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ESSAY

COURT-CREATED BOUNDARIES BETWEEN A VISIBLE LESBIAN MOTHER AND HER CHILDREN

*Susan J. Becker**

I. INTRODUCTION: SEXUALITY AND BOUNDARIES

Sexuality has created boundaries between people since the beginning of time. Some of these boundaries have significantly eroded as individuals and groups have become more aware of and more comfortable with their own sexual identities, but other boundaries have resisted the erosive powers of enlightenment. The boundaries that separate a lesbian mother from her children are among the most obstinate examples of resistance.

There are many sources of boundaries that separate a lesbian mother from her children. A lesbian mother is usually a sexual minority, even within her own family. Thus, a basic lack of sexual commonality and perspective is a distancing factor. If the mother's sexual orientation is common knowledge, the children may resent her for the slings and arrows they endure from other children and adults.

The lesbian mother's option of keeping her sexuality a secret also creates boundaries. Although often employed to protect the children, this strategy may irreparably harm the mother/child relationship by making an important aspect of the mother's life "off limits" to her children. Any chance for true understanding between mother and child is seriously undermined, if not destroyed, by this nondisclosure. And, if the secret is eventually revealed, other boundaries may take its place. The children may distrust a mother who hid such important information from them, or may reject the mother altogether due to unfounded fears and misconceptions about homosexuality which the mother never challenged from behind her closet door.

These boundaries between a lesbian mother and her children stem from personal and undoubtedly difficult decisions made by the mother, but other boundaries are created by forces far beyond her control. These boundaries include the prevailing cultural and political climate concerning homosexuality in the geographic region where the family makes its home. But perhaps the most difficult boundaries to overcome are those imposed by a civil justice system

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which, somewhat ironically, claims perpetuation of family harmony as one of its primary goals.

This essay identifies some of the boundaries and obstacles imposed by the courts on a "visible" lesbian mother striving to maintain a healthy relationship with her children. The term "visible" is used to describe a mother whose lesbian sexuality has been revealed to a court empowered with defining her future contact with her children. The primary focus here is on children who were conceived through a heterosexual relationship, and where a heterosexual parent, grandparent, or other person is challenging the lesbian mother's right to custody of, or visitation with, her own children. Court created boundaries are identified and discussed in general terms in Sections II and III. Section IV examines the issue more closely in the context of a case for which I served as pro bono counsel. Each section supports the conclusion that court-created boundaries remain a formidable challenge for lesbian mothers.

II. CHILD CUSTODY AND VISITATION: LEGAL STANDARDS APPLICABLE TO LESBIAN MOTHERS

Courts utilize the "best interests of the child" standard to determine all child custody and visitation matters.¹ This standard is necessarily flexible, empowering the courts to make difficult decisions based largely on the trial judge's personal assessments of the relative competency, credibility, and overall parental sensibilities of the persons seeking custody and visitation rights. But like any legal standard that vests significant discretion in the finder of fact, the "best interests of the child" rubric also allows for significant mischief and injustice.

The best interests of the child standard was historically interpreted to preclude, as a matter of law, homosexual parents from being awarded custody of their children.² Such preclusion was based on the theory that homosexuality constitutes "errant sexual behavior which threatens the social fabric,"³ and endangers the child's sexual identity and general welfare.⁴ Visitation by noncustodial lesbian mothers was also significantly curtailed under the same rationales.⁵ Even relatively

1. See, e.g., Steve Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian*, 32 UCLA L. REV. 852 (1985).

2. See, e.g., *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 524 (Cal. Ct. App. 1967). See generally Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties-Part II*, 11 U. DAYTON L. REV. 275, 327-71 (1986); Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

3. *J.P. v. P.W.*, 772 S.W. 786, 792 (Mo. Ct. App. 1989) (citing *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985)).

4. See, e.g., *Lundin v. Lundin*, 563 So.2d 1273, 1277 (La. Ct. App. 1990).

5. See, e.g., *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982); *Irish v. Irish*, 300 N.W.2d 739 (Mich. Ct. App. 1980). See generally Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L. J. 623 (1996); Nancy Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986).

enlightened courts that recognized the lesbian mother's right to significant contact with her children often prohibited the mother's same-sex partner from having contact with the children,⁶ thus forcing the mother to compartmentalize her relationships with the people she loved the most.

