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LESBIAN MOTHERS & GAY FATHERS: OVERT AND SUBCONSCIOUS HOMOPHOBIC BIASES CONCERNING PARENTING FITNESS

Jude Hall*

INTRODUCTION

Disputes in family law, particularly in child custody and access cases, often involve emotionally charged parties. These parties, when pitted against one other in an adversarial system, often seek to discredit, impugn or malign the opposing party in an effort to influence an outcome in their favour. The judiciary, as the triers of fact and arbiters in these cases, must consider the often widely divergent positions of each party, and apply an impartial analysis and judgment that considers the best interests of the children at the centre of these disputes. Despite the presumption of judicial impartiality, it is reasonable to assume that as participating members of society, and often as parents themselves, members of the judiciary will rely upon their own senses of morality in applying the law, assessing the merits of each party's positions, and ultimately rendering a decision in each case.

The assessment of parenting capability and skill (or lack thereof) in a custody and access dispute is a highly contextualized analysis and is dependent upon the fact scenarios of each case. When the issue of a parent's sexuality is raised, the dynamics of overt and subconscious homophobic bias are introduced into the dispute. Typically one of the litigants has raised the issue, and the judge is then compelled to address it in the decision-making process. In considering the subject matter of this article – child custody and access disputes – it is worthy to note the definition of homophobia: “irrational fear of, aversion to, or discrimination against homosexuality or homosexuals.”¹ While the litigants in child custody and access cases are often not on the friendliest of terms, homophobia does not generally present itself as hateful speech

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¹ Online: Merriam-Webster On-line <<http://www.merriam-webster.com/dictionary/homophobia>>.

or violent actions as these are often manifested in other contexts. Rather, homophobia, in the form of overt statements about or subconscious bias towards the parenting capabilities of a gay or lesbian parent, if present in the minds of the litigants or the judiciary, can result in influence on the final outcome of these disputes.

The question of parenting capability, fitness, and developmental impacts upon children of gay and lesbian parents is much broader than the context of custody and access disputes where one of the parents is alleged, or acknowledged, to be gay or lesbian. Same sex couples and gay and lesbian single adults who have become or wish to become parents endure many of the same biases, stereotypes, and resistance with respect to their abilities to parent and raise children in a healthy and supportive environment. This paper focuses only on the issue as it arises in context of litigation over child custody and access cases where one or both of the litigants is alleged or acknowledged to be gay or lesbian.

Specifically, this article attempts to elucidate primary differences in perceived parenting fitness of lesbian mothers and gay fathers, provide insight into factors fueling these perceptions, and discuss effects upon custody and access decisions in family law. In support of this objective, a qualitative case review of Canadian custody and access disputes in the last 30 years was undertaken with the goal of identifying the extent to which overt or subconscious homophobic attitudes or bias affects the tone and outcomes of these cases. Additionally, the paper will consider whether bias is different toward gay fathers and lesbian mothers and whether there has been any discernable change in these biases over time.

I. HISTORICAL BACKGROUND ON THE PATHOLOGY OF HOMOSEXUALITY

It is logical to assume that same sex orientation has existed for as long as opposite sex orientation, or, alternatively, for as long as there has been humans and human sexuality. The literature indicates, however, that the concept of the homosexual is relatively new, historically speaking, and that in a relatively short period of time discourse on homosexuality has greatly shaped modern day understanding, and often homophobic misunderstanding, of human sexuality.

Prior to the nineteenth century, the sexual act of anal intercourse was referred to as sodomy or buggery and viewed as unnatural, sinful, and, specifically within medieval England, was prohibited as immoral behavior within early ecclesiastical courts. The first known criminal sanctions in England developed as early as in 1533 with the introduction of *The Buggery Act* by King Henry VIII.² Despite the condemnation of the act of anal intercourse, and criminal liability associated with it, the act of anally penetrating someone did not define the person who was penetrating the other. The phenomenon of the act becoming a central defining element of the individual would occur towards the middle of the nineteenth century, with the introduction of the word “homosexual” into societal discourse. The word did not exist before that era, to the extent that Michel Foucault observed, “the sodomite had been a temporary aberration, the homosexual was now a species.”³

In 1864, Karl Heinrich Ulrichs, a German lawyer thought to be the first gay rights activist,⁴ publicized his theory of Uranism, stating that homosexuality was not immoral, and that it was, rather, a hereditary and congenital form of sexual variation where the soul is originally hermaphroditic and in some cases, a female soul instead of a man’s soul is implanted inside a male body.⁵ Uranism was quickly followed however, and eventually overshadowed in 1867, by the opinions of Carl Westphal, a German physician who claimed that homosexuality was a neuropathic or psychopathic condition, and those of Richard von Krafft-Ebing, in 1877, who stated that homosexuality was a manifestation of a hereditary psychopathic condition and that most homosexuals had traceable family histories of mental illness.⁶ It is not difficult to see how this early conception of the etiology or pathology of homosexuality would contribute to the view of homosexuality as a mental illness or disease.

Shortly after the turn of the twentieth century, in 1905, Sigmund Freud published *Three Essays on Sexuality* with an emphasis on psychoanalysis, and proclaiming that

² Online: LGBT Mental Health Syllabus <http://www.aglp.org/gap/1_history>.

³ Michel Foucault, *The History of Sexuality: Volume I: An Introduction* (New York: Random House, 1978) at 43.

⁴ *Supra* note 2.

⁵ Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing, 2002) at 19.

