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CUSTODY RIGHTS OF LESBIAN MOTHERS: LEGAL THEORY AND LITIGATION STRATEGY

NAN D. HUNTER* AND NANCY D. POLIKOFF**

INTRODUCTION

To many people in our society, the phrase "lesbian mother" is confusing and contradictory. Ignorance about homosexuality and insensitivity to women have made it difficult for many people to deal with the concept of lesbian mothers. Since sexual intercourse with a man is necessary for a woman to become pregnant, and since lesbians have sexual relationships with other women, the common belief is that lesbian mothers cannot exist. Although the premises are true, the conclusion is not. Recent estimates suggest that there are well over 1.5 million lesbian mothers in this country.¹

The reasons for the existence of so many lesbian mothers are varied. Two well-known lesbian writers have suggested that

[m]ostly these are women who were unaware of their Lesbian tendencies until after they married and had children. Or they are women who suppressed their Lesbian feelings, convinced, as most heterosexuals are, that these feelings merely represented a natural phase in their lives and would disappear after they experienced marriage and motherhood. There are some women, too, who consciously rejected the gay life in favor of the more societally accepted and respected heterosexual relationship.²

Another reason is the feminist movement. In the past few years, it

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1. There are an estimated 11 million lesbians in America—one out of every 10 women. See TASK FORCE ON SEXUALITY, D. C. CHAPTER, NATIONAL ORGANIZATION FOR WOMEN, *A LESBIAN IS. . .* (1974). See also Gebhard, *Incidence of Overt Homosexuality in the United States and Western Europe*, in NATIONAL INSTITUTE FOR MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS 22, 28 (1969). Studies estimate that 13 to 20 percent of all lesbians are mothers. See Gundlach & Riess, *Self and Sexual Identity in the Female: A Study of Female Homosexuals*, 1 NEW DIRECTIONS IN MENTAL HEALTH 228 (1968); Kenyon, *Studies in Female Homosexuality*, 114 BRIT. J. PSYCHIATRY 1345 (1968); *The Bilitis Study*, 11 ONE INSTITUTE: HOMOPHILE STUDIES 119 (Fall 1959).

2. P. LYON & D. MARTIN, *LESBIAN WOMAN* 141 (1972).

has helped to bring women together both emotionally and sexually. Some women who previously had accepted their heterosexuality without question have begun to broaden their view of their own sexuality to include relationships with women. Some have decided to reject heterosexuality, finding a total commitment to women to be more personally fulfilling and more politically positive. Some of these previously heterosexual women have children.

Until recently, lesbian mothers received little legal or psychological attention. The rights and needs of lesbian mothers have been neglected because it has been generally assumed that lesbian mothers simply do not exist, or that such women are pitiful aberrations. With the expansion of the women's and the gay liberation movements, more women are recognizing and affirming their homosexuality. There have always been lesbian mothers, just as there have always been homosexual fathers, but until now most of them have avoided public acknowledgment of their sexuality. Many lesbian mothers remained married, but even those who sought divorces never betrayed their secret. By rejecting the possibility of a positive life style as a lesbian, they rejected themselves as well. As more women are willing to come to grips with their identities and to accept their sexuality, neither the psychological nor the legal community will be able to ignore the existence, rights and needs of lesbian mothers.

Usually, the worst fear of a lesbian mother, and the greatest emotional trauma and legal problem that she can encounter, is a custody battle for her children based on the grounds that her sexuality renders her "unfit." The cases involving lesbian mothers overwhelmingly demonstrate the difficulty they face in attempting to maintain custody of their children and to affirm their self-identity at the same time. Homosexual fathers face no less severe problems. The bulk of litigation, however, concerns lesbian mothers rather than homosexual fathers. This article, therefore, refers almost exclusively to lesbian mothers, but the analysis should apply to a substantial degree to cases involving homosexual fathers.

In this article we will first explore the theory of child custody and neglect standards as articulated in the statutory and case law and as applied to lesbian mothers, and we will examine the law's treatment of lesbian mothers involved in custody disputes with fathers, with other relatives, and with the state. We will then suggest for practitioners the strategy and tactics which should be used by attorneys representing lesbian mothers in future cases.

I. THE LAW OF LESBIAN MOTHER CASES

A. *The Legal Standards in Custody Disputes*

In any given suit, the legal standards applied to determine which party shall receive custody of a child depend upon the nature of the proceeding. In disputes between the father and the mother, the "best interests of the child" standard is almost universally applied.³ This standard is purposefully vague, with tremendous discretion vested in the trial court. In suits by the state to remove a child from a parent, usually called neglect proceedings, the standard is statutory, but the language is often imprecise. In order to remove the child from the parent, the state may be required to show that the child lacked proper care⁴ or that the parent is "depraved."⁵ Although the statutory standard may be more specific than the "best interests of the child," it usually is not limited to physical neglect or cruelty, and considerations of parental fitness come into play. As in father-mother disputes, the trial court is permitted great latitude. A third and growing class of lesbian mother custody disputes concerns challenges to the mother's custody by third-party relatives, such as grandparents.⁶ The standard which courts apply in such cases is quite unsettled. Neither the best-interests-of-the-child approach of mother-father disputes nor the parental-fitness approach of neglect proceedings seems entirely accepted, although a review of the case law indicates that courts lean more toward the former than the latter.⁷

Because custody decisions are never final, most jurisdictions employ an additional standard, the "material change in circumstances" test, to determine whether an initial custody order should be changed.⁸ Although courts are reluctant to move children back and forth between homes, the party who lost custody can later petition the court to reconsider an initial determination. If the petitioner can demonstrate a material change, such as would justify the inevitable disruption of

3. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 572 (1968).

4. MICH. COMP. LAWS. ANN. § 712A.2 (Supp 1975).

5. CAL. WELF. & INST'NS CODE § 600(d) (West 1972); ILL. ANN. STAT. ch. 23, § 2360 (Smith-Hurd 1968).

6. See text accompanying notes 70-95 *infra*.

7. See, e.g., *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975).

8. The standard may be judicially determined. See, e.g., *Dawn v. Dawn*, 194 F.2d 895, 896 (D.C. Cir. 1952). Or it may be mandated by statute. See, e.g., OHIO REV. CODE ANN. § 3109.04 (Baldwin Supp. 1974).

moving the child, a new placement will be ordered. This standard is also subject to broad interpretation by the trial court, and the trial court's decision as to a change will be reversed only if no evidence in the record is sufficient to support it.⁹ Thus, a lesbian mother who wins custody in the first instance may be subject to further litigation under the material-change-in-circumstances standard.¹⁰

B. *Mother versus Father*

In making the initial decision as to whether the father or the mother should have custody, most courts have adopted the view that under the best-interests-of-the-child standard, virtually any evidence concerning the child's environment is relevant.¹¹ Thus, courts regularly hear evidence as to the physical facilities available at each home, the locale of the homes, the composition of the families, the moral standards of the parties, the age, sex and health of the parties as compared to the age, sex and health of the child, and the financial status of each party, as well as evidence of the child's preference and the emotional bonds between the child and each party.¹² From this maze of factual information, a court must focus on what it considers to be most essential and will then place the child accordingly. While this latitude protects parents and children from inflexible rules which might preclude the essential human aspects of a custody dispute, it also permits—perhaps even encourages—the biases of a judge to be given free rein. When the issue in question is lesbianism, in a society in which homosexuality is often viewed as immoral or unhealthy,¹³ the possibilities for abuse are clear. To deprive a parent of custody because of what one

9. See *Spence v. Durham*, 283 N.C. 671, 686, 198 S.E.2d 537, 546 (1973).

10. See *Schuster v. Schuster*, No. 36876 (Wash. Super. Ct., King County, Sept. 3, 1974), and *Isaacson v. Isaacson*, No. 36868 (Wash. Super. Ct., King County, Sept. 3, 1974), reported in 1 FAMILY L. RPTER. 2004 (1974). See also text accompanying notes 30-33 *infra*.

11. Some states have statutes which enumerate factors which the trial court should consider, but rarely are these statutes phrased so as to exclude other evidence. See, e.g., OHIO REV. CODE ANN. § 3109.04(c) (Baldwin Supp. 1974).

12. *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied 385 U.S. 949 (1966). See also H. CLARK, *supra* note 3, at 585-91; Foster & Freed, *Child Custody (Part I)*, 39 N.Y.U.L. REV. 423, 439-40 (1965).

13. The word "homophobia" has been used by some psychologists to denote the irrational fear of homosexuals prevalent in American society. See Basile, *Lesbian Mothers I*, 2 WOMEN'S RIGHTS L. REP. 3, 3-5 (1974) [hereinafter cited as Basile]; Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 800-15 (1975) [hereinafter cited as *The Avowed Lesbian Mother*].

judge may consider misconduct offends the belief that cases should be decided on rational and predictable, rather than arbitrary, grounds.¹⁴ As one court has recognized:

[A] judge should not base his decision upon his disapproval of the morals or other personal characteristics of a parent that do not harm the child. It is not his function to punish a parent by taking away a child.¹⁵

The key phrase, of course, is "characteristics . . . that do not harm the child." The only effective control against a decision based on prejudice, *sub rosa*, is a requirement that harm to the child be demonstrated before any factor, such as the mother's lesbianism, can be considered. To date, the courts which have decided custody disputes between lesbian mothers and heterosexual fathers have generally not required such a nexus or have been satisfied with a very weak one.

A threshold question that arises in applying the nexus test is whether a court must consider a parent's homosexuality in determining a custody dispute. Only one appellate court has addressed this question and, in a 1959 decision, ruled that it must. In *Immerman v. Immerman*,¹⁶ the California Court of Appeal ruled that the trial judge had abused his discretion by excluding evidence of the mother's lesbian activity. The court found a duty on the part of the trial court to inquire into the "moral character, acts, conduct and disposition" of the party seeking custody.¹⁷ The decision seems to be premised implicitly on the belief that lesbianism is immoral and therefore a factor relevant to a determination of the mother's ability to care for her child.

Although *Immerman* mandated that homosexuality be considered by the court, the impact of *Immerman* was somewhat modified eight years later by the decision of another California appellate court in *Nadler v. Superior Court*.¹⁸ The *Nadler* court reversed a trial court's determination that the mother's homosexuality rendered her unfit as

14. Many child custody decisions once regarded as morally correct today appear as flagrant abuses of individual rights. Before the turn of the century, two English courts deprived parents of custody because of their atheism. *Shelley v. Westbrooke*, 37 Eng. Rep. 850 (Ch. 1817); *In re Besant*, 11 Ch. D. 508 (1879). In the United States, a mother lost her child because of her belief in communism. *Eaton v. Eaton*, 122 N.J. Eq. 142, 191 A. 839 (1937), affirming on other grounds the trial court decision. See Casenote, 49 HARV. L. REV. 831 (1936); 36 Colum. L. Rev. 678 (1936).

15. *Stack v. Stack*, 189 Cal. App. 2d 357, 371, 11 Cal. Rptr. 177, 187 (1961).

16. 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (1959).

17. *Id.* at 127, 1 Cal. Rptr. at 301.

18. 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

a matter of law. The court held that the trial judge must consider all the evidence and exercise his discretion as to what would be best for the child's welfare. The lower court's failure to exercise its discretion was reversible error. On remand, the superior court judge exercised his discretion and awarded custody to the father, permitting visitation by the mother every Sunday in the presence of an adult third party.¹⁹

The *Nadler* remand opinion is one of several trial court decisions in mother-father disputes in which a nexus between the mother's lesbianism and harm to the child was either not demonstrated at all or was so tenuous as to be negligible. At one point, the judge in the *Nadler* remand case commented from the bench:

[W]e are dealing with a four-year-old child on the threshold of its development—just cannot take the chance that something untoward should happen to it²⁰

In *O'Harra v. O'Harra*,²¹ an Oregon trial court, after considering a number of factors, including the mother's lesbianism, awarded custody of three sons to their father without setting forth any specific basis for its findings or any relationship between the mother's sexual preference and her care of the children. An Ohio trial court, in *Townend v. Townend*,²² granted custody to neither the father nor the mother, but rather to the paternal grandmother, who was 65 years old and who neither testified nor submitted an affidavit of her willingness to be custodian of the children.²³ The father was found to be unfit because, among other things, he ignored his children for ten months and, at one point, attempted suicide in the children's presence.²⁴ The mother was found to be unfit because she lived with another woman in a lesbian relationship, which the court said was "clearly to the neglect of super-

19. Discussion of this case may be found in K. DAVIDSON, R. GINSBURG & H. DAY, *SEX-BASED DISCRIMINATION* 270 (1974) [hereinafter cited as *SEX-BASED DISCRIMINATION*]; Basile at 22, 23.