This rule of per se unfitness encouraged, if not demanded, that lesbian mothers keep their sexual orientation hidden. Early on, this was not a particularly difficult task. Well into the 1970s, society viewed women as the weaker sex, incapable of economic autonomy or general self-sufficiency. There was also a strong presumption that the children's best interests were served by awarding custody to their mother. Thus, if Ozzie and Harriet's marriage had ended in divorce, Harriet would have been the court's obvious choice for custodial parent. And if Harriet and the children had moved in with Donna, Harriet's best friend from her bridge club, Harriet and Donna would have been perceived as two of society's weaker creatures leaning on each other for support, if not survival. The possibility that Harriet and Donna might be lovers was simply not within most people's—or most courts'—frame of reference.

In recent years, significant changes have occurred in society's perception of women, lesbians, and in the courts' perception of lesbian mothers. These changes make the possibility of a lesbian relationship between Harriet and Donna much more conspicuous. The societal change in the status of women stems from the cultural revolution known generically as "the women's movement." The political, economic, and social battles fought by women over the past several decades have nudged society's view of women away from the "my wife—I think I'll keep her" characterization of women solely as support mechanisms for their husbands, as espoused by the Geritol television commercials that ran from the mid-1950s through the 1970s. Today's view is closer to the "I am strong I am invincible" conceptualization of women that singer Helen Reddy proclaimed in 1972. By the mid-1990s, the notion that a single mother cannot maintain her household without the support of another adult has been seriously challenged.

In addition, members of sexual minorities have become much more visible in recent years. Major political battles continue to rage over issues such as gay soldiers, same-sex marriages, and anti-gay ballot initiatives. These issues are vigorously debated on the front pages of the country's leading newspapers, on network television, and on radio talk shows. Such high-profile, emotionally charged debates have resulted in many gay men and lesbians "coming out" in efforts to show solidarity and strength in numbers. Gay men and lesbians are also more frequently depicted, both favorably and negatively, in mainstream books, television shows, and movies. Indeed, thirty-six million

6. See, e.g., *Irish*, 300 N.W.2d at 741. Similar restrictions have been placed on gay fathers. See, e.g., *Roberts*, 489 N.E.2d at 1067.

viewers watched comedian Ellen DeGeneres burst from the closet during her prime-time television sitcom last May.⁷ Some even argue that the increased profile of lesbians in recent years has created a kind of "lesbian chic" fueled by a mixture of curiosity and acceptance.⁸ In short, the increased visibility of lesbians and gay men has heightened people's sensitivity to the possibility that Harriet's cohabitation with Donna might be inspired by more than economic necessity.

The change in the courts is due in large part to overwhelmingly favorable data gathered by social scientists over the past decade regarding the emotional, mental, and physical health of children raised in households headed by lesbians.⁹ This empirical evidence has forced many courts to abandon the *per se* unfit rule in favor of a "nexus" test.¹⁰ In theory, this test prohibits judges from restricting a lesbian mother's access to her children absent a finding of a clear nexus between her sexual orientation and harm to the children.¹¹ Accordingly, Harriet can breathe a sigh of relief that her sexual orientation should not be *the sole* determinative factor in her bid for custody or extensive visitation.

III. THE DISSONANCE BETWEEN LEGAL THEORY AND PRACTICAL APPLICATION

A significant gap remains between the theoretical impact of the nexus test and its practical application. In theory, the nexus test has eased the lesbian mother's burden by relegating her sexual orientation to the status of *a* factor rather than *the* factor on which custody and visitation will turn. In reality, the nexus test has placed a more clearly defined burden of proof on the lesbian mother: she must prove that her contact with her children is not harmful to them.¹² This is indeed a difficult burden to satisfy. In addition to being required to prove a negative, the mother must present evidence today

7. See Virginia Rohan, *TV's Season: The Peaks and the Pits*, THE RECORD, June 1, 1997, at 3.

8. See Mark Steyn, *Everybody Out!: Ellen DeGeneres Ignites Lesbian Fever*, AM. SPECTATOR, June, 1997; Catherine S. Eaton, *A Matter of Pride: Being a Gay Woman in the Nineties*, COSMOPOLITAN, Nov., 1993, at 226.

9. See Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases*, in REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 131, 138-51 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992).

10. For a description and critique of the nexus test, see Shapiro, *supra* note 5, at 664-671. See also Judith G. Fowler, *Homosexual Parents: Implication for Custody Cases*, 33 FAM. & CONCILIATION CTS. REV. 361, 364-65 (1995).

