother. In *M.P v S.P.*,<sup>149</sup> it was alleged that the mother's sexual orientation caused embarrassment to the children, and had a detrimental effect on them. The court in confirming the custody order for the mother indicated that the embarrassment suffered by the child would not be affected by a displacement of custody. It was stated that the variation of custody would not alter the root cause of the problem, which was the mother's lesbianism. The court was of the opinion that living with the mother would cause the character of the girls to be strengthened and they will be in a position to make their own value judgements.

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<sup>145</sup> *Constant A v Paul* 344 Pa. Super 49, 496 A. 2d. (1985).

<sup>146</sup> 212 N.W. 2d 55 (Mich. Ct. App. 1973).

<sup>147</sup> 173 Pa. Super 424, 98 A 2d 638.

<sup>148</sup> 5 Fam. L. Rep (BNA) 24 50 (Cal. Super. Ct. Stanislaus County 1978).



*Bezio v Patenaude*<sup>150</sup> was hailed as a breakthrough with regards to the application of the nexus test. The court decreed that there must be a nexus between the parental unfitness and the parent's sexual orientation. In other words there must be evidence of a detrimental effect on the children. In awarding custody to the mother, the court held that "there is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy or maladjusted than children raised with a loving couple of mixed sex".<sup>151</sup>

In *Doe v Doe*,<sup>152</sup> the lesbian mother lived with her lover. She had previously enjoyed joint legal custody and visitation rights but the father applied for sole custody because of the mother's sexual orientation. Both the Trial court and the Appeal Court confirmed the joint custody. The Appeal Court stated that a parent's lifestyle was not the only factor to be taken into account and considered the following factors:

- (1) that both the father and mother were loving parents;
  - (2) the fact that the child wished to live with both his parents;<sup>153</sup>
  - (3) the fact that the child had not been teased and taunted by his peers;<sup>154</sup>
- and

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<sup>149</sup> 404 A.2d 1256 (N.J. Super. 1979).

<sup>150</sup> 410 N.E. 2d 1207 (Mass. 1980).

<sup>151</sup> Ibid, at 1215-16.

<sup>152</sup> 16 Mass. App. Ct. 499, 452 N.E. 2d 293 (1983).

<sup>153</sup> Ibid, at 295-296.

<sup>154</sup> Ibid, at 296.

(4) the evidence of experts. Three of the psychiatrists supported the mother, having joint custody of the child.

The court in *Doe v Doe*<sup>155</sup> made a decision by an examination of all the facts. Societal prejudices and the judges' own subjective views did not play a role. In *Guinan v Guinan*,<sup>156</sup> the court found that the mother's sexual orientation did not have an adverse effect on the child. In *M.A.B. v R.B.*<sup>157</sup> the child in question had general behavioural problems and experienced difficulties at school. The court awarded custody to the gay father who resided with his lover because the father's homosexuality did not have an adverse effect on the child. In fact the child's performance at school was better under the father's care. Juxtaposed to the afore-mentioned cases, a different approach was taken in *Kallas v Kallas*.<sup>158</sup> The court admitted that homosexuality did not automatically bar a person from custody or access but considered it sufficiently relevant to deny the mother any access which would include sleepovers.<sup>159</sup>

Likewise in the case of *N.K.M v L.E.M.*<sup>160</sup>, the court held that there was no automatic bar but removed the child from the mother's custody because of possible future harm to the child even though there was no evidence to substantiate such fear. The court made a decision with insufficient evidence and indicated that it could not wait until actual damage was done to remove

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<sup>155</sup> 16 Mass. App. Ct. 499, 452 N.E. 2d 293 (1983).

<sup>156</sup> 102 A.D. 2d 963, 477 N.Y.S. 2d 830 (1984).

<sup>157</sup> 134 Misc. 2d 317, 324, 510 N.Y.S. 2d 960 (Sop. Ct. 1986).

<sup>158</sup> 614 P. 2d 641 (Utah 1980).

<sup>159</sup> Ibid.