20. Transcript of Hearing at 67, *Nadler v. Nadler*, No. 177331 (Cal. Super. Ct., Sacramento County, Nov. 15, 1967).

21. No. 73-384 E (Ore. Cir. Ct., 13th Jud. Dist., June 18, 1974), *aff'd*, 530 P.2d 877 (Ore. App. 1975). In spite of a lengthy trial and extensive appellate argument, the appellate court ruled that "[b]ecause there is a potential for harm to persons involved, we conclude that no useful purpose would be served in publishing a detailed opinion." 530 P.2d at 877.

22. 1 FAMILY L. RPTR. 2830 (1975) (Ohio Ct. C.P., Portage County, March 14, 1975).

23. Brief for Defendant-Appellant at 24, *Townend v. Townend*, Case No. 639 (Ct. App., Portage County, Ohio).

24. 1 FAMILY L. RPTR. at 2831.

vision of the children.”²⁵ The court did not explain how the children were unsupervised. In establishing a nexus between the mother’s lesbianism and the best interests of the children, the court found the mother’s cohabitation with another lesbian to be specifically detrimental in one way: the lesbian relationship might result in the children being teased by their peers.²⁶ In apparent violation of an Ohio statute directing the judge to consider several specific factors in determining the best interests of the child,²⁷ the trial court judge based his entire decision with respect to the mother’s fitness on her lesbianism.

One variation on the nexus issue concerns the effect of an ongoing lesbian relationship on the analysis. Specifically, do the courts consider a mother’s lesbianism to be less harmful if it is totally repressed? In several lesbian mother custody cases, the courts have implied that a distinction exists between lesbianism as a mere sexual preference and lesbianism as a practice. Such courts may acknowledge that the former does not necessarily adversely affect the child, but the latter is viewed as far more pernicious. In these cases, it is a connection between the existence of an ongoing lesbian relationship and harm to the child which is, again, simply assumed. The resulting demand on the lesbian mother is that she deny herself full expression of her sexuality. It is hard to imagine that a court would impose this type of bifurcation of sexual identity on a heterosexual. In *Townend v. Townend*,²⁸ the trial judge stated:

I don’t say that a mother cannot be fit to rear her children even if she is a lesbian, but I wonder if she is fit when she boldly and brazenly sets up in the home where the children are to be reared, the lesbian practices which have been current there, clearly to the neglect of supervision of the children.²⁹

In *Mitchell v. Mitchell*,³⁰ both parents requested custody of their two sons and one daughter. At the hearing, a probation officer, a court conciliation counselor, and a psychologist filed reports favoring the

25. *Id.*

26. Brief for Defendant-Appellant, *supra* note 23, at 7.

27. OHIO REV. CODE ANN. § 3109.04(c) (Baldwin Supp. 1974).

28. 1 FAMILY L. RPTR. 2830 (1975) (Ohio Ct. C.P., Portage County, March 14, 1975).

29. 1 FAMILY L. RPTR. at 2831.

30. No. 240665 (Cal. Super. Ct., Santa Clara County, June 8, 1972). Discussion of this case may be found in SEX-BASED DISCRIMINATION at 276-77, and *Custody and Homosexual Parents*, 2 WOMEN’S RIGHTS L. REP. 19, 20-21 (1975).

mother as guardian. The father replied that the mother's lesbianism rendered her unfit and that he would provide the children with a Christian home. The court awarded custody to the mother but ordered (1) that she not live with her female companion, and (2) that she associate with the woman only when the children were in school or visiting their father. In a Seattle joint decision, *Schuster v. Schuster*³¹ and *Isaacson v. Isaacson*,³² which has since been modified,³³ the court permitted two lesbians to retain custody of their children. The judge did not order that their relationship end, but he did require the women to separate and to establish independent homes for their children because he deemed their living together to be a "potentially destructive environment."³⁴

The experiences of two Tacoma, Washington, women who chose to live together is illustrative of the arbitrariness which can result when a nexus requirement is absent. At issue in both cases was the effect of their relationship on their children. In *Driber v. Driber*,³⁵ one mother was awarded custody of her three children after a hearing in which the judge expressed interest primarily in the stability of the relationship between the two women.³⁶ However, in *Koop v. Koop*,³⁷ heard before a different judge in the same county, the other mother lost custody of two of her three children. All three Koop children expressed a preference for living with their mother. The trial court judge permitted the oldest, age 15, to remain with her mother but required the two younger children, ages 10 and 12, to live with their father. The two children ran away from their father's home on several occasions,

31. No. D-36868 (Wash. Super. Ct., King County, Dec. 22, 1972).

32. No. D-36867 (Wash. Super. Ct., King County, Dec. 22, 1972). The original decision in this case is discussed in *Custody and Homosexual Parents*, *supra* note 30, at 20, and in *SEX-BASED DISCRIMINATION* at 276.

33. *Schuster v. Schuster*, No. 36876 (Wash. Super. Ct., King County, Sept. 3, 1974), reported in 1 FAMILY L. RPT. 2004 (1974).

34. See *SEX-BASED DISCRIMINATION* at 276 n.73 and accompanying text.

35. No. 220748 (Wash. Super. Ct., Pierce County, Sept. 17, 1973), reported in *Custody and Homosexual Parents*, *supra* note 30, at 23-24.

36. See *Custody and Homosexual Parents*, *supra* note 30, at 24. The judge appointed a social worker to investigate Ms. Driber's home. The social worker recommended that Ms. Driber be awarded custody, and she concluded that:

[B]oth Nancy Driber and Marilyn Koop are mature, responsible individuals with very adequate parenting skills. Both Nancy Driber and Marilyn Koop use discretion regarding their sexual relationship, considering this but one aspect of an overall mutual friendship.

Investigator's Report at 4 (April 11, 1974).

37. No. 221097 (Wash. Super. Ct., Pierce County, Sept. 17, 1973), reported in *Custody and Homosexual Parents*, *supra* note 30, at 24.

and the mother petitioned the court for reconsideration of custody, claiming that the children's behavior constituted a change in circumstances. The judge ruled that the petition for change of custody was without merit and, subsequently, the two children stated that they would not return to live with their father. The judge then ordered the children placed in a juvenile detention center, and a dependency petition was filed, moving the dispute to juvenile court. Pending a hearing, the children were later placed with their married half-sister.³⁸

At the juvenile court hearing, the mother argued that the children should be placed with her.³⁹ The judge, however, continued custody in the half-sister, stating that a "neutral" home would be in the children's best interests.⁴⁰ In discussing the mother's lesbianism, the court asserted that "[t]he living arrangement of their mother is an abnormal and not a stable one. It would be highly detrimental to these girls."⁴¹ He concluded that, because the father would refuse to visit the children if they were in their mother's custody, it would not be in the children's best interests to live with their mother.⁴²

In *Koop*, a psychiatrist, a psychologist, and a juvenile court case-worker each testified that the mother should have custody. There was no expert testimony to the contrary. Yet, although commenting that the psychiatrist had testified that the lesbian relationship would not harm the children, the court was unconvinced. In the words of the judge. "The Court did not believe that statement of opinion."⁴³ Rather, the father's testimony that the mother's home was unfit, although unsupported by the evidence and based upon personal "revulsion",⁴⁴ formed a major basis of the court's ruling. Instead of chastising

38. See Respondent-Mother's Memorandum, *Re: Placement at 2-3, In re Koop*, Nos. 28218 & 28219 (Wash. Super. Ct., Pierce County, Juv. Dep't, Feb. 6, 1976).

39. The mother did not actively contest a finding that the children were dependent because only such a finding would give the juvenile court jurisdiction to make a placement with the mother. Had the juvenile court found that the children were not dependent, it would have had no choice but to dismiss the case, and the children would have been required to return to their father's home pursuant to the divorce decree and to the refusal of the judge to entertain a petition to modify the divorce decree.

40. Order Continuing Temporary Wardship and Order of Custody at 5, *In re Koop* Nos. 28218 & 28219 (Wash. Super. Ct., Pierce County, Juv. Dep't, Feb. 6, 1976).

41. *Id.* at 4. It may be noted that the living arrangement of the mother was the subject of investigation in *Driber v. Driber*, No. 220748 (Wash. Super. Ct., Pierce County, Sept. 17, 1973), and that the social worker found the home to be suitable for the *Driber* children. See note 36 *supra*.

42. *In re Koop*, Nos. 28218 & 28219 (Wash. Super. Ct., Pierce County, Juv. Dep't, Feb. 6, 1976) at 4.

43. *Id.*

44. "The father continues to see the youngsters and out of fear that the youngsters

the father for his rigidity and intolerance,⁴⁵ the court rewarded the father by denying the mother custody.

As these cases indicate, despite the lack of proof establishing a nexus between an ongoing lesbian relationship and harm to the child, some courts have been unwilling to award custody to lesbian mothers where this new factor is present. The distinction between an ongoing lesbian relationship and "discreet" lesbian activity is a dubious one so far as the demands of the nexus test are concerned. In both instances, the harm to the child is the key issue, with the court required to find some causative link between the mother's activity and the perceived harm.

In addition to custody disputes in which the courts have had to determine initial placement of the children, there have been several cases in which fathers have attempted to obtain custody of the children after an initial placement with the lesbian mother. In these cases, the concept of "changed circumstances" has come into play. Of the four known attempts by heterosexual fathers to obtain custody from lesbian mothers, three have failed. In two of them, the consolidated *Schuster-Isaacson* cases in Seattle, Washington,⁴⁶ the judge not only denied the motion for a change in custody but also removed his previous restraint on the mothers' living together. The court in that case was governed by a statutory standard⁴⁷ for altering custody awards that required a finding both that circumstances had changed and that a modification of the award was necessary for the best interests of the child. Relying on an implicit nexus standard, the court found no damage to the children from the alleged new circumstance—namely, that the mothers, since the first court decision, had lived in a single household, sought publicity and "flaunted" their lifestyle. Even though the judge was somewhat troubled by publicity that the mothers had received, he was convinced by psychiatric testimony that the children had not been harmed by the publicity. However, he did warn the mothers: "I would caution Miss Schuster and Miss Isaacson that if in the future they put the children on exhibition for the cause of homo-

will grow up with similar behavior patterns, and a feeling of revulsion over the behavior of the mother, has felt as though the youngsters are in a thoroughly unfit environment." *Id.* at 5.

45. The court found that the two daughters had "left their father's home . . . because the father continued to rant and rave against their mother's behavior" *Id.* at 2.

46. *Schuster v. Schuster*, No. 36876 (Wash. Super. Ct., King County, Sept. 3, 1974), reported in 1 FAMILY L. RPT. 2004 (1974).

47. WASH. REV. CODE § 26.09.260(1) (1975).

sexuality or if they spend too much time on that cause to the neglect of the children, these circumstances could jeopardize future custody."⁴⁸ In *Hall v. Hall*,⁴⁹ the father moved to dismiss his own petition for a change in custody after expert psychiatric testimony at the hearing had established that the child had not been harmed by the mother's lesbianism. As in *Schuster-Isaacson*, the court required a nexus in effect, but not explicitly.†

In a recent New York trial court decision, *In re Jane B.*,⁵⁰ however, a father prevailed over a lesbian mother by claiming that a sufficient change in circumstances had occurred. The mother lived in a lesbian relationship, and no issue of lesbianism had existed at the time of the divorce. The ten-year-old daughter had lived with the mother since the time of the divorce.