11. See Fowler, *supra* note 10, at 364-65.

12. See, e.g., *Barron v. Barron*, 594 A.2d 682, 687 (Pa. Super. Ct. 1991); Fowler, *supra* note 10, at 364.

which convinces the court that her children will suffer no harm in the future due to her sexual orientation.

Moreover, the nexus test has not lessened the trial judge's tremendous discretion in making custody and visitation decisions. Since all the evidence is filtered through the judge's personal assessment of the relative fitness and credibility of the lesbian mother and her heterosexual adversary, the door remains wide open for a judge to claim to apply the nexus test, while rendering decisions driven more by anti-lesbian animus than the evidence of record. And, as previously noted, the possibility of Harriet successfully opting to remain an invisible lesbian - that is, that her sexual orientation will go unnoticed by her adversary or the court - is not the safe harbor it once was.

IV. A CASE STUDY OF COURT-IMPOSED BOUNDARIES ON A VISIBLE LESBIAN MOTHER

*Hertzler v. Hertzler*¹³ dramatically illustrates the almost unfettered power courts possess to impose boundaries between a lesbian mother and her children. I served as pro bono counsel in this case, starting at the pre-trial level through oral argument before the Wyoming Supreme Court; my co-counsel was Susan Laser-Bair of Cheyenne, Wyoming.¹⁴ *Hertzler* is somewhat unique among reported custody and visitation cases because it involves allegations of sexual abuse against the lesbian mother. It is the author's view, however, that such allegations against homosexual parents are becoming more commonplace, perhaps in response to the adoption of the nexus test by courts.¹⁵

A. *The Safety of the Closet*

During their fifteen-year marriage, Pamela and Dean Hertzler lived on a farm in Veteran, Wyoming. They eventually adopted two infants, Joshua and Miriam. The children were quite young when Dean and Pamela divorced in 1991.

13. *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995) (Wyoming Supreme Court's interpretation of the facts and decision).

14. To protect the confidentiality and the dignity of my client, I will focus primarily on the evidence of record and the actions taken by the courts in response to that evidence. Descriptions contained herein of the impact of the courts' actions on my client and her children are based on my personal observations rather than their communications with me.

15. If courts are at least giving lip service to the standard which states that sexual orientation alone is not determinative of custody and visitation disputes, the heterosexual adversary must find some new ammunition. Allegations of sexual abuse are certain to get the courts' attention and also dovetail into the stereotypes of homosexuals as sexual predators and child molesters. For a more detailed discussion of the synergy between sexual abuse allegations and sexual orientation, see Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75 (1996).

Just prior to the entry of the divorce decree, Dean asked Pamela if she was a lesbian and vowed to fight her for custody if she was. Although Pamela had been questioning her sexuality for some time, she lied to Dean because she feared that she would lose her children. Pamela's decision to remain an invisible lesbian was based in part on the advice of legal counsel that a court in rural Wyoming would probably not award her custody once she acknowledged her homosexuality, and that the legal battle would be financially and emotionally devastating for everyone involved, especially the children. Based on Pamela's denial, Dean stipulated to an agreement making Pamela the custodial parent and giving him liberal visitation rights.

B. *A Visible Lesbian Mother Emerges*

The custody and visitation arrangement between Dean and Pamela worked well for almost a year. During this time, Pamela and the children lived in Morrill, Nebraska and Dean remained in nearby Veteran, Wyoming. In late 1991, Pamela became romantically involved with a woman from Ohio. About this time, Pamela lowered her shield of invisibility by confiding to a few family members that she was a lesbian. Her parents then told Dean. On the day after Christmas, 1991, Dean confronted Pamela with this information. Pamela admitted that she was in a lesbian relationship and further informed Dean that she was considering relocating with the children to Ohio to live with her new partner.

Once she became a visible lesbian, Pamela was extremely vulnerable. Dean's threat to take her to court introduced a very real possibility that she would lose not only custody but also be denied any meaningful visitation with her children. After again being advised by legal counsel that the Wyoming court would probably view her homosexuality as automatically rendering her an unfit parent, Pamela entered a new stipulation in February, 1992, which gave Dean custody and assured Pamela extensive visitation rights. The court entered a final decree based on the stipulation.

