

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

AMICI CURIAE BRIEF

Presented by the

**New York City Bar Association
Human Rights Watch
International Gay and Lesbian Human Rights Commission
International Women's Human Rights Law Clinic at the
City University of New York,
Lawyers for Children, Inc.
Legal Aid Society of New York
Legal Momentum
National Center for Lesbian Rights**

in the case of

Karen Atala Riffo (and daughters)

Case No. P-1271-04 (Chile)

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The New York City Bar Association, Human Rights Watch, International Gay and Lesbian Human Rights Commission, International Women's Human Rights Law Clinic of the City University of New York, Lawyers for Children, Inc., Legal Aid Society of New York, Legal Momentum, and the National Center for Lesbian Rights (the "Amici") respectfully submit this brief of amicus curiae in support of the petition filed with the Inter-American Commission on Human Rights (the "Commission") by Karen Atala Riffo (and daughters) against the State of Chile.

I. INTEREST OF AMICI

The Association of the Bar of the City of New York ("the Association"), founded in 1870, has over 22,000 members in the New York area, around the United States and in over 50 countries. The Association has long been concerned with the denial of basic human rights on both a domestic and international level and has a strong interest in protecting those denied their rights on the basis of sexual orientation.

Human Rights Watch ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

International Gay and Lesbian Human Rights Commission ("IGLHRC") works to secure the full enjoyment of human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation, gender identity or expression, and/or HIV status.

A U.S.-based non-profit, non-governmental organization (NGO), IGLHRC affects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

The International Women's Human Rights Law Clinic ("IWHR") at the City University of New York is dedicated to teaching and advocacy of women's human rights under international law. Working with partners abroad and in the United States as appropriate, IWHR has engaged in litigation, conferences, negotiations and advocacy of norms and instruments respecting gender equality and women's rights in international, regional and national contexts. IWHR has previously appeared before the Inter-American Commission on Human Rights as *amicus curiae* in *Caso Maria Eugenia Morales de Sierra* and as counsel for Haitian and North American women's groups in Communications on behalf of Haitian Women during the period of the illegal Cedras regime.

Lawyers For Children, Inc. ("LFC") is a not-for-profit legal corporation, founded in 1984. LFC is dedicated to protecting and promoting the health and welfare of children in New York State. LFC provides free, integrated legal and social work services to over 4,000 individual children each year in custody, visitation, foster care, abuse, neglect, termination of parental rights, and adoption cases. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts state certified professional training sessions, and seeks reform of child welfare systems affecting vulnerable children. LFC's in-depth involvement in hundreds of high-conflict custody and visitation cases allows LFC to provide informed, child centered, commentary on the policy issues affecting children that are raised in the instant case.

The Legal Aid Society of New York is the nation's largest and oldest provider of legal services to poor people. The Society's three practice areas represent clients throughout New York City in a variety of civil, criminal and family court matters. The Society's Juvenile Rights

Division provides comprehensive representation as law guardians to children who appear before the New York City Family Court in child protective and other proceedings affecting children's custody and their rights and welfare. Last year, our Juvenile Rights attorneys and social workers represented more than 29,000 children.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to the rights of all women and men, including lesbians and gay men, to live free of discrimination based on stereotypes regarding gender, sex or sexual orientation.

The National Center for Lesbian Rights ("NCLR") is a national, non-profit legal organization with offices in California, Florida and Washington, D.C. NCLR is committed to advancing the human rights and safety of lesbian, gay, bisexual and transgender people and their families. NCLR has a special commitment to ensuring that parents are treated equally, regardless of their sexual orientation.

II. INTRODUCTION

The Amici submit this brief in response to the May 31, 2004 decision of the Supreme Court of Chile (the "Decision"), which stripped Ms. Atala of custody of her three daughters for the sole reason that she is a lesbian living with her female partner. The decision presents a serious human rights violation with potentially far-reaching effects. As detailed in Ms. Atala's petition, the Decision violates the essential human rights protected by the American Convention on Human Rights (the "American Convention"). The Supreme Court improperly based the Decision on negative stereotypes about gays and lesbians. The Court's use of these stereotypes, which have been disproven by reputable psychological and sociological studies, reflects a persistent pattern of discrimination against lesbian and gay parents in custody disputes, and,

specifically, constitutes blatant discrimination against Ms. Atala due solely to her sexual orientation.