The mother's constitutional claims were rejected outright, and the court focused on the best interests of the child rather than on the fundamental rights of the mother.⁵¹ The court did not rule that a lesbian mother is, per se, unfit, but it did rule that "the home environment with her [the mother's] homosexual partner in residence is not a proper atmosphere in which to bring up this child or in the best interest of this child."⁵² After reviewing the record, the court found that the lesbian relationship created an "improper environment" for the child and further found, as a factual determination, "that the child is emotionally disturbed by virtue of this environment . . ."⁵³ Although this finding may on its face purport to satisfy a nexus requirement, an examination of the record, at least that part which is reported in the opinion, illustrates the abuse to which an alleged nexus requirement may be subject. The judge connected the child's emotional problems to the mother's lesbian relationship with no concrete evidence. Even the father's psychiatrist testified only that the

48. 1 FAMILY L. RPTR. 2004. The court's recognition of its control over "future custody" supports the argument made below. See text accompanying note 121 *infra*.

49. No. 55900 (Ohio Ct. C.P., Licking County, June 28, 1974). It was unnecessary for the judge to rule on the merits of this case, but he did state, after a full hearing had been held:

The Court feels that the best interests of the child at the present time, of course, should be with the mother. Otherwise the Court, of its own volition would remove the child from the presence of the mother's custody. *Id.* at 7-8.

50. 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976).

51. *Id.* at 523-27, 380 N.Y.S.2d at 856-59. This approach illustrates our position that constitutional arguments should not form the primary basis for lesbian mother custody litigation. See text accompanying notes 122-23 *infra*.

52. 85 Misc. 2d at 525, 380 N.Y.S.2d at 858.

53. *Id.* at 527, 380 N.Y.S.2d at 860.

† See p. 733 *infra*.

child might emulate the mother—a dubious conclusion⁵⁴ and one which clearly had no bearing on the child's existing emotional problems—and that homosexuals could be inconstant in their affections—a gross overgeneralization and one the illogic of which is apparent to anyone familiar with adultery and divorce rates. The basis of the court's decision, undoubtedly, was the psychiatrist's conclusion that the father's home provided a "more normal" environment for the child, but such reasoning does not meet a true nexus requirement.⁵⁵

The court severely restricted the mother's visitation rights. The child was prohibited from staying overnight with her mother, from being in her mother's home when any homosexuals were present, from being taken to any place where known homosexuals would be present, and from being involved by the mother in any homosexual activities or publicity.⁵⁶ No reasons relating to the best interests of the child were given for these restrictions, and no evidence in the record supported the conclusion that exposure to homosexuals would be detrimental to the child.

Also illustrative of the change-in-circumstances doctrine is *A. v. A.*,⁵⁷ an Oregon case, in which a mother initiated a change-of-custody proceeding eleven years after custody was awarded to the father.⁵⁸ The

54. One psychiatrist testified for each party. The father's psychiatrist reviewed the results of tests administered by a school psychologist and found the child to be "emotionally unsecure." 85 Misc. 2d at 521, 380 N.Y.S.2d at 854. He testified that the child might emulate the mother's conduct and that "a homosexual sometimes switches affection to another partner." *Id.* The record did not reflect any cross examination of this witness. See text accompanying notes 133-151 *infra* for suggestions of the type of cross examination which might be effective against such testimony. The mother's psychiatrist testified that "the homosexual relationship per se as described would not be harmful to the child" and that it would not cause the child to become a lesbian. *Id.* at 522, 380 N.Y.S.2d at 854-55. Evidence showed that the child was not functioning in school up to her full intellectual potential, and at an earlier hearing the school psychiatrist had testified that tests he performed indicated an emotional disturbance in the child but that he could not specifically identify the cause of this disturbance. *Id.* at 518, 380 N.Y.S.2d at 851-52.

55. See text accompanying note 117 *infra*.

56. 85 Misc. 2d at 528, 380 N.Y.S.2d at 860-61. The judge was apparently influenced by similar restrictions imposed upon the visitation rights of a homosexual father. See, e.g., *In re J.S. and C.*, 129 N.J. Super. 486, 324 A.2d 90 (Ch. 1974).

57. 15 Ore. App. 353, 514 P.2d 358 (1973).

58. Cases involving homosexual fathers have usually arisen in the context of visitation rights. See text accompanying notes 46-49 *supra*. While we cannot conclusively state the reasons for the lack of cases in this area, we surmise that, because courts have traditionally regarded the mother as the preferred custodian, homosexual fathers have felt that the added aspect of their sexual preference would make their attempts to gain custody pointless. As the trend to treat the father and mother equally increases, more custody disputes involving homosexual fathers may be anticipated.

mother had had substantially no contact with her children since the original custody award, but she alleged that the father was a homosexual and was therefore providing an unfit home environment. The father's business partner had lived in the family home for two years and had moved out after the action was commenced. The father denied any homosexual activity, but acknowledged that he "might have possible homosexual traits and tendencies." The trial court denied the custody change, but it placed conditions on the father's custody "designed to safeguard the home environment against possible pernicious influences, including prohibiting defendant's partner or any other man from living in the family home."⁵⁹ The mother appealed, and the appellate court upheld the trial court's ruling that the mother had not shown a substantial change in circumstances nor that "the two boys were being exposed to deviant sexual acts or that the welfare of the boys was being adversely affected in any substantial way."⁶⁰ The implication is clear that had the father been openly homosexual, the outcome might have been different.

An analogous decision was *Christian v. Randall*,⁶¹ in which a Colorado appellate court reversed a trial court's order removing custody of four daughters from their mother, who had undergone a trans-sexual operation and become a man. The appellate court stated that the evidence in the record did not support the statutorily-required findings that modification was necessary for the best interests of the children and that the children's present environment either endangered their physical health or significantly impaired their emotional development.⁶² The appellate court also found that the trial court based its decision to change the custody order solely on the basis of the mother's trans-sexual change, in violation of a Colorado statute which codifies a nexus requirement by specifically directing that, in determining the best interests of the child, the court "shall not consider the conduct of a proposed custodian that does not affect his relationship with the child."⁶³

The court's failure to require a clear showing of a nexus between harm to the child and the activities of a homosexual parent is apparent

59. 15 Ore. App. 353, 356, 514 P.2d 358, 359.

60. *Id.* at 359, 514 P.2d at 360.

61. 33 Colo. App. 129, 516 P.2d 132 (1973).

62. See 1963 COLO. REV. STAT. § 46-1-31(2) (Perm. Supp. 1971), *recodified as* 1973 COLO. REV. STAT. § 14-10-131(2) (1973).

63. 1963 COLO. REV. STAT. § 46-1-24(2) (Perm. Supp. 1971), *recodified as* 1973 COLO. REV. STAT. § 14-10-124(2) (1973).

not only in cases involving custody disputes, but also in the two reported visitation rights cases involving homosexual fathers. Both cases were concerned with the same principles. In the first, a 1952 Pennsylvania case, *Commonwealth v. Bradley*,⁶⁴ the appellate court agreed with the trial court that the children, while visiting the father, might "be exposed to improper conditions and undesirable influences."⁶⁵ No specific basis for that conclusion was stated. The higher court ruled that the father's visitation rights should be entirely at the discretion of the mother, who had appealed the lower court's decision to increase the father's custodial privileges from the terms of a previous separation agreement. The second case, *In re J., S. and G.*,⁶⁶ a recent New Jersey decision, ostensibly applied a nexus test and determined that visitation should be permitted but severely restricted. The father sought broad visitation rights and claimed that the Constitution prohibited restriction of his visitation rights on the basis of homosexuality. The New Jersey court agreed with the father's constitutional contention:

Fundamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, *per se*. The right of a parent, including a homosexual parent, to the companionship and care of his or her child, insofar as it is for the best interest of the child is a fundamental right protected by the First, Ninth and Fourteenth Amendments to the United States Constitution. That right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child.⁶⁷

After establishing this version of a nexus standard, the court examined the father's involvement in gay rights activities and the fact that his children had accompanied him to protest marches, meetings, and social gatherings. In its purported application of a nexus standard, the court noted: "[T]he factors which enter into consideration must be more inclusive than the threat of mere physical harm. We are dealing . . . with a most sensitive issue which holds the possibility of inflicting severe mental anguish and detriment on three innocent children."⁶⁸ No further specification of the "detriment" was given by the court,⁶⁹

64. 171 Pa. Super. 587, 91 A.2d 379 (1952).

65. *Id.* at 593, 91 A.2d at 382.

66. 129 N.J. Super. 486, 324 A.2d 90 (Ch. 1974).

67. *Id.* at 489, 324 A.2d at 92.

68. *Id.* at 497, 324 A.2d at 97.

69. The record contained conflicting expert testimony. The mother's expert testified that the father's gay rights activities had become "an obsessive preoccupation" and that exposure of the children to the father's total lifestyle "could impede

which held that restricted visitation was in the best interests of the children. The father was awarded daytime visits only on alternate Sundays and some holidays and three weeks visitation during the summer, at some place other than his home, during which he was ordered not to sleep with anyone other than a lawful spouse nor to involve the children in any homosexual-related activities or publicity nor to see his male companion in the presence of his children.

Taken as a whole, the decisions in cases involving lesbian mothers and heterosexual fathers (or heterosexual mothers and homosexual fathers) indicate that few courts have recognized a need for the kind of nexus requirement which we have suggested. The courts which have framed their analysis of the evidence in terms of a nexus test have failed to develop any definite formulation of that test. Indeed, the nexus test is often only implicit in the opinion, as though the courts intuit that such a test is proper but do not conceptualize it as a safeguard which must be clarified in order to be effective. The weakness and vagueness of the showings which courts have treated as establishing a nexus in lesbian mother cases are illustrated by those decisions in which courts have found a connection between the mother's ongoing lesbian relationship—rather than her expressed lesbian preference—and harm to the child. The decisions in such cases as *Townend* and *In re Jane B.* suggest that the courts tend to view the mere existence of such a relationship as inevitably leading to detrimental effects on the children. In effect, such courts have simply inched beyond the point of treating the status of lesbianism as per se unfitness to the point of treating the *practice* of lesbianism as per se unfitness. The missing element is a test under which the court could consider the mother's sexual activity only if there was specific, concrete evidence of a connection between it and the child's welfare.

C. *Mother versus Third-Party Relative*

A striking number of lesbian mother custody disputes are litigated between the mother and other relatives, usually maternal or paternal

healthy sexual development in the future." He suggested the possibility that the children would, at puberty, "be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development." *Id.* at 496, 324 A.2d at 96. The father's two experts contradicted the testimony of the mother's expert, and the court concluded that "any pronouncements . . . in this area must contain a relatively high percentage of speculation." *Id.* at 497, 324 A.2d at 96. The court therefore considered the possibility of harm from *overexposure* to homosexuality as the basis for a determination that the children should have *no* exposure to homosexuality.

grandparents. The same conclusion—that the courts have failed to require that a nexus be shown between lesbianism and effects on the child—can be drawn from these cases as from the decisions involving mother-father disputes. An additional issue, however, is the question of which standard for determining custody is appropriate. As stated above,⁷⁰ the courts in lesbian mother cases have tended to apply a best-interests-of-the-child test, rather than the parental-fitness test generally used in neglect proceedings.⁷¹ This distinction is significant in that, by using a best-interests standard, courts implicitly treat the parties as being equally entitled to custody. In a mother-father dispute, this equality of right to custody is presumed. But in normal custody litigation between a parent and a non-parent, most courts have held either that a natural parent is entitled to custody, unless shown to be unfit, or that, under a best-interests test, there is a rebuttable presumption that custody by the natural parent will be in the best interests of the child.⁷² This preference for the natural parent has not been accorded to lesbian mothers.