The children moved back to Dean's farm and Pamela relocated to Ohio. She remained in contact with her children through letters, packages, photographs, phone calls, and frequent visits. The children spent the summers of 1992 and 1993 with Pamela and her partner in Ohio. Pamela's bonds with her children were significantly strengthened by these lengthy visits, and the children also became very attached to Pamela's partner. During one visit Pamela took the children to Cleveland's annual Gay Pride celebration. Shortly before the end of the 1993 summer visit, the children were included in a commitment ceremony between Pamela and her partner.¹⁶

16. The commitment ceremony was performed in a United Church of Christ church; it included the singing of hymns, exchanging of vows by Pamela and her partner, and the blessings by the church pastor and congregation.

Immediately after the children returned to Wyoming in August of 1993, Dean married an Ohio woman he had met through a mail-order dating service. The children attended their marriage ceremony, and Joshua asked his father several questions about his father's marriage as compared to his mother's commitment ceremony.

Dean's new wife, Christine, had decided well before she married Dean that the children needed more discipline and that she would be their mother, not Pamela. After their marriage, Dean and Christine accelerated their campaign to alienate the children from Pamela; this campaign included repeatedly telling the children that Pamela was an evil person leading an evil life. They also prohibited the children from calling Pamela "Mom."

Dean and Christine sought to vanquish Pamela from her children's lives because she was a visible lesbian, a status they abhorred. The judicial system, however, was not an immediate ally in their venture. Dean's custody dispute with Pamela had been reduced to judgment in the form of a final decree which incorporated the stipulation which Dean and Pamela had signed. The court could not reopen the litigation unless a substantial change in circumstances occurred subsequent to the decree which would justify further judicial intervention.¹⁷ Since Dean used Pamela's lesbianism to coerce the stipulation upon which the decree was based, he could not claim that her sexual orientation constituted a change in circumstances. Pamela's visibility as a lesbian became an effective safeguard against judicial interference in her relationship with her children.

C. *Lesbian Visibility Becomes Equated With Child Sexual Abuse*

Lesbian visibility proved to be a safe harbor against judicial intervention for a very short time. Dean was again able to turn Pamela's sexuality from a shield to a sword by raising allegations that she had sexually abused their children during various visits.

In March, 1994, Dean sought a temporary restraining order (TRO) prohibiting all contact between Pamela and her partner and her children. His affidavit in support of the TRO identified Pamela as a lesbian and cited behaviors which Dean and Christine allegedly observed in the children and which they concluded were "evidence" of sexual abuse. These behaviors included masturbation and the licking of an ice tea pitcher and "Go Fish" cards by Pamela's daughter, and the alleged use of vulgar language, such as the use of the correct names of body parts, by their son. Only Dean and Christine observed these behaviors. Interestingly, Dean and Christine were able to deter-

17. See *Thompson v. Thompson*, 824 P.2d 557, 559 (Wyo. 1992). If the court was satisfied that a substantial change had occurred, it could exercise jurisdiction and substantial discretion in determining whether a modification of custody or visitation would be in the children's best interests. See *Roberts v. Roberts*, 816 P.2d 1293 (Wyo. 1991).

mine conclusively that the alleged behaviors were due to sexual contact with Pamela and her partner, even though neither Dean nor Christine had any expertise or experience in the exceedingly complex area of child sexual abuse. Supporting affidavits from medical and mental health care experts qualified to make such child sexual abuse determinations were conspicuously absent from Dean's motion and accompanying materials.

Pamela was given less than twenty-four hours to respond to the accusations. Following a hearing in which Dean and Christine and their lawyer appeared in person and Pamela and her legal counsel appeared via telephone, the court granted Dean's TRO. In Wyoming, the rights of parents to associate with their children is acknowledged as a fundamental liberty right guaranteed by both the Wyoming and the United States Constitutions.¹⁸ Thus, the court could not deny Pamela all contact with her children. However, Pamela's access to her children was drastically curtailed, limited to a few supervised visits with her children each year and a single phone call each week. Pamela's partner was barred from all contact with the children. The court also ordered the parties to refrain from discussing the case with the children or trying to influence the children in any way.¹⁹

It is impossible to gauge the impact of Pamela's lesbian visibility on the court's decision to grant the TRO. One would expect a court to err on the side of caution when an issue as potentially devastating as child sexual abuse is raised. On the other hand, the possibility that the court's decision was primarily motivated by the stereotypical linking of the words "lesbian" and "child molester" can never be lightly dismissed. But what is clear is that the TRO immediately placed significant boundaries between Pamela and her children.