⁶ *Ibid* at 20.

homosexuality is an acquired condition; Freud's work thus de-emphasized the role of biology in the etiology of homosexuality.⁷ Presumably, Freud would have been one of the earliest constructivist theorists of homosexuality, emerging from a field of primarily essentialist theories on the causes of homosexuality.

Henry Minton writes that, in the 1930's in and around the area of New York City, there were a number of early activists attempting to study homosexuality and dispel existing myths about homosexuality as a mental illness.⁸ Minton asserts that the only way these activists were able to fund this research was through financing provided by medical and psychiatric research foundations, who ultimately co-opted the work in advancement of their own designs of keeping homosexuality within the realm of medical science:

The interests of medical and scientific sexologists, however were incompatible with the objectives of the homosexual rights movement. Rather than empowering the homosexual community, medical and scientific specialists were eager to lay claim to the study of homosexuality as a means of furthering their expertise and legitimacy as agents of social control.⁹

An influential factor in the pathology of homosexuality was its inclusion in the American Psychiatric Association's Diagnostic Statistical Manual of Mental Disorders (DSM). The first edition of the DSM was published in 1952, and included homosexuality, officially designating homosexuality both to the medical community and society at large as a mental disorder.¹⁰

Homosexuality would remain listed as a mental disorder in the DSM for two decades, reinforcing the normative view that people who were not heterosexual were sick, diseased, and mentally disordered. It was not until the late 1960's, with the emergence of mass, organized gay and lesbian activism demanding that homosexuality not be

⁷ *Ibid* at 24.

⁸ Henry Minton, "Community Empowerment and the Medicalization of Homosexuality: Constructing Sexual Identities in the 1930s" (1996) 6 *Journal of the History of Sexuality* 435 at 437.

⁹ *Ibid*.

¹⁰ *Supra* note 2.

classified as a mental disorder, that it would finally be removed in the 1973 edition of the DSM II.¹¹

In Canadian law, homosexuality has often been equated with immorality, as evidenced in the initial *Divorce Act*¹² enacted in 1967, which listed homosexual acts along with other fault-based grounds for divorce such as adultery, rape, bestiality, and physical and mental cruelty.¹³ The reference to homosexual acts was finally removed from the *Divorce Act*¹⁴ in 1985, when the statute was overhauled to diminish fault as the primary basis for divorce. Yet, despite recent Canadian legislative enlightenment (such as the *Civil Marriage Act*¹⁵), there remains on the books legislation that indirectly or disproportionately discriminates against homosexuals, such as the age-specific prohibition against anal intercourse in s. 159 of the *Criminal Code*.¹⁶

Continued confusion and suspicion regarding the origins and causes of homosexuality persist. Consequently, homophobic bias continues to manifest within the mainstream heteronormative view of society, and within the context of Canadian law. Bruce Ryder uses the concept of a compassion/condonation dichotomy in describing a Canadian legal system that has a relatively new-found compassion for homosexuals, while maintaining an absence of approval, promotion, or condonation of homosexuality:

In this way, the "no condonation" approach functions in tandem with the compassion model to rationalize heterosexual supremacy and keep gays and lesbians in their (subordinate) place.¹⁷

It seems clear that this dichotomy could very well contribute to the continued reinforcement of long-held social and judicial biases rooted in the early pathology of homosexuality, namely that heterosexual people live inherently superior lives relative to those among us who possess non-heteronormative sexuality and lifestyles.

¹¹ *Ibid.*

¹² *Divorce Act*, *supra* note 3.

¹³ Online: Government of Canada <<http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/CIR/963-e.htm>>.

¹⁴ *Supra* note 12.

¹⁵ *Civil Marriage Act*, S.C. 2005, c. 33.

¹⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 159.

¹⁷ Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at para 10.

II. CONTEMPORARY RESEARCH ON GAY AND LESBIAN PARENTING

It is not an objective of this article to delve fully into the extent of scientific research into gay and lesbian parenting, or to provide a catalogue of major studies of children of gay and lesbian parents undertaken within the last thirty years. Notwithstanding this limitation, it is beneficial in the context of this report to briefly discuss the role of scientific study on the topic of gay and lesbian parenting, and to highlight a select few significant studies undertaken in recent years.

The issue of gay and lesbian parenting, or sexuality in general, is not a prevalent social problem with which average citizens concern themselves. Most people would not be familiar with psychological or sociological studies on gay and lesbian parenting unless these were within an area of personal or professional interest. Similarly, the average member of the judiciary, even those assigned to unified family law courts, is likely not well-informed with respect to the latest or most influential academic and scientific studies on the topic.

However, because sexuality is so inextricably linked to morality in our society, many individuals have morally-judgmental and emotionally-charged positions with respect to sexuality. This phenomenon is particularly evident when children and the concepts of parenting and family are involved in the discourse, and seems to flare up with well-publicized social milestones such as the proposition or passing of legislation dealing with gay and lesbian parental adoptions, legalization of same sex marriage, and reproductive technologies. The discourse from advocacy groups on either side of the gay and lesbian parenting divide will often quote from scientific studies claiming to prove or support their respective positions on the fitness or ability of gay and lesbian parents, and the possible effects of such parents upon the development of children. To the casual observer, it would not be abundantly clear which advocacy group's position is bolstered by the most reliable scientific study, or, for that matter, if the science itself is credible, reliable, or even useful in the discourse.