<sup>160</sup> 606 S.W. 2d 179, 183 (Mo. Ct. App. 1980).

the child from an “unwholesome environment.”<sup>161</sup> Paradoxically, the courts that adopted the nexus approach in order to serve the best interests of the child would deny custody and access at the slightest fear, suspicion or speculation. In other words, these courts do not presume the unfitness of gay and lesbian parents, but at the slightest negativity, no matter how minor or unsubstantiated, and even at the cost of a more suitable custodian parent would deny custody. Bagnall et al submit that there ought to be a requirement of a “demonstrable” adverse effect rather than a “speculative” one.<sup>162</sup>

*M.J.P v J.G.P*<sup>163</sup> was a custody dispute, which involved a two and a half-year-old child. The mother was involved in a committed lesbian relationship and had gone through a formal commitment ceremony in public. Evidence by a psychiatrist, a neighbour, the child’s father and paternal grandparents indicated that the child was a well adjusted, intelligent child and was well cared for by the mother. Notwithstanding such strong evidence, the custody order was reversed, placing custody with the father. The mother was granted rights of access but no overnight visits and the child was prohibited from contact with the mother’s lover.<sup>164</sup> Evans submits that the court in this case adopted the nexus approach but the enquiry was entangled with speculation and homophobia.<sup>165</sup> In other words even though the courts would not presume unfitness of the gay or lesbian parent, misconception and prejudice dictated the ultimate decision.

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<sup>161</sup> Ibid, at 186.

<sup>162</sup> Bagnall op cit note 131, at 523.

<sup>163</sup> 640 P. 2d 966 (1982).

<sup>164</sup> Ibid, at 212.

Rosenblum submits that the nexus approach is the most logical and serves the best interests of the child. In adopting the latter approach, the court does not automatically assume that the gay or lesbian lifestyle of the parent would have a detrimental effect on the child.<sup>166</sup>

### (iii) **The Imposition of Conditions**

Some courts have shifted away from the presumption of unfitness or the per se approach for fear of it being too strict, towards a more compromised approach. They have opted to grant access or custody but with the imposition of conditions. These conditions may consist of:

- (a) Prohibition of overnight visits with the gay parent and his or her partner;<sup>167</sup>
- (b) An undertaking that the children would be prevented from becoming aware of the same-sex relationship;<sup>168</sup>
- (c) A prohibition that the child would not have any contact with the lover;<sup>169</sup>
- (d) An order that the gay or lesbian parent not live with his or her partner,<sup>170</sup> and

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<sup>165</sup> Evans op cit note 125, at 654 and 656.

<sup>166</sup> D. M Rosenblum 'Custody Rights of Gay and Lesbian Parents' (1991) 36 *Villanova Law Review* 1665, at 168.

<sup>167</sup> *Collins v Collins* No. 87 – 238 – 11, 1988 Tenn. App. Lexis 123 (Tenn. App. Mar. 30, 1988).

<sup>168</sup> *Mitchell v Mitchell* No. 240665 (Cal. Super. Ct. Santa Clara County 1972).

<sup>169</sup> *Pascarella v Pascarella* 355 Pa. Super 5, 7, 512 A. 2d 715, 716 (1986).

<sup>170</sup> *Schuster v Schuster*, 90 Wash. 2d 626, 629-30, 585 p. 2d 130, 132-33 (1978).

- (e) An order that the gay or lesbian parent terminates the relationship altogether.<sup>171</sup>

Most if not all of these conditions are linked to the “open-discreet-test”. American courts have distinguished between overt relationships, where the gay or lesbian parent openly displayed his or her sexual orientation and covert or secretive relationships. Where the parents were more exhibitionary in their conduct, there was a greater probability of receiving unfavourable treatment. According to Fayer, society would tolerate gays and lesbians to a certain extent as long as it was concealed from the public.<sup>172</sup> In some instances, even where relatives have accepted the gay or lesbian lifestyle, they would prefer that the sexual orientation remains secretive.<sup>173</sup> This concept of discreet conduct of gays and lesbians was maintained by the imposition of conditions by the court, which prohibited gays and lesbians from discussing gay issues with their children or having any contact with their lovers.<sup>174</sup> Of all five conditions discussed, it is apparent that the presence of a lover posed the greatest difficulty. In the 1980 s notwithstanding the stability of the relationship, a gay parent with a lover, was denied custody with limited access.<sup>175</sup> Bagnall et al compared heterosexual parents involved in a similar relationship. They submit that the courts regard the latter relationships

<sup>171</sup> *N.K.M v L.E.M* 606 S.W. 2d 179, 183 (M.O. Ct. App. 1980).

<sup>172</sup> M. A Fayer 'Can Two Real Men Eat Quiche Together – Storytelling, Gender Role stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46:511 *University of Miami Law Review* 511, at 570.

<sup>173</sup> *Ibid*, at 589.