*Bennett v. Clemens*⁷³ is an illustrative case. In that proceeding, paternal grandparents sued the mother for custody of their eight-year-old granddaughter. The Georgia Supreme Court upheld the trial court's finding that a change in circumstances materially affecting the child's welfare had taken place and awarded custody to the grandparents. The court found sufficient grounds from the facts that the mother had lived in several places, had worked for an underground newspaper, had smoked marijuana, was a writer and a poet, and left the child with female friends who engaged in both heterosexual and homosexual acts in the presence of the child. The father of the child had testified that he wanted his former wife to retain custody. No mention was made by the court's majority of the superiority of the rights of the natural mother over those of a non-parent petitioner.

The dissenting judge, however, recognized such a superior right. He found that the life style of a parent should not be inquired into without a showing of neglect, abuse, or mistreatment:

Freedom to think, teach, and express; freedom of association with other persons or classes of persons with varying degrees of morality and philosophy; freedom to inhabit a chosen cultural environment; and freedom to adopt a life-style that may not have the approval of

70. See notes 6-7 *supra* and accompanying text.

71. See notes 96-108 *infra* and accompanying text.

72. See, e.g., *Root v. Allen*, 151 Colo. 311, 316-18, 377 P.2d 117, 120-21 (1962).

73. 230 Ga. 317, 196 S.E.2d 842 (1973).

the majority; all of these are basic to our concept of liberty, and these freedoms exist even more emphatically within the family or the parent-child relationship.⁷⁴

The dissenting judge also strenuously disagreed with the legal standard applied by the majority.

[A] proper regard for the sanctity of the parental relation requires that the objection to this paramount legal right can only be sustained by clear and satisfactory evidence. The discretion to be exercised by courts in such contests is not arbitrary. The breaking of the tie that binds parent and child to each other can never be justified without the most solid and substantial reasons, established by plain proof.⁷⁵

In the most recently reported appellate decision, *Chaffin v. Frye*,⁷⁶ the California Court of Appeal applied the following statutory standard to a custody suit initiated and won by the maternal grandparents:

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.⁷⁷

It does not appear that the statutory standard was challenged. The appellate court thus examined only whether sufficient evidence supported the trial court's finding and whether the trial court abused its discretion. No positive weight under the best interests test was given to the mother's natural parenthood, but it is clear that her status as the mother was not viewed without value judgment: the court considered it quite significant that the natural mother had voluntarily placed her children with the grandparents for a substantial period of time.⁷⁸ The court affirmed the lower court decision on several grounds,⁷⁹ one of which was the mother's lesbianism. The court stated

74. *Id.* at 322, 196 S.E.2d at 844 (Gunter, J., dissenting).

75. *Id.* at 321, 196 S.E.2d at 844.

76. 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975).

77. CAL. CIV. CODE § 4600 (West Supp. 1974).

78. 45 Cal. App. 3d at 46, 119 Cal. Rptr. at 25.

79. The trial court did not issue findings of fact or conclusions of law but the record contained the following facts: The mother had two criminal convictions between 1965 and 1972. She was unemployed and lived on social security benefits, disability benefits, and \$150 a month in income from odd jobs, but she hoped to start a home decorating business. She had a history of health problems and, when she had tried to assume full time responsibility for the children five years before the instant

that homosexuality "dominates and forms the basis for the household into which the children would be brought"⁸⁰ and expressed concern about exposing children to homosexuality during their "most formative and impressionable years." (The children were 12 and 14 years old.) Despite the failure of the trial court to make written findings of fact demonstrating any nexus between the mother's lesbianism and harm to the children, the appellate court stated:

In exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests.⁸¹

The *Chaffin* case thus stands as precedent in California on the custody rights of lesbian mothers. Yet within four months of the appellate court's ruling, a Superior Court judge modified the order to permit Ms. Chaffin to keep her children, after hearing testimony of psychiatrists and psychologists that the children would be harmed if they were removed from their mother.⁸² The modification hearing was held after Ms. Chaffin's daughters ran away from their grandparents in order to live with their mother.

Commonwealth ex rel. Ashfield v. Cortes,⁸³ an earlier Pennsylvania case, also evidenced a failure to apply both the nexus requirement and the presumption in favor of a natural parent. In this case, a maternal grandmother sought custody of her five grandchildren from

litigation, had been required to return the children to her parents after she contracted pneumonia and suffered a heart seizure. At the time of the hearing there was no question but that she was providing for the children's physical needs. The grandparents were 60 and 56 years old and lived in the State of Washington. The grandfather was disabled and received state compensation, and the grandmother earned less than \$100 a month as a hairdresser. The mother testified that her parents did not properly supervise the children, while the grandparents told a probation officer that the mother wanted the children only to increase her social security and child support payments. The children told the probation officer that they wanted to live with their mother and that their grandparents did not properly supervise them, 45 Cal. App. 3d at 42-44, 119 Cal. Rptr. at 22-23.

It might be noted in response to the court's concern that the children could grow up to be lesbian, *id.* at 47, 119 Cal. Rptr. at 26, that the record reflected that the grandparents had another alleged homosexual child, a son who visited them frequently, *id.* at 43, 119 Cal. Rptr. at 23. Therefore, custody was awarded to the only persons involved in the case who had ever raised apparently homosexual children. See *The Avowed Lesbian Mother* at 818.

80. 45 Cal. App. 3d at 46, 119 Cal. Rptr. at 25-26.

81. *Id.* at 47, 119 Cal. Rptr. at 26.

82. *Chaffin v. Frye*, No. 44465 (Cal. Super. Ct., Los Angeles County S.W. Dist., May 19, 1975).

83. 210 Pa. Super. 515, 234 A.2d 47 (1967).

her daughter. The grandmother alleged that her daughter was a lesbian whose conduct would have "an adverse effect upon the children's 'normality, behavior and upbringing.'"⁸⁴ The grandmother was a British citizen who intended to take the children to England. At trial, the judge granted most of the objections made by the mother's counsel and, consequently, a full record was not developed concerning the mother's lesbianism. The trial court dismissed the habeas corpus petition filed by the grandmother. The appellate court, unsatisfied by the incomplete record, reversed and remanded for a new hearing. The appellate court reminded the trial court that if it found conduct by the mother "which may in the future have an adverse effect on the children" but also found that the children would be better served by having them remain in the United States, then "the trial court has the power and authority to impose and enforce remedial conditions for such custody."⁸⁵ The tone of the opinion is such that, if lesbianism can be proven, the adverse effect will be inferred.

Restrictions on the personal life of the lesbian mother have been imposed in cases discussed elsewhere in this article,⁸⁶ and it is significant that, in the one case in which a mother won custody from the children's grandparents on the grounds of material change in circumstances, one of the implicit changed circumstances was that the mother was no longer involved in homosexual activity.⁸⁷ The mother brought an action in North Carolina to modify the decree of a Georgia court which awarded custody to the maternal and paternal grandparents. The majority's opinion in this case was not explicit about what behavior of the parents had rendered them unfit at the time of the Georgia decree. A finding of facts was deliberately not made by the Georgia court in order to avoid unnecessary embarrassment. The parents' behavior, however, was concluded to be "beyond the pale of the most permissive society."⁸⁸ There were references to the mother's "sexual aberrations" and the dissenting judge in the North Carolina court indicated that the mother had been involved in homosexual activity.⁸⁹

84. *Id.* at 517, 234 A.2d at 48.

85. *Id.* at 520, 234 A.2d at 49.

86. *See* text accompanying notes 28-34 *supra*.

87. *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973).

88. *Id.* at 678, 198 S.E.2d at 541.

89. *Id.* at 698, 198 S.E.2d at 552 (Lake, J., dissenting).

The North Carolina Supreme Court held that the record of evidence in the trial court was sufficient to justify a change in custody. The record contained evidence that the mother was a highly educated professional, an active church member, and a well-respected member of her community. The court agreed with the trial court's finding that "the accusations made against her, if once true, were no longer valid."⁹⁰ The mother presented expert psychiatric testimony attesting to her present ability to care for her daughters. Perhaps because of some nagging doubt, the court directed the county social services department to investigate the mother's home and the children's condition every six months and to furnish copies of its report to each party to the proceeding.⁹¹

The cases involving custody disputes between lesbian mothers and other relatives illustrate that courts have failed to require a nexus between lesbianism and detrimental effects on the children, even though the party seeking custody is a non-parent. Further, the courts have acknowledged no presumption in favor of the natural parent's custody.⁹² None of the decisions are based on a parental fitness standard, which would force the non-parents to prove the mother to be unfit before the children could be removed from her custody, as the dissenting judge in *Bennett* would require.⁹³ Rather, the courts have used the same best-interests-of-the-child standard that is used in disputes between mothers and fathers wherein no preference is accorded to either party. Courts and scholars continue to dispute which standard should be generally applicable in parent-versus-non-parent custody liti-

90. *Id.* at 687, 198 S.E.2d at 547.

91. *Id.* at 687-88, 198 S.E.2d at 547.

92. Under the "psychological best interests of the child" standard recently advocated by some psychological experts and legal scholars, no presumption would be given to a parent who was not living with the children. The court under this test would seek primarily to identify existing affection relationships, chiefly from the viewpoint of the child, by looking at the continuity, duration and closeness of the relationship, the love of the adult toward the child, and the love and trust of the child toward the adult. See Note, *Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 157-59 (1963). Should the mother die, this standard, which has yet to be judicially accepted, would support the claim of "psychological parenthood" made by a woman with whom the mother had been living for many years. Although, upon the death of a parent with custody, courts traditionally consider the other parent or some relative as the proper custodian, under the concept of psychological parenthood a woman who had lived in the home with the children and who had functioned as a parent would be a more suitable choice, even against the interest of the natural father. See generally, A. FREUND, J. GOLDSTEIN, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Basile at 17 n.132.

93. See text accompanying notes 74, 75 *supra*.

gation.⁹⁴ Professor Clark frames his choice of test as essentially a best-interests-of-the-child approach with parental preference.⁹⁵ Considering the history of judicial disapprobation of lesbian mothers, it is easy to imagine that a court could award custody to the non-parent no matter what the standard. Thus, although a parental unfitness approach would accord the highest protection to a lesbian mother, it would by no means assure her that she would retain custody of her children. Ultimately, the custody rights of lesbian mothers will best be protected, under any standard, only if detriment to the child resulting from the mother's lesbianism is concretely demonstrated before the mother's lesbianism can be weighed as a factor against her.

D. *Mother versus the State*

When the state seeks to remove a child from his or her natural parent, the highest degree of protection should be given to the parent's right to custody. In addition to the requirement of the nexus, described above, and the presumption that the parent is entitled to custody, constitutional issues such as equal protection and due process arise when the petitioner is the state.⁹⁶ There is little basis upon which to generalize about the status of the law, however, because only three neglect cases have involved lesbian mothers, and two concerned the same California family. The three cases produced two virtually opposite results.

In *People v. Brown*,⁹⁷ neglect proceedings based on the mother's lesbianism began after a state trooper was called to the home of two women to stop a fight between them. The Michigan statute permitted removal of children when "the home or environment, by reason of

94. Compare *Nolan v. Nolan*, 240 Ark. 579, 401 S.W.2d 13 (1966), with *People ex rel. Edwards v. Livingston*, 42 Ill. 2d 201, 247 N.E.2d 417 (1969). See generally H. CLARK, *supra* note 3, at 591-93. Clark points out very aptly that the facts of the case may determine the legal theory. *Id.* at 593. Compare *People ex rel. Edwards v. Livingston*, *supra*, with *Middlecoff v. Leofanti*, 133 Ill. App. 2d 882, 272 N.E.2d 289 (5th Dist. 1971) (per curiam).

95.

[The solution] is to continue to be guided by what is best for the child's welfare, but to place the advantages of parent's care high in the scale of factors conducive to that welfare. In any controversy between a parent and a stranger [i.e., nonparent], the parent as such should have a strong initial advantage, to be lost only where it is shown that the child's welfare plainly requires custody to be placed in the stranger.