The boundaries created by the TRO were concrete and obvious. Pamela could no longer spend extensive periods of time with her children, either in person or on the phone. This dramatically changed her status from an involved parent who could experience and celebrate her children's day-to-day development, to a distant relative whose contact was remote and infrequent. When personal visits were allowed, a licensed social worker or child care worker had to be present to observe Pamela's interaction with her children. In addition to inhibiting Pamela's natural displays of affection toward her children, the presence of the supervisor conveyed a clear message to the children: your mother has done something wrong and must be watched or she will do it again.

This message was constantly reinforced by Dean and Christine as they continued to denigrate Pamela to the children despite the TRO's

18. See *L.P. v. Natrona Cty. Dept.*, 679 P.2d 976, 981 (Wyo. 1984).

19. The court made an oral finding at the conclusion of the hearing on March 11, 1994; the corresponding written order was issued 12 days later. See *Hertzler v. Hertzler*, No. 24-269 (Dist. Ct. Goshen Cty. Wyo. March 23, 1994) (order granting temporary restraining order) (on file with author).

prohibition against such conduct. They listened in on Pamela's phone conversations with her children. Dean also told the children (both before and after the TRO) that their mother was in a lesbian relationship, that lesbians are women who have sex with other women, that God did not like their mother because she was a sinner worse than a thief, liar, or prostitute, and that their mother had left them to lead a life of sin. Dean and Christine also told the children that Pamela left them because she did not want to take care of them anymore.

D. *Lesbian Visibility on Trial*

Four months after the TRO was issued, a four-day hearing was held to determine whether the restrictions on Pamela's visitation should be permanent. Dean and Christine testified, as they had during the TRO hearing, on the children's alleged behaviors and claiming that any contact with Pamela caused the children to act inappropriately. Dean also testified that he thought the children had been harmed by participating in the Gay Pride celebration and in their mother's commitment ceremony while visiting her in Cleveland.

Dean offered an expert, Lynn Rhodes, who testified that the children had been "eroticized" while visiting with Pamela and that any contact with her was and would continue to be harmful to them. This expert received his Master's Degree in counseling just two years prior to being retained by Dean and had very little training or experience in child sexual abuse or in custody and visitation disputes. Mr. Rhodes did, however, have twenty-seven years of experience as a minister in a conservative church and a strong personal view that homosexuality is morally wrong. During cross-examination, Mr. Rhodes admitted that he could not identify which part of his "professional opinion" was based on his moral and religious beliefs and which was based on his training as a counselor.

Pamela and her partner testified, denying all of the allegations of sexual abuse and relating many instances in which Dean and Christine had continued to alienate the children from Pamela in contravention of the TRO. In addition to offering a number of character witnesses who had observed Pamela with her children in numerous situations, Pamela offered two expert witnesses, Dr. Larry Bloom and Dr. Carole Jenny. Dr. Larry Bloom is a clinical psychologist who had been evaluating children for sexual abuse for more than seventeen years at the time of the trial, and who had done extensive clinical research and writing on the topic. Dr. Carole Jenny is a board-certified pediatrician who has devoted more than two decades of her life to working with sexually abused children; at the time of trial she had been serving for four years as the Director of the Child Advocacy and Protection Team at the Denver Children's Hospital. Pamela's experts independently concluded that the children had not been sexually abused. They observed that the methodology used by Mr. Rhodes to conclude other-

wise was fatally flawed, and that Mr. Rhodes' term "eroticization" was not recognized among health care professionals. They further found that Dean and Christine were causing serious harm to the children by trying to convince them that their mother had harmed them when she had not.

The trial court's opinion following this hearing strongly suggested that Pamela's visibility as a lesbian had influenced its initial TRO decision. The court characterized Pamela as a woman who had abandoned her children to pursue an "open homosexual relationship."²⁰ Even though Dean had known of Pamela's sexual orientation when he agreed to the consent decree which allowed her considerable visitation rights, the court found that "numerous" changes in circumstances since that time justified the court's jurisdiction to reconsider the decree. The specific changes cited by the court included Pamela's "involvement of the children in homosexual activities such as a gay rights parade and a 'commitment' ceremony."²¹

The court also relied exclusively on Mr. Rhodes to find that "eroticization" had occurred when the children visited with their mother; it rejected the testimony of Pamela's experts, finding it neither "useful nor credible."²² Based on Mr. Rhodes' testimony, the court restricted Pamela's visitation to one Saturday and Sunday supervised visit every other month, no overnight stays, and one phone call per week.²³

E. *A Blatant Condemnation of Lesbian Visibility*

The court, however, was not finished. In a diatribe which flowed from the bold-face heading "Homosexuality," the court made clear the impact which Pamela's visibility as a lesbian had on its decision:

The Plaintiff [Pamela] lives in an open and obvious lesbian relationship. The Plaintiff and . . . [her partner] disclose their relationship to their neighbors and co-workers, they have participated in a "commitment" ceremony with the children, they have attended a "gay rights/pride" public function with the children, they share the same bed while the children are in their home, and physically express affection for each other in the presence of the children.