The endorsement of research into the effects of gay and lesbian parenting upon the development of children by professional entities that deal with children can be helpful in neutralizing or balancing contradictory claims of research that may be used by advocacy groups either in support of or opposed to gay and lesbian parenting. Charlotte Patterson, in reviewing and summarizing recent studies into gay and lesbian parenting, states that no evidence has been found to show that parental sexual orientation has an important impact upon child or adolescent development.¹⁸ Patterson does acknowledge that much of the research to date has been centered on lesbian mothers, and that more study into children born to gay fathers is needed.¹⁹ In her report, Patterson notes the following statement by the American Psychological Association, adding that similar statements have been issued by the American Psychiatric Association, American Medical Association and the American Bar Association:

Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.²⁰

Research has been conducted in the past with gay fathers as a specific focus. An earlier study in 1995 of gay fathers and adolescent sons showed that the majority of sons were heterosexual; the study did not focus on mental health, but did address the misperception that a child's sexual orientation could be influenced by the parent, stating:

The available evidence, including this study, fails to provide empirical grounds for denying child custody to gay or lesbian parents because of concern about their children's sexual orientation.²¹

The Canadian Bar Association also appears to have endorsed, albeit indirectly, the notion that children living with gay and lesbian parents have normal and healthy childhoods, through its policy statement on same sex marriage equality:

¹⁸ Charlotte Patterson, "Children of Lesbian And Gay Parents" (2006) 15:5 Association for Psychological Science 241 at 243.

¹⁹ *Ibid.*

²⁰ *Ibid* at 243.

²¹ J. Michael Bailey *et al.*, "Sexual Orientation of Adult Sons of Gay Fathers" 1995, 31:1 Developmental Psychology 124 at 128.

Moreover, the federal government has publicly stated its commitment to legislation and funding to ensure that the best interests of children are met. Many children are living with gay or lesbian parents. Often those gay or lesbian parents are involved in serious and committed relationships. These children should not be discriminated against because their parents are unmarried. They should be able to feel the stability of a publicly recognized union. Indeed, all of society should be comforted by the desire and need of these partners to create stable, committed unions.²²

III. CANADIAN CUSTODY & ACCESS CASES FROM 1978-1987 AND 1998-2007

In support of this article's objective of assessing the extent to which overt and subconscious homophobic bias may influence societal perceptions of gay and lesbian parenting fitness, a review of Canadian case law is necessary in order to gain insight into how this issue has been addressed by the courts in child custody and access disputes. Using past case reports, and reviewing the circumstances in which the sexual orientation of either parent is raised and dealt with in the context of the custody or access decision, provides a means through which insight and general observations can be made about prevailing judicial attitudes towards gay and lesbian parents.

1. Methodology

The case review was devised to include cases from across Canada during two separate ten-year periods, the first from 1978 to 1987 (Period 1), the second from 1998 to 2007 (Period 2). The time periods chosen reflect a desire to assess cases as far back as the initial years surrounding the enactment of the *Canadian Charter of Rights and Freedoms*²³ up until the present, based on an assumption that custody and access case reports would be rare before the mid-1970s. The selection of the bookend periods for review was chosen so that there would be an earlier group of cases to compare with more recent cases, in the hopes of gaining qualitative insights into patterns or trends in the

²² Canadian Bar Association, "Submission on Marriage and the Legal Recognition of Same-Sex Unions" (March 2003) at 13.

²³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

evolution of perception of gay and lesbian parents by the litigants and judiciary members involved.

The cases were selected using the on-line legal database repository of Lexis-Nexus Quicklaw, searching for cases within the time periods using search terms of “custody and access” and “homosexual or gay or lesbian.” The returned cases were then further narrowed by selecting a family law category and a sub-category of custody and access for the latter time period. Cases returned that were criminal or child protection proceedings dealing specifically with child sexual abuse were screened out; similarly, cases wherein no actual discussion of sexuality occurred or where the word homosexual, gay, or lesbian was used as a verbal slur only were omitted.

In reviewing the cases, a brief reading of the reports pertaining to the custody and access issues was completed, logging a subjective summary of the discourse in the case review inventory, included in Appendix A. Cases were also sorted by male (gay fathers) or female (lesbian mothers), in order to assess potential differences across gender lines using the following classifications:

Lesbian mother - mother who is either confirmed or alleged to be lesbian (past or present); or, a father’s new female partner who is alleged to be lesbian.

Gay father – father confirmed or alleged to be gay, or adult males involved with either parent who would be in contact with children who are confirmed or alleged to be gay; and, a single case of a heterosexual father where the mother is worried that too much father/son access (i.e., lack of female influence) will lead to homosexuality.

From the review of the reports, the cases were identified as having the following three types of judicial commentary:

Negative – overt statement(s), negative in context, regarding homosexuality, gays or lesbians; with a direct or implied reference to a deficiency or risk of some kind regarding parenting capability.

Positive – overt statement(s), positive in context, with respect to homosexuality, gays or lesbians, and the confirmation or assertion that sexuality has no impact on parenting capability or the custody and access decision (usually phrased neutrally) with no apparent contradictions.

Silent – the issue of homosexuality has been raised and mentioned in the case report, but no statement is made that could be interpreted as negative or positive.

After making a subjective identification of judicial commentary, the end result of the case was then logged as either a “good result” or “poor result”, where the alleged/confirmed gay or lesbian parent improved or maintained their pre-case level of custody or access rights, or in the latter scenario, the end result was a restriction or refusal of enhanced custody or access rights.