<sup>174</sup> *Ibid*, at 591.

as being positive, as far as the children are concerned. Finally, they concluded that major discrepancies existed because gays with lovers received far less favourable and harsher treatment than their heterosexual counterparts.<sup>176</sup> Judges of American courts have wide discretionary powers as to the election of the approaches, namely irrebuttable presumption, nexus or the imposition of conditions approach. When faced with a case, the Judge may opt for either of the former approaches, which may be favourable or unfavourable to the gay or lesbian parent. The latter could be quite extreme, because the gay or lesbian parent could face outright denial of custody or access. For a more compromised position the Judge may impose conditions or place limitations on custody or access rights. A study of the cases in the 1970 s and 1980 s indicates that there is no precedent or set pattern for the court to follow. Irrespective, of which approach was adopted, the cases showed stark contrast. This suggests that the gay or lesbian parent is faced with uncertainties and it would just depend which court and judicial officer is tasked with his or her decision.

### **3.3.3 Homosexual American Fathers**

The hostility against gays, more particularly men was emphasized when the Aids epidemic broke out in the United States because gays were a major risk group.<sup>177</sup> A gay father in a custody dispute faced a double-edged sword.

Firstly, like any other father applying for custody he has the Tender Years

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<sup>175</sup> *N.K.M v L.E.M* 606 S.W. 2d 179, 183 (M.O. Ct. App. 1980) M.J.P. V J.G.P. 640 P. 2d 966 (1982).

<sup>176</sup> Bagnall op cit note 131, at 530-531.

doctrine<sup>178</sup> against him. Although it has been under attack, and in some instances even rejected by the courts, in ninety percent of custody cases, the mother was awarded custody.<sup>179</sup> There were a fewer number of gay men who applied for custody as opposed to lesbian mothers. This may be attributed to the fact that children do not form part of the gay world.<sup>180</sup> Secondly there is a greater degree of societal acceptance of lesbians, as compared to their male counterparts. Wishard submits that lesbian mothers have a greater prospect of success in custody disputes than gay fathers do.<sup>181</sup>

### **3.3.4 Sexual Orientation and the American Constitution**

The constitutional implications of homosexuality have serious ramifications for the gay and lesbian as will be shown below.

The United States of America has a Bill of Rights entrenched in its Constitution. The Constitutional provisions, which impact on homosexuality, are the right to privacy; the equal protection clause; the due process clause; and the right to freedom of association.

The right to privacy received constitutional stature not through constitutional enactment but by judicial decision. The right to privacy was first discussed in

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<sup>177</sup> L. H Tribe *American Constitutional Law*, (1988) 1934.

<sup>178</sup> Also known as the maternal preference rule, in terms of this doctrine the custody of girls of any age and young children are awarded to the mother.

<sup>179</sup> D. R Wishard 'Out of the Closet and into the Courts: Homosexual Fathers and Child Custody' (1989) 93 *Dickinson Law Review* 401, at 407-408.

<sup>180</sup> F. W Bozett 'Gay Fathers: Evolution of the Gay-Father Identity' (1981) 51 (3) *American Journal of Orthopsychiatry* 552, at 555 - 559.

<sup>181</sup> Wishard op cit note 179, at 407.

*Griswold v Connecticut*,<sup>182</sup> a case which dealt with whether married couples could use contraceptives.

A gay or lesbian may argue that his or her right to privacy is being curtailed. The question posed is, does the right to privacy protect the gay and lesbian? The right to privacy was previously regarded as being settled in *Bowers v Hardwick*.<sup>183</sup> Bowers was arrested in his bedroom by the Atlanta police for engaging in gay conduct with a consenting adult. The court upheld the statute criminalizing consensual gay and lesbian conduct because the right to privacy did not protect such activity.<sup>184</sup> Some of the activities protected by the right to privacy are child rearing, education, family relationships, procreation, marriage, contraception and abortion.<sup>185</sup> The court in Bower's case afforded the complainant no protection because such a matter did not involve a family. However, in the case of *Roe v Wade* that dealt with a couple's right to have an abortion, the right was upheld. The couple was unmarried.<sup>186</sup> This certainly did not involve marriage or family.

*Griswold v Connecticut*<sup>187</sup>, *Eisstadt v Baird*<sup>188</sup> and *Carey v Population Services International*<sup>189</sup> were all cases that dealt with access to contraceptives. *Bowers v Hardwick*<sup>190</sup> regarded the aforementioned cases as being irrelevant as if they dealt merely with buying pharmaceutical products. In all of these cases, the

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<sup>182</sup> 381 U. S. 479 (1965).

<sup>183</sup> 478 U. S. 186 (1986) 106 S. Ct.

<sup>184</sup> Ibid, at 2844.

<sup>185</sup> Wishard op cit note 179, at 422.

<sup>186</sup> 410 U.S. 113 (1973).

<sup>187</sup> 381 U.S. 479 (1965).