H. CLARK, *supra* note 3, at 592. We basically concur with Clark's standard, provided that it is coupled with a concrete nexus requirement, but our definition of parent is not a biological one—we would accord parental status to a psychological parent as well. See note 92 *supra*; H. CLARK, *supra*.

96. See *The Avowed Lesbian Mother*, *supra* note 13, at 821-38.

97. 49 Mich. App. 358, 212 N.W.2d 55 (1973).

neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in"⁹⁸ The trial court ordered the children placed in foster homes after the two women refused to live apart. The appellate court found sufficient evidence to support the conclusion that the women were involved in a lesbian relationship, but it found, implicitly, that the nexus requirement had not been met: "[T]here was little, if any, material and admissible evidence to support the finding that the appellants' homosexual relationship rendered their home unfit for their children"⁹⁹ The court reversed and remanded, and the prosecuting attorney moved to dismiss the case against the two women.

The California Court of Appeal upheld removal of two daughters from a lesbian mother in *In The Matter of Tammy F.*,¹⁰⁰ asserting that a nexus had been established. The matter came to the attention of the state after the mother was arrested for possession of marijuana. A neglect petition was filed by the state seeking the removal of two daughters from their lesbian mother to assure their adjustment to "a dominantly heterosexual society." The state presented evidence at trial that the older daughter had complained to a social worker about her mother's relationship, although the daughter later told the worker that she had complained in anger over her mother's refusal to take her on a vacation. The daughter testified that she wanted to continue living with her mother, and two child placement workers testified that they thought both children should remain with the mother. There was no evidence of neglect. The trial court granted the petition nevertheless, and the children were placed in a foster home. The California Court of Appeal affirmed. It distinguished *Nadler*¹⁰¹ on the grounds that removal was based not on the mother's lesbianism alone but on the continuance of the relationship in the home with the children's knowledge.¹⁰² The court stated as fact, without explanation, that the "continuous existence of a homosexual relationship in the home where the minor is exposed to it involves the necessary likelihood of serious adjustment problems."¹⁰³ The court used the same reasoning—that the

98. MICH. COMP. LAW ANN. § 712A.2 (Supp. 1975).

99. 49 Mich. App. at 365, 212 N.W.2d at 59.

100. 1 Civil No. 32648 (Cal. 1st App. Dist. Div. 2, Aug. 21, 1973), reported in *Custody and Homosexual Parents*, 2 WOMEN'S RIGHTS L. REP. 21 (1974).

101. 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

102. 1 Civil No. 32648 (Cal. 1st App. Dist. Div. 2, Aug. 21, 1973), reported in *Custody and Homosexual Parents*, 2 WOMEN'S RIGHTS L. REP. 21 (1974).

103. *Id.*

decision was based on the effects of the relationship on the children and not on the mother's status—to deny the mother's due process and equal protection arguments. Thus the court implied that a causal connection requirement had been demonstrated. However, the only proof of adverse effects of the mother's lesbianism cited by the court was "a reasonable inference" that Tammy was unwilling to face all the ramifications of her mother's relationship because she cried when asked while on the witness stand if she knew what a lesbian was.

The mother in *Tammy F.* was involved in additional litigation when the court refused to return to her two other children who had remained in foster homes after her release from jail on the marijuana charge.¹⁰⁴ At the review hearing, the court agreed that the original reason for declaring the children to be dependent no longer existed; the mother had completed her period of probation. But because of the mother's lesbian relationship, the court asserted continuing jurisdiction and found foster care to be in the best interests of the children. The mother appealed on several grounds, among which was her claim that the appropriate standard was parental unfitness, not the best interests of the child. In other words, she claimed a presumptive right against the state which could not be abridged without a determination that she was unfit. However, the court of appeal affirmed the trial court decision, including its choice of test.

State interference with the way parents raise their children is a legal avenue of last resort to be pursued only when physical or emotional damage to the child can be substantiated.¹⁰⁵ Statutes which permit removal of a child from his or her natural parent should be interpreted as requiring proof both that the child is harmed and that the parental behavior under scrutiny is the cause of that harm. Speculation about future harm, such as that which has been expressed about children raised in lesbian homes, is an inappropriate basis for any custody determination; it is surely indefensible as a ground for

104. *In re Deanna P.*, 1 Civil No. 34000 (Cal. 1st App. Dist. Div. 4, July 2, 1974). reported in *Custody and Homosexual Parents*, 2 WOMEN'S RIGHTS L. REP. 21, 22 (1974).

105. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 918-19 (1975). The constitutional rights of parents to be free from state intervention in the upbringing of their children is beyond the scope of this article. For constitutional questions posed by removal of children from their parents for alleged immoral conduct, see Areen, *supra*, at 931-32. See generally Thomas, *Child Neglect Proceedings—A New Focus*, 50 INDIANA L.J. 60, 63 & n.13 (1974); Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process*, 9 DUSQUESNE L. REV. 651, 662-63 (1971).

granting custody of children to the state. The best interests of the child is assuredly not the appropriate standard in a neglect proceeding.¹⁰⁶ Unlike parents engaged in a divorce action, the competing parties cannot claim a presumption of equal rights to custody. Much attention has been focused on the danger that neglect statutes can be easily misused if they are interpreted to permit children to be removed from poor homes so that they may be placed in middle-class homes.¹⁰⁷ As great a danger to family rights lies in those statutes and court decisions which permit allegedly immoral conduct of the parent to form the basis for a neglect finding.¹⁰⁸ A lesbian mother is entitled to her children, against the interest of the state, unless her lesbianism or some other factor can be shown, by concrete evidence, to be the cause of harm to the child sufficient to warrant destruction of parental ties.

E. Conclusion

It is clear that whomever the lesbian mother has faced in a custody dispute—the father, another relative or the state—she has been placed at a significant disadvantage because of her sexual preference. Judicial predisposition against homosexuals has been demonstrated time and again by the courts' assumptions that lesbianism is equivalent to, or tantamount to, unfitness. The courts which have posited some kind of nexus requirement have failed to define how specific and how strong the necessary showing of causal connection must be. At times these courts seem to have accepted as sufficient the mere recitation of phrases ("adverse effect") or proof of lesbian activity or the expression of a preference for homosexuality. Instead, courts hearing such dis-

106. "A child cannot be declared 'neglected' merely because his condition might be improved by changing his parents." *In re Rinker*, 180 Pa. Super. 143, 148, 117 A.2d 780, 783 (1955), cited and discussed in 9 *DUSQUESNE L. REV.*, *supra* note 105, at 659.

107. See Thomas, *supra* note 105, at 61-62.

108. Sixteen states permit "immorality" of the parents to trigger a neglect finding, and 31 states permit a finding of unfit "environment" or "surroundings" to trigger a neglect finding. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 *GEO. L.J.* 887, 926 nn.203 & 204. See also *In re Dake*, 87 Ohio L. Abs. 483, 485, 180 N.E.2d 646, 648 (Juv. Ct. 1961), in which the court answered in the negative its own formulation of the issue: "Is a woman who is incapable of ordering her own life in accordance with the prevailing legal and moral codes, capable of raising children without a father?" As a practical matter, a mother's lesbianism is most likely to come to the attention of juvenile court authorities if she becomes involved with the state for some other reason, such as receipt of public assistance or alleged criminal activity. But see *In re Koop*, Nos. 28218 & 28219 (Wash. Super. Ct., Pierce County Juv. Dep't, Feb. 6, 1976), note 38 *supra* and accompanying text.

putes ought to rule that, until and unless a nexus is established between lesbianism and its effect on the child, the mother's sexual activity shall be irrelevant. The nexus itself must be factually specific and concrete. The evidence required to support such a connection must be definite and relevant to the individuals involved. Speculation should not suffice. The *Tammy F.* case, in which the court specifically claimed to have found such a nexus, is a good example of why a nexus test should be so defined. The trial court, rather than requiring a specific showing of adverse effects before considering the mother's lesbianism, admitted a great deal of evidence about her sexual activity without ever pinpointing its relevance. The appellate court then based its affirmance on a single inference on which the trial court *might* have relied. Had the state first been forced to prove specific adverse effects, it may very well have failed, and the trial court would have been unable to justify removal of the children from their mother.

In the second section of this article, with this bleak picture of the present case law in mind, we will discuss strategy and trial tactics, including further legal arguments in support of the nexus test. Because precedent in this area is so sparse, the attorney's factual presentation of his or her own case will usually be significantly more important than knowledge of the case law. Indeed, the primary value of the case law, from a practical point of view, lies in evaluating which evidence is likely to influence a judge to rule for or against a lesbian mother. In the following section we will build on the foregoing analysis in an effort to construct a model strategy for representing a lesbian mother in a custody dispute.

II. STRATEGY AND TRIAL TACTICS IN LESBIAN MOTHER CUSTODY CASES

We begin this section with the premise that a judge is often likely to be predisposed against a lesbian mother¹⁰⁹ and that, therefore, an attorney can usually best serve his or her client by making every attempt to keep a case from going to trial. We shall first address several considerations which could either improve the chances of settlement without trial or increase the likelihood of success if trial cannot be

109. This judicial predisposition against the lesbian mother is conditioned by three factors: ingrained individual prejudices of some judges against homosexuals (see the references to homophobia, note 13 *supra*), prevalent societal attitudes towards homosexuals, and the judicial propensity to rule against lesbian mothers as reflected in the case law.

avoided. In the second part of this section we shall attempt to provide lesbian mothers and their lawyers with some of the tools which are useful in coping with judicial prejudice when a trial is inevitable. Throughout this section, we will focus on disputes between lesbian mothers and heterosexual fathers, although the discussion also applies to other parties who oppose the lesbian mother's custody.

A. *Pre-Litigation Strategy*

Two major objectives which are generally applicable to many custody cases should also shape the pre-litigation conduct of the lesbian mother and her attorney. First, the case should be prevented from going to trial as a disputed custody battle. Second, the groundwork must be laid for success at trial if litigation becomes unavoidable. Because the mother's personal decisions about behavior and lifestyle may well affect the outcome of the case, the first step for an attorney counseling a lesbian mother is to advise her about the possible legal consequences of those decisions. The advice that an attorney can give his or her client at these early stages is as crucial as effectiveness in the courtroom. In this part, therefore, we will discuss some of those choices and their legal ramifications. We will also outline suggestions for the attorney to use in negotiation and settlement discussions.

1. Personal decisions. Lesbian mothers who have been open about their sexuality before the possibility of a custody battle arises do not have a choice of whether or not to "come out," or to tell their families and friends that they are lesbian. Many women, however, reach the point at which a custody dispute seems likely without having told their family members. For them, the decision of whether or not to be open about their sexual preference must be considered in light of legal as well as emotional ramifications.

The prospect of a lesbian mother avoiding litigation by keeping her lesbianism secret is at first sight an attractive one. Although this decision may offer a satisfactory short-run solution, it could severely restrict the mother's life in the future. A custody determination is never final, because, even after a court hearing, it can be relitigated upon a showing of a material change in circumstances.¹¹⁰ A father who learns of the mother's lesbianism after she has received custody could legitimately argue that a material change has occurred. Thus, unless the mother is willing to hide her sexuality until her children are

110. See notes 8-10 *supra* and accompanying text.

grown, the decision to stay "in the closet" might merely postpone the difficult custody battle. Resolution of this issue depends on factors individual to each woman's situation. If a woman knows that her husband is moving away and that he will maintain little contact with the children, she could only harm herself legally by revealing her lesbianism. On the other hand, if she knows he will live nearby and will want to maintain an ongoing relationship with the children, then it may be impossible for the woman to hide her sexuality from her husband for any substantial period of time. In that case she might want a reasonably definite resolution before she begins to build a new life for herself and her children.