The principal function of the Commission is “to promote the observance and defense of human rights.”¹ This includes the right of all persons to be free of “any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”² In light of the Commission’s crucial role in combating all forms of discrimination, the Amici urge the Commission to clarify for member states that it will not tolerate discrimination based on an individual’s sexual orientation. The Commission should mandate appropriate redress, including the return of Ms. Atala’s daughters to her custody.

III. BACKGROUND

Ms. Atala is a judge in Chile. She married Ricardo Jaime Lopez on March 29, 1993, and the couple had three daughters together. The couple separated in March 2002. During the course of marital counseling, prior to the parties’ separation, Ms. Atala realized that she was a lesbian. By mutual agreement between Mr. Lopez and Ms. Atala, legal custody and personal care of the girls were left with Ms. Atala, with Mr. Lopez having weekly visitation rights. Ms. Atala continued to seek counseling for herself and her daughters following the separation.

In June 2002, Ms. Atala began a relationship with Emma de Ramón Acevedo, a professor. In November 2002, Ms. Atala and her daughters began living with Ms. Acevedo. A

¹ Inter-American Commission on Human Rights, Statute of the Inter-Am. C.H.R. art. 1.1, *entry into force* July 18, 1978, O.A.S.T.S. No. 36.

² Organization of Am. States, Am. Convention on Human Rights ch.1, art. 1.1, Nov. 22, 1969, O.A.S.T.S. No. 36. The United Nations Universal Declaration of Human Rights similarly provides: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” G.A. Res. 217A (III) art. 2 (Dec. 10, 1948).

psychologist's report indicated that, from the beginning, Ms. Atala's daughters had a positive relationship with Ms. Acevedo.

In January 2003, Mr. Lopez filed an action for custody of his daughters. In October 2003, the Court of Villarrica issued a detailed, thirty-page decision rejecting Mr. Lopez's request. Among other things, the court noted that a psychologist who examined the girls determined that they were not confused about gender roles and had not been discriminated against because of their mother's sexual orientation. Moreover, the court held that there was no reason to presume Ms. Atala was unable to care for her children. In fact, the court held that Ms. Atala displayed constant attention to the health and education of her daughters and that all three of her daughters expressed a preference to be returned to her. Mr. Lopez appealed the ruling. Six months later, however, the Appeals Court of Temuco affirmed it. Mr. Lopez again appealed and, in May 2004, the Supreme Court of Chile reversed the appeals court and granted custody of the girls to Mr. Lopez.

The Supreme Court's Decision is discriminatory. In contrast to the factual findings of the lower courts, the Decision was based almost wholly on the unfounded speculation that Ms. Atala's daughters would eventually suffer psychological harm from living with Ms. Atala and Ms. Acevedo. The Supreme Court also speculated that Ms. Atala's daughters would eventually become confused about gender roles and be subject to discrimination and isolation. The Supreme Court rejected the analyses of psychologists and social workers that the lower courts had found persuasive and, instead, substituted its own personal convictions in concluding that minors must live in a family that is structured "normally" and considered "traditional" and "proper."³ The Supreme Court's bias against gays and lesbians had nothing to do with the

³ Decision ¶¶ 14, 15, 20.

specific facts of Ms. Atala's case. Moreover, the negative stereotypes on which the Supreme Court relied are contradicted by nearly thirty years of reputable psychological and sociological research in the area of gay and lesbian parenting.

IV. ARGUMENT

A. The Commission Previously Has Held That Discrimination On The Basis Of Sexual Orientation Can Violate Protected Human Rights.

In 1999, the Commission deemed admissible a case, *Marta Lucía Álvarez Giraldo* (Colombia), Case No. 11.656, Inter-Am. C.H.R., Report No. 71/99 (1999) ("*Giraldo*") (see Tab 1), brought by a lesbian prisoner in Colombia who had been denied the right to have conjugal visits with her life partner.⁴ In *Giraldo*, Colombia argued that same-sex conjugal visits would disrupt the prison and "that Latin American culture has little tolerance towards homosexual practices in general."⁵ Colombia acknowledged that the petitioner was "being treated in an inhuman[e] and discriminatory manner," but stated that "the prohibition [on homosexuality] is based upon a deeply rooted intolerance in Latin American culture of homosexual practice."⁶

The Commission deemed the *Giraldo* case admissible on the grounds that the state's action could constitute a violation of Article 11(2) of the American Convention.⁷ Ms. Atala seeks relief under the same provision. Like the petitioner in *Giraldo*, Ms. Atala has been subjected to disparate treatment by a member state based on her sexual orientation. Indeed, Ms. Atala's situation presents an even stronger case on the merits, because the Chilean Supreme Court's Decision affects not only Ms. Atala's rights, but also those of her young children.