<sup>188</sup> 405 U.S. 438 (1972).

<sup>189</sup> 431 U.S. 678 (1977).

<sup>190</sup> 478 U.S. 186 (1986) 106 S. ct.



plaintiff was seeking constitutional protection of intimate human relationships. Tribe submits that in a case where the conduct was behind closed doors and where the participants were consenting adults, the State of Georgia must justify itself for being in Hardwick's room.<sup>191</sup> *Bowers v Hardwick*<sup>192</sup> was not decided on legal principle but on prejudice which is evident in the judgement of the dissenting judges which refers to the majority's "almost obsessive focus on gay and lesbian activity". Hardwick and his partner were adults and by mutual consent engaged in sexual relations. There is no need for the state to protect such conduct. It is understandable that the state protects individuals regarding rape and paedophilia as the latter lacks consent. In *Bowers v Hardwick*<sup>193</sup> the privacy argument was not extended to gay and lesbian conduct.

The Equal Protection Clause is contained in the 14th Amendment to the United States Constitution. The right to equal protection is expressly stated in the Constitution, unlike the right to privacy.

Unlike our equality clause, the Equal Protection Clause makes no specific mention of the protected categories. It does not include "such as" or "other status" clauses. The inclusion or the exclusion of the categories has been left to the judiciary. In order for homosexuality to be included as a category and to receive protection, it has to be classified. In the United States there are three different classifications which operate under different levels of scrutiny. Statutes or prohibitions by the state that discriminate on the basis of race or

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<sup>191</sup> Tribe op cit note 177, at 2853.

<sup>192</sup> 478 U.S. 186 (1986) 106 S. ct, at 2843 - 2844.

national origin are subject to strict scrutiny and are known as “suspect classification”. These laws would only be constitutional if they served a compelling interest of the state.<sup>194</sup> Then there are laws which whilst discriminating against a certain group of persons protect another group, for example gender laws protecting women, may discriminate against men. This is known as the “quasi-suspect class”. This particular class is subject to “intermediate scrutiny”. It is therefore important that sexual orientation becomes classified as one of the aforementioned. If the discrimination does not fall into the suspect class or the quasi suspect class then there is a greater burden on the complainant to prove the illegitimacy of the State, rather than the State justifying its conduct and proving its legitimacy.<sup>195</sup> Therefore in order for gays and lesbians to receive protection under the equal protection clause it has to be classified as “suspect” or a “quasi-suspect” class. However in *Bowers v Hardwick*<sup>196</sup> the court stressed that it was not deciding its case on the Equal Protection Clause and did not categorize homosexuality into any of the classes.

In *Watkins v US Army*,<sup>197</sup> The court looked at three requirements that needed fulfillment before ascertaining whether the classification was suspect or quasi suspect. The requirements are:

- (1) That the particular group in question has a history of discrimination;<sup>198</sup>

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<sup>193</sup> Ibid.

<sup>193</sup> Tribe op cit note 177, at 1063 - 80.

<sup>194</sup> E Heinze *Sexual Orientation : A Human Right* (1995) 232.

<sup>195</sup> 478 U.S. 186 (1986) 106 C. cl. at 196.

<sup>196</sup> 847 F. 2d 1329 (9th Circ. 1988).

<sup>197</sup> Ibid, at 1345 - 1346.

- (2) That the discrimination has embodied a gross unfairness; and<sup>199</sup>
- (3) That the class has been “politically powerless” both historically and by being in the minority.<sup>200</sup>

In the *Watkins* case<sup>201</sup>, the court found that gays and lesbians did have a history of discrimination. As far as the second requirement in concerned, the court looked at three factors, which constitute “gross unfairness” namely:

- (1) Whether gays and lesbians belonged to a group which is unable to contribute to society;
- (2) That the disabilities that gays and lesbians face is as a result of societal prejudice rather than logical argument or reason; and
- (3) That the characteristics of a group are immutable.

The question of immutability has already been discussed earlier.<sup>202</sup>

With regard to the third requirement, of being “politically powerless”, the courts looked at whether that particular class belonged to a minority group because minority groups are usually unrepresented.<sup>203</sup> Sexual orientation was found to be a suspect class hence requiring strict scrutiny by the courts.

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<sup>198</sup> Ibid, at 1345 - 1346.

<sup>199</sup> Ibid, at 1348.

<sup>201</sup> 847 F. 2d 1329 (9<sup>th</sup> Circ. 1988).

<sup>201</sup> See Chapter I.

<sup>202</sup> Ibid, at 1348.