The major advantage of remaining silent is that it buys time for the mother. During that time the husband might rearrange his life and consequently decide that he does not want custody of the children, or the two parents might develop, in time, a more amicable relationship in which the mother would feel free to talk about her lesbianism. More significantly, however, the time during which the mother is the sole custodian of the children places her at a distinct advantage should her husband learn of her lesbianism and challenge her fitness at some point in the future. Continuity is generally a factor in determining the best placement for the children. A mother who has had custody for a substantial period of time can benefit from the judicial aversion to uprooting children from an accustomed environment.¹¹¹

If the parents are on good terms upon separation, and if the father does not want custody, the lesbian mother must evaluate whether or not to tell her husband about her lesbianism in light of the possibility of future legal proceedings. If the father is aware of the mother's lesbianism when he leaves the children in her custody, it would be difficult for him subsequently to persuade a judge that the mother, whom he knew all along to be a lesbian, had somehow become unfit. Although no estoppel concept has been incorporated into child custody law, the father in such proceedings would be in an inherently weak position. He would have a difficult time explaining his sudden concern that the mother's lesbianism would be detrimental to the children.

Other personal decisions are also of critical importance. The little case law that exists indicates that judges are more likely to award custody to a lesbian mother if she is not actually sexually involved or

111. See p. 722 *infra*.

living with another woman.¹¹² Although counsel must be prepared to argue in court that a custody award contingent upon such personal restrictions is both detrimental to the children¹¹³ and unconstitutional,¹¹⁴ the attorney should make the mother aware during the pre-litigation stage that the less sexually active she is and the less open about her lesbianism, the more likely it is that she will be able to retain custody of her children. The mother must ultimately decide for herself whether to forego forming a household with another woman, involving herself in any sexual relationship, attending lesbian social functions, or participating in organized political action as a lesbian in order to minimize that possibility of losing her children. But any woman facing such a decision must be aware that, in order to insure protection from a custody dispute, her decision to refrain from certain activities may well have to be a long-term one. Even if the mother gains custody pursuant to a judicial determination, any significant change in lifestyle or substantial increase in public activities could subject her to relitigation based on an alleged material change in circumstances.¹¹⁵ It is naive to believe that by making certain compromises which avoid immediate conflict on the issue of lesbianism the underlying controversy will disappear. It is by being open that a lesbian mother may consider her custody to be most secure. That path, however, is also the one that subjects the lesbian mother to the greatest possibility of permanently losing custody of her children.

2. *Negotiation and settlement.* While each decision made by a lesbian mother and her attorney must be farsighted enough to take into account its ultimate impact on a judge, the goal of the attorney is to secure the client's goals through settlement, thus avoiding a trial. Homophobia within the judicial system is not to be underestimated.¹¹⁶ Even the best prepared case, in which the equities are squarely with the mother, cannot be assured of success if the judge categorically refuses to grant custody to a lesbian.

Before negotiation is viable, the mother and her attorney must evaluate the opposing side. Many fathers will want custody of their

112. See notes 28-34 *supra* and accompanying text.

113. See notes 147-48 *infra* and accompanying text.

114. *The Avowed Lesbian Mother*, *supra* note 13, at 842-64. See also Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

115. An attempt to change custody based in large part on the mother's public activities failed in the *Schuster-Isaacson* case, discussed in notes 46-48 *supra* and accompanying text.

116. See note 13 *supra*.

children regardless of the mother's sexuality. Such a father may use the issue of lesbianism not because he believes it renders his wife unfit but because he knows it will be a persuasive factor in the courtroom. Other fathers, however, may threaten and pursue custody proceedings out of anger or vengeance, with more interest in getting revenge than in doing what is in the best interests of the children.

The situation in which both parents genuinely want custody is obviously the more difficult, both for the parties and for the attorneys. An attempt should be made to persuade the father and his attorney to keep the mother's sexual preference out of the dispute. It may be possible to persuade him, with the help of scientific data,¹¹⁷ that the mother's lesbianism is not relevant to determining the best interests of the children.

However, if the father insists on trying to use the mother's lesbianism against her, perhaps the most powerful bargaining weapon with which to respond is an outline of evidence which could be presented at trial to demonstrate that the father himself is less than a perfect custodian by conventional standards. Investigation might well uncover relevant aspects of the father's behavior which could prove embarrassing to him if revealed in court. Men who fear loss of their jobs or of their prestige may be more willing to stay out of court altogether than to face public exposure.¹¹⁸

If the father is more concerned with himself than with his children, an attempt should be made to gather factual proof of the father's true motives from his statements and from other sources. Deficiencies in the father's own personal behavior, together with evidence of his true motivation, such as a desire for revenge rather than concern for the children, may force the father to reconsider his chances of success at trial.

Having gathered information which will be useful in negotiation, the lesbian mother and her attorney must consider some difficult compromises. Sometimes it is possible to trade the claim to alimony or the amount of child support for custody of the children themselves. Although such a concession could create serious financial problems for women who are not economically self-sufficient, they should explore every alternative source of support before rejecting this route.

117. See note 138, *infra*.

118. One case was settled in favor of the mother when the lawyer threatened to bring into court evidence that the husband was less upset about his wife's relationship with another woman than he was about not being included in the relationship.

Realistically, they must evaluate the possibility that the father's support obligation may often become difficult to enforce in the future.¹¹⁹

Another possibility, albeit one which is never entirely satisfactory, is splitting up the children. Sometimes a father will be more concerned about removing a son from a lesbian environment than he is about removing a daughter. Painful as this possibility might be, in a given case it might be better for both mother and children than enduring protracted litigation. Judges will also, not infrequently, split children up either by sex¹²⁰ or by age.¹²¹

A father may agree to allow the mother to have custody if she agrees to certain personal compromises. The mother's attorney may be able to pursue this possibility by asking opposing counsel what his or her client specifically objects to about the mother's lifestyle. If the parties can agree on certain restrictions, then a court battle might be averted. Every mother will have a different compromise level and every father will have different demands, but the mother's attorney must stress to his or her client that going to court should be absolutely the last resort and that any plan which can avoid it must be seriously considered.

At this stage, as at the trial stage, the mother's attorney is most effective when s/he remains on the offensive. Opposing counsel may overestimate the father's chances for success. S/he may believe that the mother is in no bargaining position whatsoever. The mother's attorney should emphasize to opposing counsel those cases in which lesbian mothers have prevailed. Success in the pre-litigation stage—that is, securing a reasonable settlement amenable to both parties—may be predicated on the other party's understanding that his fight for custody will be difficult, lengthy and, therefore, expensive.

B. Litigation

If bargaining and other informal efforts to settle should fail and a trial becomes unavoidable, the primary goal of the mother's attorney

119. See Nagel & Weitzman, *Women As Litigants*, 23 HASTINGS L.J. 171, 190 (1971).

120. One court award of two children, a boy and a girl, to their mother in spite of inferences about her "lesbian tendencies," contained within the order the provision that the son be turned over to his father when he reached the age of 5—after his "tender years." See Lyon & Martin, *Lesbian Mothers*, Ms., October, 1973, at 79.

121. See *Koop v. Koop*, No. 221097 (Wash. Super. Ct., Pierce County, Sept. 17, 1973), a case in which all three children, ages 10, 12 and 15, expressed a desire to live with their mother. The court permitted the 15 year old girl to remain in her mother's custody, but the two younger children were awarded to the father.

should be to prevent the mother's sexual preference from becoming the central issue of the case. Opposing counsel undoubtedly will attempt to use the trial as a forum for airing stereotypical, negative generalizations about lesbians. It will be up to the mother's attorney to focus the court's attention, instead, on the quality of the relationship between the particular mother and her children. If the mother's lesbianism is relevant at all, it is relevant only to the extent and in the ways that it affects her children, positively as well as negatively. As in any custody case, the most important factor for the court to examine is the child's emotional and physical environment. The mother's attorney must attempt to direct the court's focus so that the lesbian mother is perceived primarily as a mother and only tangentially as a lesbian.

Constitutional arguments about equal protection or privacy rights, intellectually appealing as they may be, should be made secondary to the presentation of solid factual evidence about the particular family.¹²² A lesbian mother is very likely to lose if the civil rights of lesbian mothers in general are allowed to take center stage, eclipsing the strongest points in the individual case. The lesbian mother's attorney should not assume that the function of the trial is merely to lay the basis for an appeal on constitutional issues. Regardless of what the appellate court may think of the constitutional questions, a trial judge's decision on the facts in a custody dispute is subject to reversal only for gross abuse of discretion, which is virtually never found.¹²³

If the court insists upon centering its inquiry around the mother's lesbianism, the attorney must develop a contingency plan. S/he must be prepared to cross-examine expert witnesses which the other side might produce on the issue of homosexuality and to offer persuasive evidence of a healthy, lesbian lifestyle. Because this article is written about suits involving lesbianism, and not about custody cases in general, much of it will describe specific tactics to implement the contingency plan. The reader should remember, however, that the first goal is to keep lesbianism out of the trial, not to debate it in detail.

122. See *Schuster v. Schuster*, No. 36876 (Wash. Super. Ct., King County, Sept. 3, 1974), and *Isaacson v. Isaacson*, No. 36868 (Wash. Super. Ct., King County, Sept. 3, 1974), reported in 1 FAMILY L. RPT. 2004 (1974), wherein the judge stated: "I would like to conclude by stating that I don't think this case should be regarded as a landmark decision or as any stamp of approval by the court on homosexuality. I think that it is a case just like cases that we decide everyday where we look to the individuals to try to determine the best interests of the children, and that is what I have attempted to do in this case."

123. See H. CLARK, *supra* note 3, at 584.

The most important single factor of the mother's situation before trial is whether she has had custody until that time. The longer she has had sole or predominant custody, the better her position, because of the value placed on preserving the continuity of a child's relationship with the custodial parent. By the same token, if the father has custody, the lesbian mother is in for a much more difficult battle. In many instances, the mother may have relinquished custody temporarily while looking for a place to live, obtaining a job, finishing school or in some other way establishing an independent living arrangement for herself and her child. It is essential that the mother's attorney demonstrate that the separation was intended to be only temporary and that the mother maintained contact with the child as frequently as possible during the separation. For a mother without custody, the sooner the complaint is filed, the better. If the mother is being prevented from seeing her child, her attorney should request reasonable visitation rights pending suit. If no mother-child contact occurs for a lengthy period of time, the quality of their relationship inevitably will suffer, and so will the mother's chances of regaining custody.

In actuality, most mothers do receive custody of the children by mutual consent and expectation when a couple breaks up. All of the reported or known lesbian mother cases have involved attempts to take children away from the mother. The remainder of this section, therefore, will emphasize strategies for preserving the custody rights of a lesbian mother who actually has the child, although much of it will apply to any litigation posture.

1. Causal connection: a pre-condition for admissibility. As a starting point in the trial and as a way of putting lesbianism into proper context, the mother's attorney should argue against the admission of evidence of or about lesbianism absent a showing of relevance to the particular case. Unless the proponent of the evidence can demonstrate a causal connection between the mother's homosexuality and the quality of her child's environment, the homosexuality should be of no consequence in a custody dispute. Requiring such a link does not exclude any evidence that is truly relevant to the child's best interests, but it does shatter the assumption that lesbianism renders the mother, *per se*, an unfit parent.¹²⁴

Such a causal connection has been required by a growing number of courts in child custody disputes in which a parent's sexual conduct was at issue. The most closely analogous situation to that of the

124. See notes 13-27, 105 *supra* and accompanying text.

lesbian mother is the case law concerning adulterous mothers, who have historically been viewed by courts as unfit.¹²⁵ At least nine state appellate courts have upheld the award of custody to an adulterous mother specifically on the grounds that no evidence was presented to show that her conduct adversely affected the child.¹²⁶ In another case involving sexual conduct, an appellate court recently ruled that a father's previous sexual relationship with his oldest daughter, who had since left the home, plus his possession of pornographic materials, which might indicate an "unwholesome" sexual outlet, did not disqualify him from receiving custody, absent a showing that it affected his relationship with the children in question.¹²⁷

Counsel can also cite a decision in a neglect case which did not involve sexual conduct but which does support the argument that a specific nexus must be shown. *In the Matter of Larry and Scott H.*¹²⁸ involved a mother alleged to be mentally incapable of caring for her children because of chronic paranoid schizophrenia. The Ohio court required the state to prove not only that she was mentally ill, but also that the children lacked proper care because of her illness. The state failed to meet that burden, and the children were found not to be dependent.