The children in this case are confronted with an extreme clash of values and moral beliefs. The Plaintiff's openly expressed values and morals include homosexuality as an acceptable lifestyle, even in the context of a family. The Defendant's values and morals are that homosexuality is not an acceptable lifestyle. As with other moral values, there is no neutral or middle ground on this issue. Openly

20. The court issued a Decision Letter containing these findings on July 21, 1994. *Hertzler v. Hertzler*, No. 24-269 (Dist. Ct. Goshen Cty. Wyo. July 21, 1994) (on file with author). These findings were incorporated into an Order dated Sept. 8, 1994. *Hertzler v. Hertzler*, No. 24-269 (Dist. Ct. Goshen Cty. Wyo. Sept. 8, 1994) (on file with author).

21. Decision Letter of July 21, 1994, at 2.

22. *Id.*

23. *See id.* at 3.

expressed homosexuality is either presented as acceptable or unacceptable.

The Court finds that this clash of values has already caused concern and confusion for Joshua. Homosexuality is generally socially unacceptable, and it is probable that the children will be subject to social difficulties as a result of the Plaintiff's lifestyle in addition to their personal concern.

The state has an interest in perpetuating the values associated with conventional marriage, as the family is the basic cornerstone of our society. Homosexuality is inherently inconsistent with families, and with the relationships and values which perpetuate families.

The moral climate in which children are raised is an important factor in child custody and visitation. The Plaintiff's open homosexual relationship creates much of the moral climate surrounding her life. This moral climate is probable to have an effect on the children's development of values and character which is inconsistent with that supported by the Defendant or society.

Because the Plaintiff's open homosexuality has and is likely to create confusion and difficulty for the children, and because her lifestyle is likely to negatively affect the development of the children's moral values, and because the State has an interest in supporting conventional marriages and families, the Court would find it appropriate to reduce the Plaintiff's visitation with the children even if the issues of sexual abuse or eroticization were resolved.²⁴

Despite the overwhelming evidence that she was a good parent who loved and was loved by her children, the trial judge condemned Pamela by embracing the *per se* rule prohibiting homosexuals from meaningful contact with their children. But it was Pamela's decision to be open about her sexual orientation—that is, her decision not to create false and artificial boundaries between and among the various relationships in her life—that really ignited the trial judge's ire. The court's message is both shrill and unambiguous: How dare a lesbian disclose her relationship with her partner to neighbors and co-workers? How dare she have a commitment ceremony and invite the children to participate? How dare she express physical affection for her partner in front of her children, or sleep in the same bed with her partner when the children are in the house?

The *Hertzler* trial court was not the first, and will not be the last, to find the visibility of a parent's sexual orientation as a primary source of harm to her children. What the courts want to see is evidence of a "good" lesbian, one who projects a hyper-heterosexual (and yet completely asexual) image. The mother's portrayal of this complete fabrication to the children is seen as the "moral" and appropriate choice.²⁵

What is wrong with this picture? In addition to the court's conclusion that Pamela's sexual orientation was entirely volitional and

24. *Id.* at 4-5.

25. See Polikoff, *supra* note 5.

that her resulting "lifestyle" was somehow radically different than that of her heterosexual counterparts, at least three other lapses in logic are obvious.

The first flaw in the court's reasoning is its underlying premise that living an open and honest life constitutes an inappropriate flaunting of a particular lifestyle in an effort to indoctrinate children to that lifestyle. If this is so, then Pamela's ex-husband and his new wife were guilty of the same offense. They acknowledged their heterosexual relationship to neighbors and co-workers, shared the same bed when the children were in the house (even prior to being married), demonstrated their commitment in a public ceremony in which the children participated, and expressed affection for each other in front of the children. The court did not accuse Dean of making a major political or moral statement by engaging in these activities, did not accuse Dean of flaunting heterosexuality or trying to indoctrinate his children to a heterosexual lifestyle, and did not accuse Dean of engaging in "inappropriate sexual behavior" while in the children's presence. Rather, these activities were simply viewed as part of an appropriate moral choice to live his life as "an open and obvious" heterosexual. Pamela's parallel activities, motivated, as were Dean's, by her love for her partner and children, were never intended to be radical political maneuvers to indoctrinate the children to any particular "lifestyle." She was just living an honest—and moral—life.