Since the *Bowers*'s<sup>204</sup> decision, it has been understood that discrimination against gays and lesbians is allowed. In 1987, a year after the *Bowers v Hardwick*<sup>205</sup> decision, in *Padula v Webster*<sup>206</sup> a lesbian who had applied for employment with the Federal Bureau of Investigation was turned down because of her homosexuality. The court held that in light of the milestone decision of *Bowers v Hardwick*,<sup>207</sup> the plaintiff in this case had not suffered a violation of the Equal Protection Clause.

In another case, *Woodward v United States*,<sup>208</sup> the plaintiff challenged his dismissal from the Navy in terms of the Due Process clause and the right to Freedom of Association. Strangely enough, the court cited *Padula's* case wherein the plaintiff's argument was based on a violation of the Equal Protection Clause.<sup>209</sup> The courts seemed to regard the Equal Protection and the Due Process clauses as being one and the same. Sunstein, in his analysis of *Bowers v Hardwick*,<sup>210</sup> argues that the Equal Protection Clause and Due Process Clause are distinct from each other. *Bowers*'s case was unsuccessful as far as the Due Process clause goes. Sunstein argues that the fact that certain laws challenged under one clause failed does not mean that it will also be unsuccessful under another clause.<sup>211</sup> The liberty of an individual is entrenched in the Due Process Clause.

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<sup>203</sup> C. J Joslin 'Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of *Bowers v Hardwick* - *Romers v Evans* 116 S.ct. 1620 (1996)' (1997) 32 *Harvard Civil Rights - Civil Liberties Law Review* 225, at 227.

<sup>204</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>205</sup> 822 F. 2d 97 D.C. Cir. 1987.

<sup>206</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>207</sup> 871 F. 2d. 1068 (Fed. Cir. 1989).

<sup>208</sup> 822 F. 2d 97 D.C. Cir. 1987.

<sup>209</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>210</sup> C Sunstein Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection (1998) 55 *University of Chicago Law Review* 1161, at 1168.

In terms of the 5th Amendment:

“No person shall.... be deprived of life, liberty of property, without due process of law.”<sup>212</sup>

The fourteenth amendment, which binds the state, stipulates:

“Nor shall any State deprive any person of life, liberty, or property without the due process of law.”

The due process clause is thus a means of judicial review by the courts to protect the liberty of individuals.

In attempting to seek protection for gays and lesbians, and in searching for loopholes in the *Bowers v Hardwick* decision,<sup>213</sup> lawyers have emerged with various legal arguments. One such argument is that *Bowers v Hardwick*<sup>214</sup> upheld the sodomy statute on the basis of the Due Process of law. Hence gays and lesbians may now challenge laws regarding their sexual orientation under the Equal Protection clause.<sup>215</sup>

Ten years later, the case of *Romer v Evans*<sup>216</sup> caused a serious shift of focus from the *Bowers* era.<sup>217</sup> Since this decision the courts don't blindly follow the

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<sup>211</sup> This clause commands the federal government.

<sup>212</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>213</sup> Ibid.

<sup>214</sup> Sunstein op cit note 210.

<sup>215</sup> 116 S.ct 1620 (1996).

<sup>216</sup> 478 U.S. 186 (1986) 106 S. ct.

precedent laid down in *Bowers v Hardwick*,<sup>218</sup> which allowed discrimination against gays and lesbians.

The court held that Amendment 2 of the Colorado Constitution was invalid in that it violated the Equal Protection clause of the Constitution of the United States.<sup>219</sup> The effect of Amendment 2 was that it would repeal all laws, which discriminated against gays and lesbians, and it would also prohibit the enactment of further laws that protect gays and lesbians.<sup>220</sup> Discrimination would not be allowed but at the same time, gays and lesbians would not receive protection. There were two legs of argument:

- (i) The Equal Protection clause; and
- (ii) The rational basis test.

In adopting the aforementioned test, the court questioned whether the legislation was connected to a legitimate state interest.<sup>221</sup> When a particular group is disadvantaged or targeted for discriminatory treatment, then the courts need to establish after careful examination, what the intent of the state is.<sup>222</sup> However, the courts did not grant gays and lesbians “suspect-class” status.<sup>223</sup> Therefore since the *Romer v Evans*<sup>224</sup> decision, legislation affecting gays and lesbians is not automatically subject to strict scrutiny.

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<sup>217</sup> Ibid.

<sup>218</sup> 116 S. ct. 1620 (1996), at 1623.

<sup>219</sup> Ibid, at 1626.

<sup>220</sup> 116 S. ct. 1620 (1996), at 1629.

<sup>221</sup> Joslin op cit note 203, at 243.

<sup>222</sup> Ibid, at 237.