⁴ Attached for the Commission's convenience are copies of a few select authorities cited herein.

⁵ *Giraldo* ¶ 2.

⁶ *Id.* ¶ 12.

⁷ *Id.* ¶ 21.

Consistent with the *Giraldo* ruling and the cases discussed in the following section, the Commission should rule in Ms. Atala's favor.

B. The Chilean Supreme Court's Decision Is Contrary To The Weight Of International Authority.

1. The European Court of Human Rights And The United Nations Human Rights Committee Have Held That Sexual Orientation Discrimination Violates Human Rights.

The European Court of Human Rights (the "European Court") and the United Nations Human Rights Committee (the "U.N. Committee") have held that discrimination on the basis of sexual orientation violates human rights. These cases are instructive.

In particular, the European Court rejected a member state's attempt to deny a parent custody of a child based on unfounded stereotypes about the parent's sexual orientation. In *Salgueiro da Silva Mouta v. Portugal*, [1999] Eur. Ct. H.R. 176 ("*Salgueiro*") (see Tab 2), the European Court held that a Portuguese appellate court violated Article 8 (respect for private and family life) and Article 14 (prohibition against discrimination) of the European Convention of Human Rights by denying the custody of his children to a father who was living with his same-sex partner.

In *Salgueiro*, a lower court originally had awarded custody to the father, who was gay. On appeal, the reviewing court did not question the father's love or his ability to care for his daughter and acknowledged that society is becoming more tolerant of gay relationships. Nonetheless, purporting to base its decision on the paramount interests of the child, the Portuguese appellate court gave custody of the children to the mother, stating that the father could not give them a "traditional" home environment that would conform to the "dominant [family] model" in Portuguese society.⁸ Portugal defended this ruling by arguing that member

⁸ [1999] Eur. Ct. H.R. 176 at 8.

states “enjoyed a wide margin of appreciation” with regard to questions of parental responsibility and that national courts were better suited than an international court to examine the best interests of a child.⁹

The European Court rejected Portugal’s arguments. It held that, with regard to protected rights and freedoms, it must examine whether its member states treated similarly situated persons differently and, if so, whether the difference was justified.¹⁰ In finding that a human rights violation had occurred, the European Court concluded that the Portuguese decision was improperly based on the father’s sexual orientation, “a distinction which is not acceptable under the Convention” and for which there was no reasonable justification.¹¹

The European Court also has curtailed other governmental attempts to justify discrimination against gays and lesbians. The European Court has rejected the disparate treatment of gays and lesbians in a case involving succession to tenancy. In *Karner*, the Austrian government attempted to justify discrimination on the basis of sexual orientation by arguing that it protected “the traditional family.”¹² The European Court noted, however, that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures can be used to implement it.” It found that the government had not shown why it was necessary to exclude gay people from the protections provided by the succession law to achieve that aim.¹³

⁹ *Id.* at 10.

¹⁰ *Id.* at 11; *see also Karner v. Austria*, [2003] Eur. Ct. H.R. 395 at 7 (“*Karner*”) (margin of appreciation afforded to member states is narrow where there is a difference in treatment based on sexual orientation).

¹¹ *Salgueiro*, [1999] Eur. Ct. H.R. at 12-15.

¹² [2003] Eur. Ct. H.R. 395 at 6.

¹³ *Id.* at 7.