The case review is entirely qualitative; all observations, insights and noted thoughts on the cases reviewed or any trends or patterns across the cases are subjective only, and are not based on controlled variables, or any statistically significant grounding. Family law cases, particularly custody and access decisions, are highly contextual and short of a judge stating explicitly that custody or access was denied solely on the basis of parental sexuality, there is no definitive way to confirm the degree to which, if at all, the parent’s sexuality affected the final decision. In fact, in some of the cases, undoubtedly the gay or lesbian parent objectively was significantly lacking in parental capability, and the poor end result for that parent was arguably the most just decision. However, because this is not a controlled variable quantitative study, all cases selected by the criteria outlined above remain in the review and are included in averages only to demonstrate general qualitative patterns, trends, or peculiarities.

2. Period 1 (1978 – 1987) Observations

During Period 1, the issue of homosexuality was raised frequently by mothers alleging or stating that the father was gay, and typically correlating that assertion to direct concerns of risk to the children (72% of gay father cases). Conversely, fathers infrequently raised the issue of homosexuality or cited specific concerns regarding harm to children with respect to a lesbian mother, and it is not clear just how the issue has come up from the case report (23% of lesbian mother cases). Undoubtedly, in many of these cases, the issue was raised by the mother as an offensive strategy in countering custody or access claims of the father; in fact, in a number of cases, the homosexuality of

the father was alleged and not accepted by the courts. One such case is *Smith v. Smith*,²⁴ wherein the judge found that the mother accused the father of being gay in order to “impeach his reputation in the community”; the father retained his custody rights, yet the implication by the mother and the judge that homosexuality could be fashioned into an accusation, and that homosexuality itself could damage a person’s good character, indicates negative bias of homosexuality as something that brings with it considerable shame.

During Period 1, only 3% of the cases contained an overt positive judicial comment that homosexuality is not an influencing factor or risk in assessing parental capability or the best interest of the child in the custody or access decision.

In contrast, in approximately 39% of the cases, the judicial commentary is overtly negative, and frankly homophobic. The common themes with respect to risks to the child’s best interest include the “questionable morality and stability” of the presumed gay or lesbian “lifestyle” and the “embarrassment” to which children of gay and lesbian parents may be exposed. In several of the cases from this period, judges state that these negative effects can be mitigated if the gay or lesbian parent is able to censure and police themselves, as was the case in *D v. D*:

His sexual orientation is not known outside his immediate circle; he does not flaunt it. Visitors to his home include married couples, mainly. He has never exhibited any missionary attitude or inclinations toward militancy in this difficult area of homosexual behavior. He disclaims ownership in any club although he admits to having frequented a bar which has earned the reputation of having become a meeting place for people of homosexual leanings.²⁵

This case and its suggestion that suppression of the gay or lesbian parent’s sexuality can mitigate the negative effects on children of being a non-heterosexual parent, was then cited and followed in a later case – *Barkley and Barkley*.²⁶ This type of negative judicial commentary is an example of overt homophobic bias against the perceived parenting

²⁴ *Smith v. Smith*, [1980] B.C.J. No. 1847 at para. 6.

²⁵ *D. v. D.*, [1978] O.J. No. 3486 at para. 20.

²⁶ *Barkley and Barkley*, [1980] O.J. No. 3555.

fitness of gay and lesbians, which was relatively evenly distributed across gay father and lesbian mother cases in Period 1.

In the remaining 58% of the cases, the judicial commentary is classified as silent, in that no overt statement was made with respect to the effect that a parent's sexual orientation might have on parenting fitness or suitability.

As for the end results of these cases, a little under half of the gay males cases end with a poor result wherein the father's custody or access rights are curtailed in some manner. However, most surprisingly are the relatively poor results during Period 1 for the lesbian mothers: many cases (over 70%) have a poor end result in which custody or access rights are curtailed. As stated in the methodology, in some of these cases the mothers have serious emotional stability issues, yet it nonetheless raises the question as to whether there a bias at work where lesbianism itself is seen as an indicator of emotional instability, beyond that which might be applied against a gay father. This possibility is evident in *Adams v. Woodbury*, in which a mother is seeking custody of her child from proposed adoptive parents seeking to dispense with her consent for the adoption. The mother is deemed unable to offer a stable lifestyle to the child by the judge, who, within his decision's conclusion, states that her lesbianism is not a factor, yet appears to contradict himself when mentioning her problems with sexuality and unstable lesbian relationships:

That is not to say that the mother has not tried her best against great odds considering her youth, her lack of skills and earning capacity and her isolation from her family and the problems which she has with her sexuality. [...] Her lesbianism does not bear directly on the custody issue and the consensus which emerged during the trial was that this, in itself, was not a factor. The question which arises however is whether her present relationship with Miss Young, certainly in light of both their histories, is a permanent one.²⁷

3. Period 2 (1998 to 2007) Observations

²⁷ *Adams v. Woodbury*, [1986] B.C.J. No. 2735.

During Period 2, mothers alleged or raised the issue of the father's homosexuality less frequently than in Period 1. The issue of sexuality in these cases may be raised by either parent, or enquired about by the judge in the context of outlining why the relationship broke down, as opposed to the higher incidence of raising sexuality as a direct offensive tactic for defeating a gay or lesbian parent's custody or access claims seen in Period 1. It is also possible that the issue is raised by a third party, such as a children's aid agency, as seems to be the case in a number of gay father cases during Period 2 wherein allegations or investigation of pedophilic behavior was a concern.