<sup>223</sup> 116 S. ct. 1620 (1996), at 1629.

To summarize, the position is that *Bowers v Hardwick*<sup>225</sup> seemed to have shut the doors for gays and lesbians thus curtailing legal argument and causing a major stumbling block for their lawyers. Then followed *Romer v Evans*<sup>226</sup> ten years later, preventing discrimination against gays and lesbians, a decision welcomed by the gay community. *Bowers v Hardwick*<sup>227</sup> dealt with criminalisation of gay and lesbian sexual conduct. The writer is of the view that, the decriminalization of private sexual conduct between two consenting adults is very important and is related to family aspects like custody and access because the rights of gay parents cannot be protected if the law regards their sexual conduct as an offence.

About the same time as *Romer v Evans*<sup>228</sup> was the case of *Baehr v Miike*.<sup>229</sup> The plaintiffs challenged the refusal of marriage licenses by the Department of Health. The Supreme Court of Hawaii held that there was an onus on the State to prove that there was a compelling State interest for refusing the application. The defendant alleged *inter alia* that it had a "compelling interest to promote the optimal development of children ... It is the State of Hawaii's position that, all things being equal, it is best for a child that it be raised in a single home by its parents or at least by a married male and female..."<sup>230</sup> It was argued by the defendant that if same sex marriages were to be recognized, gay parents would become more involved with the rearing of children. Expert witnesses were called by the defence. According to Dr Pruett, an expert for the defence, a

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<sup>224</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>225</sup> 116 S. ct. 1620 (1996).

<sup>226</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>227</sup> 116 S. ct. 1620 (1996).

<sup>228</sup> 1996 WL 694235 (Haw.Cir. Ct. 1996) <http://www.qrd.org/usa/legal/hawaii/baehr-v-mike.txt>.

parent's homosexuality would not disqualify him or her because they could be just as capable and loving as their heterosexual counterparts.<sup>231</sup> Another defence expert witness, Dr Eggbeen, submitted that children in a gay and lesbian household were similar to those raised by step-parents and experienced severe problems.<sup>232</sup> However, he later conceded that gay or lesbian couples could provide a stable family environment.<sup>233</sup> The last expert witness for the defence was Dr Merrill, who testified that parental fitness was not affected by sexual orientation.<sup>234</sup> The court held that the most significant factor was the nurturing relationship between parent and child. It was further held that gays and lesbians were capable of raising happy well-adjusted children<sup>235</sup> It was decreed that the defendant could not deny an application for a marriage license solely on the basis of the applicants being of the same sex. In response to the Supreme Court of Hawaii decision, the Legislature re-enacted the laws regarding marriage in that it would remain a union between a man and a woman.<sup>236</sup> There was a concern that if the State of Hawaii were to award same-sex couples the right to marry, many from the United States of America would go there to solemnize their unions. This would create the problem of States having to deal with the recognition of such unions. In 1999 in response to the dilemma and in refusing to recognize same-sex marriages, twenty nine States adopted non-recognition Legislation.<sup>237</sup>

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<sup>229</sup> Ibid, at para 19.

<sup>230</sup> Ibid, at para 31-35.

<sup>231</sup> Ibid, at para 49.

<sup>232</sup> Ibid, at para 51.

<sup>233</sup> Ibid, at para 71.

<sup>234</sup> Ibid, at para 125.

<sup>235</sup> Chamber and Polikoff op cit note 130, at 526.

<sup>236</sup> Ibid.



## CONCLUSION

It is very important to establish the perceptions that society has regarding gays and sodomy because these perceptions are carried into the courtroom. It is these negative perceptions that could account for the biases held by many judicial officers. An examination of *Bowers v Hardwick*<sup>238</sup> reveals that sodomy was a crime, and gay and lesbian sexual relations were not protected by the law. One can therefore hardly expect to find an environment of tolerance and acceptance of gays and lesbians in the courtroom. Hence, contrary to the best interest rule, the judge's own biases came to the fore. Their wide discretionary powers allowed for such biases.<sup>239</sup> In light of the aforementioned discussion the irrebuttable presumption approach was not surprising. This approach is illogical, presumptuous and discriminatory in that it concludes without evidence that the gay or lesbian parent is neither fit nor capable of being a parent.

The nexus approach seems to be more in line with the recognition of human rights. In the majority of cases where the nexus approach was adopted, the court's award was in favour of the gay or lesbian parent, having found no detrimental effect on the children concerned.<sup>240</sup> Quite to the contrary, in *M.P. v S.P.*,<sup>241</sup> the court found that the mother's lesbianism would positively impact on her daughters and would instill in them maturity and character. *Bezio v Patenaude*<sup>242</sup> must be commended for the test that it

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<sup>237</sup> 478 U.S. 186 (1986) 106 S. ct.