All of these decisions support the demand that a nexus be shown between the mother's sexual preference and activities and specific detrimental effects on the child if her lesbianism is to be considered at all.¹²⁹ Frequently, opposing counsel will attempt to demonstrate such a linkage by suggesting that a mother's lesbianism inherently and inevitably damages the child. Three fears, in particular, are likely to be raised: (1) a child raised by a homosexual is likely to become homo-

125. In nineteenth-century England, courts were forbidden to award custody to mothers who had committed adultery. Custody of Infants Act, 2 & 3 Vict., c. 54, at 179 (1839). See generally Annot., *Award of Custody of Child to Parent Against Whom Divorce Is Decreed*, 23 A.L.R.3d 6 (1969).

126. Anonymous v. Anonymous, 106 Ariz. 284, 475 P.2d 268 (1970); *In re Russo*, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); Moore v. Moore, 51 Del. 592, 150 A.2d 194 (1954); Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975); Weideman v. Overstreet, 244 So. 2d 313 (La. Ct. App. 1971); Hansen v. Hansen, 284 Minn. 1, 169 N.W.2d 12 (1969); J-F-R- v. R-R-, 482 S.W.2d 543 (Mo. Ct. App. 1972); Feldman v. Feldman, 45 App. Div. 2d 320, 358 N.Y.S.2d 507 (1974); Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965). *Contra*, Brim v. Brim, 532 P.2d 1403 (Okla. Ct. App. 1975); Shroul v. Shroul, 224 Ore. 521, 356 P.2d 935 (1960).

127. *In re L. & L.*, 18 Ore. App. 642, 526 P.2d 491 (Ore. Ct. App. 1974).

128. 24 Ohio Op. 2d 334, 192 N.E.2d 683 (Juv. Ct., Cuyahoga County, Ohio 1963).

129. Employment discrimination cases in which such a nexus was required to be shown are instructive. See, e.g., Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

sexual; (2) a child raised by a homosexual will suffer some kind of psychological damage; and (3) even if the home environment itself is not harmful, the mere stigma of having a homosexual parent would be traumatic. The lesbian mother's attorney must emphasize not only that the postulated nexus must be supported by proof but also that it must be shown to apply to the individual mother and children in the particular case.

Although no court has yet so ruled, the demonstration of specific causal connection between a parent's homosexuality and detrimental effects on the child may be required by the due process clause of the fourteenth amendment. One can argue that deprivation of custody without a showing of harm to the child violates one's right to a judicial decision based on the issue in dispute. In *Stanley v. Illinois*,¹³⁰ the Supreme Court ruled unconstitutional a provision of Illinois law which provided that illegitimate children became wards of the state after their mother's death, thereby creating the presumption that unwed fathers were unfit. The Court ruled that fathers are entitled to a hearing on their fitness and also stressed that an unwed father is entitled to an individualized determination of whether he is fit.¹³¹ The Court forbade the state from using a presumption which foreclosed decision on the dispositive issues of competence and care of the child. The same reasoning would apply to the situation in which a court is asked to remove custody because of a parent's homosexuality: due process requires an individualized determination of the issue of the best interests of the particular child. If a court were to base its custody decision on the parent's sexual preference, without focusing its inquiry on the particular family and without examining whether there were any real adverse effects from the parent's homosexuality, there would be no individualized determination, and the right to a hearing would be meaningless.¹³²

2. *The role of experts.* In a lesbian mother's custody case, both sides are likely to present psychiatric testimony. Expert testimony for the mother is probably the evidence most likely to impress a judge, and it can provide him or her with an acceptable rationale for awarding custody to the mother. On the other hand, convincing testimony by

130. 405 U.S. 645 (1972).

131. *Id.* at 656-58.

132. See also *In re Richardson*, 251 Cal. App. 2d 222, 59 Cal. Rptr. 323 (1967), in which the court found a due process violation as well as an abuse of discretion in a trial court's denial of the adoption of a normal child by a deaf-mute couple solely because of their physical condition.

the father's expert can undo the mother's case. The need to prepare the presentation of this evidence carefully, therefore, cannot be over-emphasized.

(a). *The Opposing Expert.* Undoubtedly, there are many psychiatrists who believe that homosexuality is a form of mental illness. Within the discipline, however, a steady trend away from that position has resulted in a new policy stance adopted by the American Psychiatric Association.¹³³ Psychiatric testimony based on a mental illness theory can be attacked on cross-examination in a number of ways.

Most psychiatrists, even if they have counseled homosexuals, are not experts in the field of sexuality. A psychiatrist's qualifications as an expert can be challenged if s/he has no special training or has done no research on homosexuality. The questions as to qualification should be specific: How many courses in medical school on the subject of homosexuality did the witness take? For how long was lesbianism studied? For how long was the effect on children of homosexual parents studied? How long ago were the courses taken? Has the witness ever done any primary research on homosexuality? The attorney can also probe into the nature of the psychiatrist's present practice: How many lesbians has s/he ever counseled? How many children of lesbian mothers? It is evident that the mother's attorney must thoroughly investigate the opposing expert's background and practice before trial.

If the expert has not personally examined all of the principals, the mother's attorney should again impress upon the court that the proffered testimony will not be relevant to the particular case.¹³⁴ The expert can be forced to acknowledge that homosexuals probably account for at least 10 percent of the adult population and that they come from all racial, religious, class and educational backgrounds.¹³⁵ Given such number and variety, it can be argued that generalized knowledge and theory are not relevant to the very specific dispute of whether *this* child should live with *this* mother.

133. See notes 136-37 *infra* and accompanying text. See also REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1957) (Wolfenden Report).

134. This argument will not be useful, of course, if the father's counsel has asked that the mother be examined by a psychiatrist chosen by the father. Whether she should agree to be examined is a question of calculated risk for the mother and her attorney to decide on a case-by-case basis.

135. ALFRED C. KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); D. J. WEST, HOMOSEXUALITY (1967); M. McIntosh, *The Homosexual Role*, 16 SOCIAL PROBLEMS 182 (1968); H. Lawrence Ross, *Modes of Adjustment of Married Homosexuals*, 18 SOCIAL PROBLEMS 385 (1971).

If the opposing psychiatrist is qualified as an expert witness, one can assume that s/he will testify that the children in question would be better off with the father, at least in part because of the mother's lesbianism. A great deal of the cross-examination must be tailored to the testimony of the particular expert, but certain general areas should usually be explored.

If the expert states or implies that homosexuality is an illness, s/he should be confronted immediately with the decision by the American Psychiatric Association removing homosexuality from its list of mental disorders.¹³⁶ This decision is the most effective rebuttal of studies cited by an expert in support of an illness theory of homosexuality because it indicates that the group of persons responsible for those studies has itself rejected that position. Counsel can present evidence that the final vote of the entire A.P.A. was slightly more than 60 percent in favor of the resolution to stop classifying homosexuality as an illness.¹³⁷ Preceding that vote, three specialized committees (reference committees on research, nomenclature and standards) and the board of trustees all voted unanimously in favor of the resolution.

The expert can also be probed as to what s/he conceives the components of mental health to be. The attorney should explore the expert's thinking in several important areas: does the expert think it impossible that a lesbian could have a positive attitude toward herself, that a lesbian could function as an autonomous, self-actualized person and that a lesbian could embody in other ways the criteria of mental health? If the expert suggests that lesbians are less likely to exhibit such positive attributes, the attorney can question the expert's familiarity with several recent clinical studies which have found lesbians to be as emotionally healthy,¹³⁸ and on some scales more emotionally healthy,¹³⁹ than control group samples of heterosexual women.

Much of what an opposing expert might describe as the harmful psychological effect on a child of being raised by a lesbian mother is also likely to be based on the premise that lesbianism is unhealthy.

136. N. Y. Times, Dec. 16, 1973, at 1, col. 1.

137. The precise vote on the resolution was 5,854 in favor, 3,810 against, and 367 abstentions.

138. See Armon, *Some Personality Variables in Overt Female Homosexuality*, 24 J. PROJECTIVE TECHNIQUES 292 (1960).

139. See Freedman, *Homosexuality Among Women and Psychological Adjustment*, 12 THE LADDER 2 (1968); Hopkins, *The Lesbian Personality*, 115 BRIT. J. PSYCHIATRY 1433 (1969); Siegelman, *Adjustment of Homosexual and Heterosexual Women*, 120 BRIT. J. PSYCHIATRY 477 (1972). It should be noted that research in the area of female homosexuality has been limited. See Siegelman, *supra*, at 477.

In cross-examination, the mother's attorney should stress the difference between sexuality and mental health and query whether the child's development is not much more likely to be affected by the mother's emotional maturity than by her lesbianism.¹⁴⁰

In addition, the mother's attorney has a right to explore the expert's personal biases against homosexuality: does s/he consider homosexuality to be immoral; how many homosexuals does s/he know socially; how many are children of lesbian mothers; how many members of her or his family are homosexual? If appropriate, the attorney should emphasize what is likely to be the case: that the psychiatrist has had very little, if any, contact with homosexual women and men, except for those who have been patients, and who are, by self-definition, in need of psychiatric care.

(b). *The Favorable Expert.* The expert witnesses for the lesbian mother may well form the most important part of her case. A psychiatrist should be selected who has studied homosexuality and who personally has worked with homosexuals and/or children raised by homosexuals.¹⁴¹ That person should interview the mother and the children and prepare detailed psychological evaluations of them. The function of the mother's expert will be to evaluate her fitness as a mother, to explain why her lesbianism will not harm the child, and to legitimate for the judge, by implication as well as by explicit statement, a view of lesbianism as a healthy and nonthreatening—albeit minority—form of sexuality.

After the expert is qualified, s/he can be asked to explain some basic facts about lesbians and lesbian mothers. Since this tactic will emphasize, rather than downplay, the issue of lesbianism, each attorney must decide if this is the appropriate way to proceed in a given case. On direct examination, the friendly expert can be asked: How many lesbians are there in the United States? How many lesbian mothers? Why is it that so many homosexual women have become mothers? How does one define a "lesbian" scientifically? How are sexual relations between lesbians different from heterosexual relations? The last ques-

140. See M. FREEDMAN, *HOMOSEXUALITY AND PSYCHOLOGICAL FUNCTIONING* 106 (1971).

141. For assistance in obtaining an expert witness, an attorney can contact the American Civil Liberties Union Sexual Privacy Project, 22 East 40th Street, New York, N.Y. 10016; American Psychiatric Association Gay Caucus, c/o Dr. Richard Pillard, 6 Bond Street, Boston, Mass. 02118; Association of Gay Psychologists, Box 29527, Atlanta, Ga. 30329; Lesbian Mothers National Defense Fund, 2446 Lorentz Pl., N., Seattle, Wash. 98109; National Gay Task Force, 80 Fifth Avenue, New York, N.Y. 10011.

tion is suggested because several judges have asked lesbian mothers on the stand about the details of their sexual relations,¹⁴² placing the women in the embarrassing and degrading position of being forced to explain intimate details of their lives to a stranger who is usually unsympathetic. If an attorney senses that kind of attitude, s/he may want to pre-empt the judge's questions by simply providing an explanation.

The expert can then be asked about the causes of lesbianism and whether s/he considers it to be an illness. At this point, the mother's attorney can introduce through the expert the idea that lesbianism not only is not a disease but also has a number of psychologically positive aspects. Several recent clinical studies based on psychological tests administered to similar groups of lesbians and heterosexual women revealed no difference in the incidence of neurosis;¹⁴³ furthermore, the lesbian women exhibited such attributes as stronger self-directedness and greater independence.¹⁴⁴ In addition, in the only study done specifically of lesbian mothers (based on two years of individual and group therapy sessions), a New York psychotherapist found that lesbian mothers who have accepted themselves as lesbians without feelings of guilt have a stronger sense of self because they have rejected a heterosexual role relationship in which the woman is very often expected to be submissive and dependent:¹⁴⁵ "The fact of being a lesbian increases the guilt that the lesbian mother feels initially, but also is the very instrument that will allow her to be ultimately freer to function as a separate, productive and vital human being."¹⁴⁶ It should be emphasized, however, that the most frequent finding of all these studies was that the similarities between lesbian and heterosexual women with respect to their lifestyles and psychological characteristics far exceeded the differences.