During Period 2, there was an increase in cases over Period 1 wherein positive statements regarding gay and lesbian parenting can be attributed to the judiciary. Interestingly, however, this increase was disproportionately in favour of lesbian mothers, with all but one of the positive comments dealing with lesbian mothers. The typical positive comment is distinguished from a silent comment in this report, in that the judge explicitly states that a gay or lesbian parent is the same as a heterosexual parent, or that sexuality is not a factor in custody or access decisions, without obvious contradictions. An example of a positive comment from Period 2 can be seen in *Bubis v. Jones*:

A lesbian relationship, conducted with discretion and sensitivity, is no more harmful to children than a heterosexual relationship, conducted with discretion and sensitivity. Heterosexual parenting is not better than lesbian parenting – just different.²⁸

There was a corresponding reduction in overt negative judicial statements in Period 2 relative to Period 1 (39% in Period 1, down to 19% in Period 2). Unlike in Period 1, where negative commentary was evenly distributed between gay fathers and lesbian mothers, in Period 2, most of the negative comments occurred in gay father cases. The reduction indicates a possible shift in attitude and bias over time regarding the capabilities and fitness of gay and lesbian parents. The disproportionate split is unexplained, and is likely skewed by the fact that all of the negative comments regarding risks to the children of gay fathers occurred in cases where pedophilic or

²⁸ *Bubis v. Jones*, [2000] O.J. No. 1310 at para. 19.

hebophilic tendencies were alleged or had been confirmed in the father's past. It is interesting to note that the words pedophile and hebophile were absent from the earlier Period 1 era, yet they occurred rather frequently in Period 2.

There was a slight increase in cases during Period 2 in which judges remained silent and made no statements as to whether homosexuality was a negative or neutral (i.e., positive) factor in parenting. This result is somewhat counter-intuitive, as one would expect, perhaps naïvely, that in recent years members of the judiciary would seize the opportunity to be openly frank about past prejudices and stereotypes directed at gay men and lesbians, and be positively explicit that a parent's sexuality is not a factor in parental capability.

The end results of cases for gay fathers in Period 2 were relatively evenly split between poor and good results, a finding similar to Period 1. However, the end result of cases for lesbian mothers in Period 2 was markedly different from Period 1, with a significant reduction in poor end results – suggesting a possible reduction in negative bias concerning the ability of lesbian mothers to parent and provide healthy and stable lives for their children in more recent years.

4. Observations across Period 1 and Period 2

In what may be simply a peculiarity or coincidence, the same number of cases (31) were included in the case review for both periods based on the selection criteria outlined in the methodology, and across both time periods, the number of gay father and lesbian mother cases in each period is roughly equivalent. Taken at face value, this implies that neither the lesbian mother nor gay father is more likely than the other to be involved in a custody or access case that eventually makes it to trial; what occurs before trial in the vast numbers of parental relationship breakdowns in Canada remains unreported and largely unknown.

Through both time periods, but less so during Period 2, mothers seem to have alleged or raised the issue of a father's sexuality more frequently than a father might raise the issue with respect to a lesbian mother. In many cases, especially during Period 1, it was

clear that the issue was being raised by the mother, attributing the father's sexuality as a risk factor to the children in an offensive strategy to foil access or custody claims by the father. In these scenarios, judicial responses ranged from castigation of the mother for the allegation, to a serious consideration of the role of sexuality in assessing the best interests of the children.

In terms of judicial commentary, positive statements (i.e., neutrally phrased) regarding gay and lesbian parents increased in Period 2 over Period 1, and correspondingly negative and overtly homophobic comments by judiciary decreased in Period 2 relative to Period 1. The negative commentary during Period 1 was proportionate between gay fathers and lesbian mothers, and dealt with the common themes of risks to child development from emotional instability, immorality, and embarrassment associated with having a gay or lesbian parent. However, negative commentary during Period 2 was almost exclusively attributed to gay father cases only where perceived risks of child sexual abuse were being considered, and as such tempers any potential insights, in that allegations of pedophilia raise the risk analysis to a different level and make it difficult to casually infer that judicial comments are indicative of homophobic bias.

Overall, given that Period 2 occurs within the last 10 years, over 25 years after the enactment of the *Charter*²⁹ and within the era of legalization of same-sex marriage in Canada, the increase in positive comments and reduction in negative comments is not surprising.

The end result of cases for gay fathers is relatively constant across the periods with roughly almost half of the cases ending in poor results of a curtailment of custody or access rights. However, in Period 2, a marked improvement in good end results (i.e., improvement to pre-case custody and access rights) was observed for lesbian mothers relative to Period 1.

When the consistent and improved end results are considered for gay fathers and lesbian mothers, respectively, and the trend toward reduction in overt negative

²⁹ *Supra* note 23.

statements and increase in positive statements from Period 1 to Period 2 is equally considered, one can see a moderate evolutionary shift away from the biased perception of parental deficiency or instability associated in the past with gay and lesbian parents by the courts, to a more cautiously positive or neutral view over the last 10 years.

IV. FACTORS FUELING BIAS TOWARDS GAY AND LESBIAN PARENTS

1. Raising the Issue of Parental Sexuality

Results from the case review indicate that it is often the heterosexual parent that raises the issue of the other parent's homosexuality in contested custody and access cases. In some cases, the issue had appeared to be raised by third parties, such as children's aid agencies, and in a number of cases, it appeared to arise benignly as overall context for why the parental relationship breakdown had occurred preceding the trial. Regardless of the initial reason, one has to wonder why judges then in many cases delved into the issue in the context of the custody and access decision, as opposed to dismissing the issue or refusing to address it during trial.