<sup>238</sup> Ali op cit note 123.

<sup>239</sup> *People v Brown*; *Leonard v Leonard*; *Smith v Smith*; *M.P. v S.P.*; *Bezio v Patenaude*; *Doe v Doe*; *Guinan v Guinan*; *M.A.B. v R. B.*

<sup>240</sup> 404 A. 2d 1256 (N.J. Super. 1979).

<sup>241</sup> 410 N. E. 2d 1207 (Mass. 1980).

introduced. The court was of the opinion that there should not only be a nexus between the parent's homosexuality and a negative effect on the child, but that there must be demonstrable evidence of such effect.

The court in *Kallas v Kallas*<sup>243</sup> appeared hypocritical when they stated on one hand, that there was no bar to homosexuality but denied sleepovers on the other, without any evidence or forwarding any explanation for such denial. A similar decision was taken in the case of *N.K.M. v L.E.M.*<sup>244</sup> The court in the aforementioned case also seemed to hide behind the farcical approach that there was "no automatic bar" to custody, only to deny custody without any evidence. There was no evidence of a negative or detrimental effect on the child concerned but the court was concerned about possible future harm. This surely smacks of prejudice and bias. The writer submits that documented evidence indicative of harm to the child needs to be placed before the court.

The discrimination was glaringly obvious in the case of *M.J.P v J. G. P*<sup>245</sup> because all the evidence pointed to the mother as the most suitable parent, but she was denied custody. This decision was made even though it was contrary to the interests of the child. The writer agrees with the submission of Rosenblum that the nexus approach is the more "logical" one, however the latter cases reveal that courts hover behind the curtains of this approach only to camouflage their deep seated prejudices and biases.<sup>246</sup> The third approach adopted by American courts, that of imposition of conditions, is one that assumes that homosexuality is "bad" and children should not be

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<sup>242</sup> 614 P. 2d 641 (Utah 1980).

<sup>243</sup> 606 S.W. 2d 179, 183 (M.O. Ct. App. 1980).

<sup>244</sup> 640 P. 2d 966 (1982).

<sup>245</sup> Rosenblum op cit note 166.

exposed thereto. This approach is farcical and like any other approach not supported by evidence, highly prejudicial.

## CONCLUSION

Sexual orientation is an enumerated ground in the Equality clause. The Best Interest Rule which governs custody and access disputes in South Africa has no clear guidelines.<sup>1</sup> The judge has to rely on a value system. The decisions may therefore reflect the values as well as the prejudices of the community and the judge. The judge has a wide discretion. This wide discretion results in the disparity of decisions. The problem is increased when the litigant in the custody or access dispute is a gay or lesbian parent. Homophobic attitudes may then come to the fore. The writer does not propose the enactment of legislation for the granting of custody or access to gay or lesbian parents.<sup>2</sup> Such legislation would have no effect unless proper guidelines are set in place. The writer sees a need for the Constitutional Court to lay down proper guidelines. A proper set of guidelines would avoid lengthy, expensive and protracted litigation, which causes great acrimony for all parties, including the children. It needs to be established that the best interest rule that applies in all custody and access cases is also operative, when the parent happens to be gay or lesbian.

By refusing custody or access and by imposing unjustified conditions, the courts would be perpetuating homophobia and prejudice instead of attempting to eradicate it. The study of the fears held by gay and lesbian parents reveals that there is no basis, which can be countenanced before the law for treating gay and lesbian parents differently. Homosexuality per se should not be the issue.

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<sup>1</sup> A Pantazis 'Children's Rights' in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman *Constitutional Law of South Africa* 1ed (1996) 33-1.

Instead, there must be a common objective of both the courts and the parents, to place the child with the parent who is most able to care for, protect and educate the child. The nexus approach which the American courts use seems to be the most logical. According to this approach, the homosexuality of the parent would be taken into account if it were detrimental to the interests of the child. The writer finds the test laid down in *Bezio v Patenaude*<sup>3</sup> to be useful. The court held that there must be “demonstrable” evidence that the parent’s homosexuality has negatively affected the child. We must not be lulled into a false sense of security because we have a Bill of Rights, as does Canada. Yet the majority of Canadian cases are based on the open-discreet test. This test is dependent on how discreet or overt the homosexual parent is, regarding his or her sexual orientation. It would be detrimental if South African courts were to follow in these footsteps. It would be discriminatory if South African courts were to reward discreet gay and lesbian parents, by awarding custody or granting more liberal access. Such an attitude presumes that homosexuality is immoral or wrong. Majoritarian views are not necessarily the correct one. Gays and lesbians have the right to live their lives both in the bedroom and in public, freely, and to the same extent as all South Africans.