The most important and most detailed part of the favorable expert's testimony should be the psychological profile of the particular mother

142. D. MARTIN & P. LYON, *supra* note 2, at 62, 139. See also Brief for Defendant-Appellant at 44-46, *Townend v. Townend*, Case No. 639 (Ct. App. Portage County, Ohio 1975).

143. See Freedman, *supra* note 139; Hopkins, *supra* note 139; Saghir, Robins, Walbran & Gentry, *Homosexuality. IV. Psychiatric Disorders and Disability in the Female Homosexual*, 127 AM. J. PSYCHIATRY 147 (1970); Siegelman, *supra* note 139.

144. See Freedman *supra* note 139; Hopkins, *supra* note 139; Siegelman, *supra* note 139.

145. B. Goodman, *The Lesbian Mother* (1973) (unpublished paper presented before the Fiftieth Annual Meeting of the American Orthopsychiatric Association, May 1973).

146. *Id.* at 6.

and children. The mother's lesbianism should be discussed forthrightly and concisely, but the bulk of the testimony should concern her mothering abilities. A "psychological best interests of the child" test has been suggested which would evaluate affection relationships, primarily from the child's viewpoint, by examining the continuity, duration and closeness of the relationship, the love of the adult toward the child, and the love and trust of the child toward the adult.¹⁴⁷ These are the kinds of interpersonal dynamics which the mother's attorney should stress as the foundation for an award of custody and on which the expert should be asked to comment. In this framework, the details of the parent's sexual behavior are irrelevant.

In the context of the particular mother, the expert should address the fears that a court might have about placing a child in a lesbian home environment. The expert will be able to explain to the court that, although the causes of homosexuality are not certain, there is no evidence to suggest that being raised by homosexual parents is a cause. The theory that role models create children's sexuality is simply not accepted.¹⁴⁸ It certainly could not explain why almost every homosexual is raised in a heterosexual family. The expert should also discuss the probable psychological effect, if any, of being raised by a lesbian mother. Many persons equate lesbianism with man-hating and therefore fear that lesbians would instill extreme anti-male ideas in their children. The expert, should be asked to discuss, based on his or her interviews with the mother and children, the mother's attitudes towards men and the opportunities that the children have for interaction with male role models, such as relatives or friends.

If the mother lives with a woman with whom she is emotionally and sexually involved, the mother's expert witness should address the specific question of what effect the daily exposure to an active lesbian relationship will have on the child. The court may consider conditioning the mother's custody on the condition that she and her companion live separately.¹⁴⁹ Such an order subtly punishes the mother by prohibiting her from fully expressing her own sexuality and reminds both mother and children of the guilt which society expects her to feel about her lesbianism. The expert should be asked to interview the

147. Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 153 (1963).

148. See, e.g., M. FREEDMAN, *supra* note 140, at 27-34. See also *The Avowed Lesbian Mother*, *supra* note 13, at 860-61.

149. See notes 30-34, 57-60 *supra* and accompanying text.

mother's companion and prepare an individual evaluation of her in the context of her role as a psychological parent to the child. The expert should also discuss whether living with two women who display warmth and affection for each other would be detrimental to the child,¹⁵⁰ as compared to the effect on a child of living with a mother whose sexuality is repressed. A comparison to other children who grow up in families headed by two women, such as a mother and an aunt, may be helpful.

Finally, the expert should be asked to discuss the possible stigma to the child—specifically, whether stigma might attach to the child, what its effects would be and, most importantly, whether this mother and child are capable of coping with it. The mother's attorney should emphasize that any evidence of adverse effect from peer pressure, as from other factors, must be shown to apply to the particular child. Children react in different ways to teasing by their peers: some are greatly bothered by it while others are not. Mothers also react differently. The study of lesbian mothers in New York found that the mothers who accepted their own homosexuality could help their children deal with conflicts in the neighborhood in a healthy, tolerant way, just as Jewish mothers could help their children cope with anti-semitism—because they did not feel guilty about being Jewish.¹⁵¹ If the opposing party concedes that no stigma has occurred to date but argues that the possibility exists as the children grow older, the court should be reminded that it has continuing jurisdiction for future developments. Counsel for the mother should argue further that depriving her of custody because of expected peer pressure is no more justifiable than denying custody for that reason to racially mixed couples, a rationale that several state appellate courts have explicitly rejected.¹⁵² Finally, if the mother is known in the community as a

150. The lesbian mother should be advised not to permit a child to witness actual sexual relations. Should that have already occurred, however, counsel should note the following statement:

From the theoretical point of view it could in fact be argued that the children viewing a perverse act such as that decried [fellatio and cunnilingus], might be less disturbed psychologically than in viewing sexual intercourse with its attendant fantasies of an aggressive nature. It is in fact this aspect which may prove more damaging psychologically than the sexual connotation.

Finlay & Gold, *The Paramount Interest of the Child in Law and Psychiatry*, 45 *AUSTRALIAN L.J.* 82, 87 (1971).

151. B. Goodman, *supra* note 145, at 7.

152. *Stingley v. Wesch*, 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966); *Commonwealth ex rel. Lucas v. Kreisler*, 299 A.2d 243 (Pa. 1973), *rev'g* 221 Pa. Super. 196, 289 A.2d 202 (1972). *See also* *Goldman v. Hicks*, 241 Ala. 80, 1, So. 2d 18 (1941);

lesbian, counsel can point out that the children may be harassed, if at all, regardless of with whom they live.

3. *Other witnesses and evidence.* In addition to the psychiatrist, the defense should present witnesses whose testimony will alleviate the judge's fears of placing children with a lesbian mother. Other lesbian mothers who can describe their lives, placing their lesbianism in proper perspective, could give effective testimony, and their appearance will emphasize to the judge that lesbians are not unnatural creatures. Gay activist or feminist groups can help a lawyer contact potential witnesses who can testify without jeopardizing their own custody rights. A further possibility is presenting grown children of lesbian mothers to discuss their childhood and adolescence. One such convincing witness could effectively dispel a judge's mental image of "perverted" mothers.¹⁵³

If the child is old enough, his or her preference should be made part of the record. Whether the child should testify beyond that must be decided on a case-by-case basis, depending on such factors as the child's age and the intensity of the animosity among family members. Other possible witnesses include adults such as teachers who primarily know the child rather than the parents and who could testify about the child's well-being with the current custodian.

When opposing witnesses other than an expert testify, they should be probed for bias in much the same way as the expert. The father, in particular, should be closely examined about his true reasons for seeking custody.¹⁵⁴ If prejudice against lesbians appears to be a strong motivating factor, the mother's attorney can argue that the father is likely to raise the children in an atmosphere of intolerance and bigotry.

The mother's attorney will also want to consider, prior to trial, asking the court to appoint a guardian ad litem to represent the children's interest. An independent attorney representing the children will have the duty of presenting an assessment of their best interests which is presumably untainted by the personal interests of the parents. The risk, of course, is that the person appointed will be as homophobic, or more so, than the judge. If, on the other hand, an impartial guardian

Langin v. Langin, 2 Ill. App. 3d 471, 276 N.E.2d 822 (1971); People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); *In re* Brenda H., 305 N.E.2d 815 (Ohio Ct. C.P., Cuyahoga County, 1973).

153. A film depicting the Schuster and Isaacson family has been admitted into evidence in three Lesbian mother cases. *Admissibility of Film on Lesbian Mothers*, 2 WOMEN'S RIGHTS LAW REP. 23 (1974).

154. See notes 117-18 *supra* and accompanying text.

is designated and the guardian recommends that the mother retain custody, it will bolster the mother's case significantly.¹⁵⁵

CONCLUSION

A lesbian mother's struggle to keep or to obtain custody of her children will be difficult. Her best strategy is to reach a private settlement with the father without judicial intervention. If that fails, her attorney should attempt to shape the framework of the trial or hearing so that the mother's lesbianism is treated in the proper perspective as a tangential factor, among many others, to be examined by the court.

The law which has emerged to date suggests that the most important goal of attorneys handling lesbian mother custody cases in the future should be to make courts realize that a parent's sexual preference is irrelevant to the best interests of the child unless a concrete causal connection can be demonstrated between the two. Courts are starting, tentatively, to require such a connection. If the demand for it is reiterated, both in the courts and in the legislative reform of statutes governing custody decisions,¹⁵⁶ the specter of child custody decisions based largely on unfounded societal and judicial prejudices may be substantially reduced or eliminated.

155. A guardian ad litem was appointed in *Isaacson v. Isaacson*, No. 36868 (Wash. Super. Ct., King County, Sept. 3, 1974), and *Schuster v. Schuster*, No. 36876 (Wash. Super. Ct., King County, Sept. 3, 1974), reported in 1 FAMILY L. RPT'R. 2004 (1974).

156. Perhaps the most effective method of reform in this area of law is to lobby for legislation which would add nexus test requirements to the existing state laws governing custody and neglect determinations. Colorado and Kentucky have adopted the language of the Uniform Marriage and Divorce Act which directs that the trial court "shall not consider conduct of a proposed custodian that does not affect his relationship to the child." COL. REV. STAT. § 14-10-124(2) (1973), cited in *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973); KY. REV. STAT. § 403.270(2) (1974 Supp.). Washington has adopted very similar language which prohibits consideration of conduct that "does not affect the welfare of the child." WASH. REV. CODE § 26.09.190 (Supp. 1975). Language such as this, although an improvement over a standard consisting of nothing more than the best interests of the child, is nonetheless imprecise enough so that courts have attempted to base findings of detrimental effects of the parent's conduct on assumptions about that conduct. Compare the lower court and appellate court results in *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973); *In re Marriage of Moore*, — Colo. App. —, 531 P.2d 995 (1975); *Forester v. Forester*, — Colo. App. —, 540 P.2d 1107 (1975); *McDaniel v. McDaniel*, 14 Wash. App. 194, 539 P.2d 699 (1975); *Wildermuth v. Wildermuth*, — Wash. App. —, 542 P.2d 463 (1975). We would suggest that law reform advocates press for language which requires specific factual evidence that: (1) the child is being harmed, and (2) that the conduct of the proposed custodian is the cause of that harm.

† Addendum to page 701:

A specific, concrete nexus test was applied by the trial court in *Whitehead v. Black*,^{49.1} a Maine decision determining that it would be in the best interest of the 7 and 10-year old children to remain with their mother, who lived with another woman in a lesbian relationship. The court articulated the weight accorded to the mother's lesbianism as follows:

A court charged with the responsibility of acting in the best interests of a minor child must inquire into the psychological, social and moral well-being of that child as well as its physical well-being. To this end the sexual activity of the mother or father becomes a relevant consideration, not for the purpose of censuring or criticizing the manner in which the parent lives, but for the purposes of determining the impact of the parent's life style upon the minor child. Thus the inquiry would be . . . what is the effect on the child exposed to this relationship?^{49.2}

The court decided, on the basis of expert testimony, that the mother's homosexuality had not interfered with the development of the children's personal identities, although it also accepted the expert's conclusion that the effects of Ms. Whitehead's lesbianism on the children during adolescence could not be predicted with precision. After examining all the evidence, including the fact that the children had lived with the mother since the divorce and initial custody decree, the court determined the mother to be the better custodian. While the court implied that the mother's situation did not constitute an ideal family arrangement, it also had no evidence of harm to the children and, therefore, applying its own well-articulated nexus test, lesbianism was not a dispositive issue.

49.1. Civil Action Nos. CV-76-422 and VC-76-426 (Main Super. Ct., Cumberland County, June 14, 1976).

49.2. *Id.* at 8.