It is likely impossible to identify with any confidence a single or common reason as to why the issue of homosexuality and parental fitness is glossed over by some members of the judiciary, yet fully examined and explored in custody and access decisions by others. Undoubtedly, in some cases, full exploration of a parent's behaviors in front of the children may be warranted in assessing the best interests of the child. Conversely, it has been suggested that some members of the judiciary derive pleasure from sorting through, in great detail, the sexual proclivities of gay or lesbian parents.³⁰

Perhaps the reason for exploration of the non-normative sexuality of a parent is a remnant of early divorce law, historically focused on the fault of either party in the breakdown of a marriage. The *Divorce Act*³¹ maintained a fault basis for the breakdown of marriage, up until 1985, that included a legislated list of reprehensible and presumably unforgivable acts such as adultery, cruelty, bestiality, incest, and

³⁰ Katherine Arnup, "Mothers Just Like Others': Lesbians, Divorce and Child Custody in Canada" (1989) 3 C.J.W.L. 18 at 29.

³¹ *Divorce Act*, *supra* note 3.

homosexuality. These grounds were also used by the judiciary in deciding custody of children; while heterosexual adultery may have been viewed as a natural act between a man and a woman, homosexuality, not unlike bestiality or incest, would have been considered as deviant behavior.³² Obviously, the parent engaging in deviant behavior, to whom the fault for the breakdown of the marriage was assigned, often found that courts relied on such information in the subsequent custody and access decisions.

Despite modern-day divorce legislation that adopts a no-fault rationale, and the removal of homosexuality as a specific fault, many judges may still knowingly or subconsciously equate the discovery of one's homosexuality, in a failed heterosexual union, with mental cruelty visited upon the other spouse.³³ An example of this kind of judicial disapproval of non-heteronormative sexuality was seen in the case review in *J.M.L. v. J.R.L.*,³⁴ wherein the liberal sexual views of a mother who had admitted a prior lesbian affair were described by the judge as "not acceptable to the vast majority of decent citizens in our country."

Perhaps the most rational explanation for the degree to which the sexuality of a gay or lesbian parent is assessed once it is raised in custody and access cases is the presence of the Best Interests of the Child Test. The test is derived from the legislative intent of the *Divorce Act* to put the best interests of children above all other considerations in family law. Consequently, whatever factors, explicit or implicit, a judge may consider in arriving at a custody and access decision, it will always be framed within the context of the best interests of the children test. The test has been said to be an inherently heterosexist test,³⁵ which may result in bias against gay and lesbian parents because it gives weight to normative family values that gay and lesbian parents often cannot provide such as a stable family unit through marriage (only possible since 2005), no anxiety or fear of discovery of one's sexual orientation, and adherence to a constructed notion of a heteronormative family. As Susan Boyd explains,

³² *Supra* note 30 at 23.

³³ *Ibid.*

³⁴ *J.M.L. v. J.R.L.*, [1980] B.C.J. No. 1723 at para. 6.

³⁵ Susan Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?" (1998) 15 Can. J. Fam. L. 131 at para. 6.

That is, factors other than sexual orientation per se that judges typically take into account in determining the best interests of children, or which parent is better suited for the custodial role, can result in a bias against those who are regarded as having a sexual preference that is different from the heterosexual norm.³⁶

Similarly, Ryder also maintains that the Best Interests of the Child Test uses a heteronormative standard that is biased against gay and lesbian parents, forcing them to “be discrete” about their sexuality and new partners, whereas a new relationship for the heterosexual parent can be viewed positively by the judge as a return to stability:

A new heterosexual relationship, flaunted or not, is seen as an indication of a return to stability and a loving, nurturing environment, unless it can be demonstrated by positive evidence that the relationship is harmful to the children. Evidently, the best interests of the child test is applied in custody disputes with reference to a normative standard, namely that a privileged family unit provides the ideal environment for the raising of children. As a result, the emotional trauma and economic vulnerability that often follows a separation will be compounded for gay and, especially, lesbian parents.³⁷

The case review performed for this article did uncover a number of cases wherein judges seemed to imply that risks to children can be mitigated through a form of self-regulation of the gay or lesbian parent’s sexuality that likely would never be expected of a heterosexual parent (whose parenting fitness or capability was being assessed under the same test).

2. Role of Predominant and Persistent Stereotypes in Fueling Bias

It is evident, when considering the historical evolution of homosexuality, that much of the discourse over the last 150 years has been greatly skewed against the gay male as opposed to the lesbian. Lesbians simply do not occupy the forefront of society’s perceptions, negative or positive, with respect to non-heteronormative sexuality. Early ecclesiastical and common law, in seeking to prohibit immoral sexual behavior, focused

³⁶ *Ibid.*

³⁷ *Supra* note 17 at para. 40.

on gay male behavior such as sodomy. Katherine Arnup notes that, traditionally, lawmakers and politicians refused to even contemplate lesbianism:

For the most part lesbianism has been treated as a physical and emotional impossibility by lawmakers seeking to control other forms of “immoral” activity.³⁸

While, presumably, the morally bankrupt gay male has long been the target of criminal sanction, Arnup demonstrates that, while the law is generally ambivalent towards lesbians, the arena of family law is an exception wherein the lesbian mother can face grave consequences because of her sexuality.³⁹

It may be that a lack of social discourse in general on lesbianism relative to male homosexuality renders lesbianism a less divisive concept, and, hence, less likely to generate disproportionate negative bias and outright homophobic prejudice such as that typically directed at gay men. This article had a working presumption in the initial stages that the respective stereotypes of the benign silent lesbian relative to the sexually compulsive gay male predator would fuel perceptive differences and bias by judiciary as between gay and lesbian parents, resulting in varying degrees of severity of treatment, particularly for gay fathers in custody and access decisions. No such obvious differences were observed in the present case review.