The court has to deal with the fact that the child would be teased and stigmatised by his peers. The writer agrees with the Australian authorities,<sup>4</sup> that exposure of the children to the different lifestyles would cause them to mature. *Palmore v Sidoti*<sup>5</sup> has

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<sup>2</sup> Save for section 6(1)(b) of the Divorce Act 70 of 1979.

<sup>3</sup> 410 N.E. 2d 1207 (Mass. 1980).

<sup>4</sup> *Spry v Spry* (1997) F.L.C. at 76,447, *Jarman v Lloyd* (1982) 8 Fam. L.R. 878, at 890.

<sup>5</sup> 466 U.S. 429 (1984).

indicated that if a court were to deny custody on the premise that the child would be teased, that court would be condoning society's prejudices. The writer submits that the latter would perpetuate homophobia. The court's role is to eradicate it and not perpetuate it. If the gay parent were to be refused custody but still maintains contact by exercising rights of access, the interaction would still cause the child to be teased. The court must be satisfied that the denial would cause the harassment to be eradicated.<sup>6</sup> Boyd advocates that there are differences between the heterosexual and the gay and lesbian parent. She submits that the courts place an onus on the heterosexual parent to assist the child, in understanding and accepting the gay or lesbian parent. The child concerned would need to deal with stigmatisation by peers and homophobic community attitudes. The role of the heterosexual parent would be to counsel and support the child in this regard.<sup>7</sup>

There is also a definite need for independent representation for the children. The best interests of the child have been constitutionalised by section 28 of the Constitution. This provision places a burden on the State to provide mechanisms for the protection and interests of the child, independent child representation is tantamount to such protection. Considering South Africa's economy, creation of new structures would place further financial burden. The state already has a structure in place, which is the family advocate.

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<sup>6</sup> *M.P. v S.P* 169 N.J Super 425, at 436-39, 404 A. 2d 1256., 1263 (App. Div 1979).

<sup>7</sup> S.B Boyd "Lesbian (and Gay) Custody Claims: What Difference does Difference make?" (1997) 15 *Canadian Journal of Family Law* 131, at 145.

The Mediation in Certain Divorce Matters Act<sup>8</sup> provides for the family advocate. The function of the family advocate is to hold an enquiry with both parents and children and then to make the necessary recommendations. The State needs to grant new directives to the family advocates regarding its function. The family advocate must not only be present but must actively participate in the proceedings, thus protecting the interests of the child. Although courts are guided by the recommendations of the family advocate, there is little clarity as to the evidentiary value of such recommendation.<sup>9</sup> In the 1994 case *Van Rooyen v Van Rooyen*,<sup>10</sup> the court did not accept the family advocate's report. The writer proposes that section 6(1)(b)<sup>11</sup> be amended to give legal status to the report of the family advocate. The latter is in an invidious position because he or she has had personal interviews with all parties, including the children. The transformation regarding family law has already begun. Durban has a Family Centre situated at the Magistrates Court. Integral to the programme, is the training of family court officers. The writer submits that the training ought to include a series of seminars regarding custody and access disputes involving gay and lesbian parents. Although the State must be commended for its efforts in transformation, the writer submits that there is a dire need for Family Centres in rural areas. Magistrates are authorised by virtue of the Child Care Act<sup>12</sup> to remove children from their homosexual parents as was done in the case of *Greyling v Minister of Welfare and Population Development and Others*.<sup>13</sup> A gay or lesbian parent in a

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<sup>8</sup> Act 24 of 1987 see also section 6(1)(b) of the Divorce Act 70 of 1979.

<sup>9</sup> F.J Bosman and G.J Van Zyl "Children, Young Persons and their Parents" in J.A Robinson *The Law of Children and Young Persons* (1997), at 65.

<sup>10</sup> 1994 (2) SA 325 (W).

<sup>11</sup> Of the Divorce Act 70 of 1979.

<sup>12</sup> Section 13 of the Child Care Act 75 of 1983.

<sup>13</sup> Case no: 98/8 197 – WLD, unreported.

rural area would not be in a financial position to apply to the High Court to overturn the lower court decision. There is therefore a need for all family magistrates both in the cities and rural areas to receive adequate training. It is hoped that there would be equality for all premised on our Bill of Rights but at the same time acknowledging that the interests of the child is paramount.



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