An even more fundamental flaw in this trial court's and in other courts' reasoning is that the homosexual parent creates the "conflict" which in turn harms the children. In this particular case, the children did not seem troubled by their mother's sexual orientation and openness. Rather, it was the constant condemnation of their mother by Dean and Christine which caused the stress and conflict in the children's lives. What child wouldn't experience stress when one parent is calling the other a sinner worse than a liar, thief, or prostitute? In truth, what the court termed a "clash of values" is more appropriately described as Dean's repeated violation of the court's order to cease his campaign of hatred and alienation against his children's mother.

The third flaw in the court's reasoning is the conclusion that the children "will be subject to social difficulties" because of their mother's sexual orientation. There was absolutely no evidence that the children had suffered any such "difficulties" except inside of the home they shared with Dean and Christine. As Dr. Jenny testified, children are subject to teasing and are sometimes stigmatized by a number of situations beyond a child's control; if courts sought to protect children from every parent-related stigma, few parents would be allowed to associate with their own children. As other courts have recognized, a child's best interests are not served by trying to shield the child from all negative situations she may encounter, but rather by allowing her the opportunity to deal with social challenges when and

if they arise.²⁶ Rather than assuming that children will be harmed by contact with a gay parent and possible teasing from friends and acquaintances,

it is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.²⁷

F. *Post-trial Evaluations*

The one appropriate step the trial court took in the *Hertzler* case was to order the parties to jointly select a counselor for the children and to report back to the court in six months, by January 1, 1995.

Pamela agreed to a counselor selected by Dean. Unlike Dean's trial expert, the post-trial expert Dean chose, Dr. Rachael Moriarty, had significant experience working with sexually abused children and families in conflict. After extensive sessions with Dean, Christine, Pamela, Pamela's partner, and the children, Dr. Moriarty concluded that the children had not been sexually abused and that they were being harmed by Dean and Christine's efforts to alienate them from their mother.

Based on this new evidence from the counselor Dean had selected, Pamela went on the offensive. She moved the trial court for full restoration of her visitation rights and a TRO enjoining Dean from continuing to interfere with her relationship with her children. During a full-day hearing in January, 1995, Dr. Moriarty testified at length about her evaluation of the children and the reasons she had concluded that no sexual abuse had occurred. Pamela also presented significant evidence demonstrating that Dean and Christine had made numerous false representations to the court about the children's behavior.

Not surprisingly, the court remained convinced that Pamela had eroticized the children through her visibility as a lesbian. The judge denied Pamela's requests for extended visitation and chastised Dr. Moriarty for failing to address the "eroticization" which the court had found. The court loosened Pamela's shackles slightly by allowing her parents to supervise the visits with her children.²⁸

26. See *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985).

27. *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979).

28. Pamela had never asked the court to allow her parents to supervise her visits. This was a strange ruling for the court to make sua sponte especially because, as the court heard at trial, Pamela's relationship with her parents had been strained since they told Dean about her sexual orientation.

G. *The Wyoming Supreme Court Weighs In On Visibility*

Since Wyoming has no intermediate courts of appeal, Pamela appealed the trial court's decision to the Wyoming Supreme Court.²⁹ In a 3-2 decision, the supreme court agreed with Pamela that the trial judge erred: (1) as a matter of law in qualifying Mr. Rhodes, the former minister hired by Dean, as an "expert" in child sexual abuse;³⁰ (2) in its factual findings—including the finding that the children had been "eroticized" while in Pamela's care—based primarily on Mr. Rhodes' interpretation of them; and (3) in expressing his personal bias against homosexuality.³¹

Despite these three alternative, independently sufficient grounds for reversal, the Wyoming Supreme Court affirmed the trial court's decisions curtailing Pamela's visitation. In a statement completely divorced from the reality of the case as the court itself described it, the Wyoming Supreme Court concluded: "Searching the record for abuse of discretion, we cannot say, under the circumstances revealed, that the district court's decision was either arbitrary or capricious."³² Instead of vacating or reversing the lower court's decision, the supreme court applauded the trial judge for having "wisely eased" the restrictions on Pamela's visitation rights following the January hearing and encouraged (but did not order) the trial court to continue in that direction.³³

The dissent opined that the case should be remanded to a non-biased judge and that the majority inappropriately based its decision by rewriting the facts in a manner unsupported by the record:

As I understand the evidence, the cause of the children's inappropriate behavior is found in the father's and Christine's "zealous machinations," not the mother's.