The case review did, however, uncover the existence of what appeared to be stereotyping by the judiciary on a limited basis of gender, which in some cases was manifested in overt negative comments, or may have subconsciously affected a custody or access decision. In Period 1, across a number of cases, there appears to be an association between lesbian mothers and emotional instability or fragility. Many of these cases involve women with a host of emotional issues, yet the impression from reviewing the cases is that somehow a lesbian mother’s sexuality is more of a component of emotional instability than it is for gay fathers whose emotional well-being is rarely mentioned.

³⁸ *Supra* note 30 at 19.

³⁹ *Ibid.* at 25.

In considering gay fathers, some of the typical stereotypical beliefs of a gay lifestyle as being immoral, deviant, and unstable were evident, just as these stereotypes existed with respect to lesbian mothers. However, during Period 2, particularly because the number of cases in which a pedophilic or hebophilic tendency of a gay father was of concern, there may be an element of the gay male predator stereotype at play, although understandably legitimate risks may also be present.

3. The Socially Constructed Normative Ideal Family

As previously discussed, it has been argued that the Best Interests of the Child Test is heterosexist and weighted heavily towards a normative view of what is believed will provide familial stability to children. It seems reasonable to propose that the test itself then inherently relies upon a socially-constructed notion of an ideal family structure, one that is optimal for fulfilling the best interests of the child. This normative ideal family structure presumably is what is often referred to in modern social discourse as the traditional family, comprised of one male parent and one female parent in a conjugal opposite sex union. Of course, in the event of parental union breakdown, as is often the basis for custody and access disputes, the ideal family structure is no longer possible for the litigants.

Millbank implies that, instead of considering the diversity of parental sexuality and gender in family structures, the judiciary has a binary view, tending to over-simplify sexuality as either the heterosexual norm or non-heterosexual alternative:

Gender issues, gender difference and the conflicting roles and ideologies surrounding mother/fatherhood and female/male sexuality appear to be largely ignored as everything is swept under the rubric of “homosexuality”.⁴⁰

If Millbank’s assertion is accurate, then it stands to reason that only as members of the judiciary become aware of and attuned to the issues of sexuality and the bias towards a normative, “ideal heterosexual” two-parent family will there be a transformative shift away from the current binary view of the heterosexual parental standard as opposed to the non-heterosexual alternative.

⁴⁰ J. Millbank, “Lesbian mothers, gay fathers: sameness and difference” (1992) 2 Australian Gay and Lesbian Law Journal 21 at 21.

This type of limited binary choice may result in the application of the Best Interests of the Child Test in such a rigid fashion that, in the absence of the ideal family which includes a heterosexual male father and female mother, the judge may be biased in favour of the closest alternative – which is the heterosexual parent – as opposed to the parent who is gay or lesbian (and who does not conform to the heteronormative parental standard). An absurd result can be seen in a custody case in Florida discussed by Arnup, wherein a father had been convicted of the murder of his first wife. After a long separation from his second wife, a lesbian who had custody of their 11 year old daughter, the father was awarded custody of the child because the judge in the case declared that it was important to give the child the opportunity to live in a “non-lesbian world.”⁴¹

The case review in both periods did not contain any cases wherein judges in their analyses delved into the relatively academic concepts of social construction, normative ideal family structure, gender theory, or idealized parental roles, nor was that expected. The judiciary, in adjudicating custody and access cases where parental sexuality is at issue, are like all other members of society, despite their obligations to remain consciously impartial, and are influenced to the extent that they possess unknown or subconscious biases in their perceptions of gays and lesbians, and in their assessments of these parents’ respective capabilities in raising their children.

CONCLUSIONS

Much of the secondary research that supplemented this report consisted of commentary and articles that were authored prior to 2005. Authors such as Arnup⁴² and Ryder⁴³ have posited that the judiciary in the past has either consciously or inadvertently penalized gay and lesbian parents in custody and access decisions because of the deficiency of a same sex union (compared to an opposite sex union) to provide the kind

⁴¹ Katherine Arnup, “Out in This World: The Social and Legal Context of Gay and Lesbian Families” (2000) 10 *Journal of Gay & Lesbian Social Services* 1 at 3.

⁴² *Supra* note 30 at 26.

⁴³ *Supra* note 37.

of long-term familial stability that children need – an obvious aspect of deficiency being the impossibility of marriage for the gay or lesbian parent.

However, society and the law do evolve, albeit slowly, and a significant stride in formal equality for gays and lesbians in Canada was achieved in 2005 with the enactment of the *Civil Marriage Act*.⁴⁴ The present case review only covered a two year period after the *Civil Marriage Act*;⁴⁵ however, both periods of the review were substantially during time periods following the enactment of the *Charter*⁴⁶ in 1982. It would be reasonable to conclude that results of the case review demonstrated a positive shift in judicial attitudes and a decrease in overt negative bias towards gay and lesbian parents regarding their overall fitness relative to their heterosexual counterparts, from the earliest review periods in the late 1970's forward until 2007. Furthermore, it stands to reason that this observed attitudinal shift may correspond with a remedial post-*Charter*⁴⁷ effect of evolving societal recognition of the rights, capabilities, and inherent value that gay and lesbian parents also provide to their children.

Undoubtedly, homophobia still exists in society, and as such it is likely that many of the predominant stereotypes, prejudices, and biases toward those in our society whose sexuality does not fit neatly within the normative heterosexual model of sexuality will also persist. The law is not immune to this continuing heterosexist bias; in considering the concepts of parents and family in the law, Fiona Kelly states:

For the most part, the issues raised by same-sex families reflect a dissonance between the designation of "parenthood" and "family" under the law, and the construction of parenthood and family within the lesbian and gay community.⁴⁸

Kelly believes that the next front or wave of gay and lesbian cases will not come from heterosexual couples who separate or divorce after one parent discovers their true sexuality; rather, it will emerge from same-sex couples who have had families and then

⁴⁴ *Supra* note 14.