The record quite clearly reveals that the father and Christine have worked long and hard at alienating these children from their mother. They should have been held in contempt for what they

29. See *Hertzler*, 908 P.2d 946.

30. Wyoming has expressly approved the *Daubert* standard for qualifying expert witness. See *Springfield v. State*, 860 P.2d 435, 443 (Wyo. 1993) (affirming the standard in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S.Ct. 2786 (1993) (requiring that the admissibility of a proffered expert's testimony is determined by its underlying reliability)). Reliability of the testimony "is based on whether the underlying theory is scientifically valid and pertains to the facts of the case." *Springfield*, 860 P.2d at 443. One of the primary arguments on appeal was that Lynn Rhodes did not meet this standard due to his inexperience in child sexual abuse cases and his admitted anti-gay bias.

31. See *Hertzler*, 908 P.2d at 950.

32. *Id.* In Wyoming, a trial court abuses its discretion when "it acts in a manner which exceeds the bounds of reason under the circumstances," with the ultimate issue being "whether or not the court could reasonably conclude as it did." *State v. D.D.M.*, 877 P.2d 259, 261 (Wyo. 1994).

33. See *Hertzler*, 908 P.2d at 952.

have done; instead, they are, despite the spin placed on it by the majority, rewarded for their outrageous behavior.³⁴

The majority's decision to uphold the trial court's restrictive visitation order despite its recognition of three independent, usually reversible errors in the trial court's decision is curious indeed. Based on the evidentiary record and the compelling arguments successfully made by Pamela in her appeal, the majority's conclusion that the trial court's restrictions on her visitation were neither "arbitrary or capricious" is nonsensical. It is a rational decision only if one acknowledges that the Wyoming Supreme Court embraces the same underlying philosophy that inspired the trial court's decision: Contact between a visible lesbian mother and her children is per se harmful to the children. Even if specific resultant harms have not been shown in a particular case, the court believes it must place significant boundaries between the mother and child to protect the children.

H. *On Remand: A Small Victory*

Based on the Wyoming Supreme Court's mild directive and Pamela's perseverance, the trial judge finally, in October, 1996, extended Pamela's visitation rights to include a few weeks each summer and additional holiday visits. While this order allows significantly less visitation than she had prior to Dean's false allegations of sexual abuse, it constitutes Pamela's most significant victory since the TRO was entered two and a half years earlier: the visits no longer have to be supervised.

Finally, one of the most formidable boundaries imposed by the court between Pamela and her children has finally come tumbling down. But will the psychological boundaries imposed between Pamela and her children through the courts' homophobic decisions ever be fully overcome? It is highly probable that the trial court's action and inaction in this case, including the sudden and extreme curtailment of Pamela's contact with her children, the continuation of the supervision requirement long after the evidence clearly established that no sexual abuse had occurred, and the court's refusal to intercede in Dean's continued campaign of hate and alienation against Pamela, will continue to cast a long shadow of apprehension and doubt on the children's relationship with their mother for many years to come.

V. CONCLUSION

Due to the enhanced visibility of lesbians over the past decade, the days when a lesbian mother could successfully opt to conceal her sexual orientation may be nearing an end. But fortunately, as society evolves, certain biases proven to be based in ignorance and misunder-

34. *Id.* at 954 (Golden, C.J., dissenting).

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standing are declared politically incorrect and, eventually, legally impermissible. This evolution is occurring with visible lesbian mothers entangled in custody and visitation disputes. Most modern courts espouse a reluctance to impose barriers between a lesbian mother and her children absent a clear nexus between the mother's sexual orientation and harm to the children. But development of new doctrine should not be equated with sweeping attitudinal shifts by trial and appellate judges. Rather, overt expressions of bias may give way to more subtle actions and comments. And while overt bias can be readily identified and attacked in trial court decisions such as *Hertzler*, insidious bias seeps stealthily into credibility assessments and evidentiary rulings to form the foundation for "best interests of the child" determinations. The boundaries formed from an unarticulated anti-lesbian bias are just as sturdy as those built by blatant bias, but they are even harder to assail. This is the visible lesbian mother's latest challenge.