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 23.

⁴⁷ *Ibid.*

⁴⁸ Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law" (2004) 21 Can. J. Fam. L. 133 at para. 1.

experience subsequent familial breakdowns, where there has never been a heterosexual partner in the equation:

While many children being raised by lesbian or gay parents were conceived and born into a heterosexual relationship that ended, and where one parent “came out” as lesbian or gay, the number of children in these circumstances is declining. It is now much more likely that children being raised by lesbian or gay parents were born into a same-sex family unit.⁴⁹

Gay and lesbian parents, whether in the context of adoption rights, or custody and access rights subsequent to opposite sex or same sex union breakdowns, will continue to face discrimination, both in society and potentially in the law. Continued advocacy is required in order to ensure that the rights of gay and lesbian parents are recognized and respected alongside those of heterosexual parents, and commensurate with the genuine best interests of involved children. It was surprising to discover an apparent territorial tension in the research with respect to advocacy for lesbian mothers and advocates for gay fathers. Much of the research and academic writing appears to be focused on lesbian mothers, with a majority of writers being female. There appears to be a resistance or resentment with respect to advancing the cause of the gay father in custody and access disputes, presumably out of a sense that this may somehow dilute the potency of advocacy or attention focused on the rights of lesbian mothers. An example can be found in an acknowledgement by Arnup that gay fathers face discrimination, but not to the same degree as lesbian mothers:

It has been argued that gay men face much more judicial resistance to their parental relationships than lesbian mothers. Darryl Wishard (1989) claims that “more courts have granted lesbian mothers the right to custody of their children than have granted custody to homosexual fathers.” A number of explanations have been offered, including the supposed judicial preference for maternal custody (Brophy, 1985; Boyd,

⁴⁹ *Ibid.* at para. 2.

1989), assumptions about paedophilia, and fears of AIDS. Such a claim cannot be upheld, however, without much more quantitative evidence.⁵⁰

Irrespective of academic or advocacy claims as to whether the gender of the gay or lesbian parent makes a difference in the degree of discrimination and negative bias the parent will face in a custody and access case, one fact is indisputable: the black letter of family law and the predominance of the Best Interests of the Children Test is unlikely to significantly change in the foreseeable future.

As such, meaningful reduction of overt and subconscious biases against the capabilities and inherent value that gay and lesbians also provide to their children can only be achieved through judicial participation in a transformation of how the Best Interests of the Child Test is conceptualized, assessed, and applied in custody and access decisions where one or both of the litigants has non-heteronormative sexuality. This goal might be achieved by minor legislative reform reducing judicial discretion (such as by prohibiting consideration of a parent's sexuality in the custody and access decision). Such a legislated prohibition was enacted eliminating consideration of spousal misconduct in assessing spousal support awards in s. 15.2(5) of the *Divorce Act*.⁵¹ Alternatively, the judiciary, with authoritative guidance from provincial appeal courts, or ideally from the Supreme Court of Canada, could take judicial notice of the fact that there is no difference between the parenting capabilities of heterosexual parents relative to gay and lesbian parents, and could refuse to allow the issue to be raised in these cases unless there is corroborated evidence of risk to the children relative to the sexuality of a parent (such as pedophilic behavior). It should be noted however, that judicial notice of fact is not lightly adopted by the judiciary in Canadian law.

On the other end of the spectrum of transformative change, Boyd advocates for a radical approach of conscientiously and purposely focusing on the issue of sexuality when one parent is gay or lesbian, ostensibly to ensure all aspects of the issue are on the table, discussed amongst the litigants and the judge, and to ensure the genuine best interests of the children are addressed:

⁵⁰ *Supra* note 41 at 12.

⁵¹ *Supra* note 12.

The question to ask when deciding custody disputes should be as follows: where one parent is lesbian or gay, which parent is better suited to assisting the child(ren) in understanding issues of sexuality (including societal bias against lesbians and gay men) in a constructive and supportive manner. In other words, the heterosexual parent cannot be assumed to be in a position to offer "good parenting" without questions being asked of that parent about their understanding of sexual orientation and homophobia. The onus should be on both parents to offer parenting plans that offer to the child(ren) a way to understand the prejudice that the lesbian or gay parent may experience, and to cope with the ramifications of such prejudice.⁵²

Clearly the optimal point of transformation lies somewhere within these two ends of the spectrum; the refusal to consider sexuality at all in custody and access cases may be too restrictive of desired judicial discretion in highly fact-dependent and contextual custody and access disputes. Similarly, the proposal by Boyd requiring parenting plans that directly educate children about sexuality may be too radical in a society and amongst a judiciary that may not realize the degree to which it harbors subconscious homophobic bias, especially as it relates to presumed risks to children.

Marked improvement in acknowledgement and acceptance of the capabilities and inherent value that gay and lesbian parents provide to their children, truly perceived as different, but commensurate with the quality of heterosexual parenting, depends upon the judiciary in finding this optimum point in the transformative approach to evaluating the best interests of the child in custody and access disputes.

Only through a concerted effort to conscientiously understand the dynamics of human sexuality can judges uncover, address and remediate overt and subconscious homophobic bias within their own perceptions of gay and lesbian parents, and ensure a fair and just adjudication of custody and access decisions.

⁵² *Supra* note 35 at para. 22.