In addition, the European Court has held that discharging gays from the military based on their sexual orientation violates Article 8 of the European Convention of Human Rights.¹⁴ The British government attempted to justify its discriminatory policy on the basis of the “unique nature” of the armed forces and their intimate connection to national security.¹⁵ The European Court, however, held that the discriminatory policies “were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation” and that such negative attitudes cannot justify discrimination “any more than similar negative attitudes towards those of a different race, origin or colour.”¹⁶

The U.N. Committee also has rejected discrimination based on sexual orientation. The U.N. Committee has held that both Australia’s refusal to grant pension benefits to the same-sex partner of a military veteran and Tasmania’s criminalization of certain forms of sexual contact between men violate the International Covenant on Civil and Political Rights.¹⁷

In *Young v. Australia*, the petitioner challenged the Australian Repatriation Commission’s denial of his request for benefits based on his status as a dependent of “Mr. C,” a war veteran with whom Young had a long-term relationship and for whom Young had cared during the last years of Mr. C’s life. The U.N. Committee rejected Australia’s arguments that Young had not established that Mr. C’s death was “war-caused” or that a heterosexual partner

¹⁴ See *Lustig-Prean & Beckett v. United Kingdom*, [1999] Eur. Ct. H.R. 31417/96; *Smith & Grady v. United Kingdom*, [1999] Eur. Ct. H.R. 33985/96.

¹⁵ *Smith & Grady*, [1999] Eur. Ct. H.R. 33985/96 ¶ 85.

¹⁶ *Id.* ¶¶ 89-90.

¹⁷ See U.N. Comm. On Human Rights, *Young v. Australia*, Comm. No. 941/2000 (Sept. 18, 2003) (“*Young*”), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument); *Toonen v. Australia*, Comm. No. 488/1992 (Mar. 31, 1994) (“*Toonen*”), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/22a00bcd1320c9c80256724005e60d5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/22a00bcd1320c9c80256724005e60d5?Opendocument). Article 26 of the International Covenant on Civil and Political Rights provides “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” United Nations Int’l Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 6 I.L.M. 360, 375.

would have been entitled to pension benefits. The U.N. Committee held that Australia “provide[d] no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and [held that] no evidence which would point to the existence of factors justifying such a distinction ha[d] been advanced.”¹⁸

In *Toonen v. Australia*, a gay-rights activist challenged a Tasmanian law criminalizing various forms of sexual contact between men, arguing that the law did not permit him to be open about his sexuality, and that the law contributed to a “campaign of official and unofficial hatred against homosexuals and lesbians.”¹⁹ Tasmania argued that the law was justified because, among other things, it was intended to protect Tasmanian citizens from the spread of HIV/AIDS and because the law reflected the moral position of a significant portion of the Tasmanian populace.²⁰ The U.N. Committee rejected these arguments, holding that these criminal laws were not “essential to the protection of morals in Tasmania” and that the laws arbitrarily interfered with the petitioner’s rights under article 17 of the International Covenant on Civil and Political Rights, which provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”²¹

As this body of law demonstrates, and as discussed below, it was improper for the Chilean Supreme Court to use the purported prejudices of its country’s citizenry to justify discriminatory policies. There is by no means a uniform bias among Chileans against gays and lesbians. Indeed, two lower courts had deemed Ms. Atala an appropriate custodial parent, and

¹⁸ *Young* ¶ 10.4.

¹⁹ *Toonen* ¶ 2.6.

²⁰ *Id.* ¶¶ 6.5, 7.1, 8.6.

²¹ United Nations Int’l Covenant on Civil and Political Rights art. 17, 6 I.L.M. at 373.

the Chilean Supreme Court itself was closely divided on this issue, deciding against Ms. Atala by the narrowest of margins. Furthermore, to justify discrimination on the basis of individual prejudice would render the protections of the American Convention meaningless. The very purpose of the American Convention and this Commission is to protect those “essential rights [that] are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”²² For the same reasoning applied by the European Court and the U.N. Committee in the above cases, the Commission should remedy the Chilean Supreme Court’s wrong and hold that the lower courts correctly awarded custody of the children to Ms. Atala.

2. Courts In Other Countries Have Found That Giving Custody Of A Child To A Gay Or Lesbian Parent Is Compatible With A Child’s Best Interests.

Many other courts around the world have rejected the very same stereotypes that the Chilean Supreme Court used in its Decision. Moreover, many courts have given gay and lesbian parents custody of children, finding that doing so would be in the best interests of the children.

One of the most thorough opinions dissecting stereotypes of gay and lesbian parents is a 1995 decision from the Ontario Court (Provincial Division) of Canada, *K. (Re)*, 23 O.R.3d 679 (Ont. Ct. 1995) (“*K. (Re)*”). In that case, the court was faced with four lesbian couples who had been denied joint applications for adoption of the children in their respective relationships. One member of each couple was a biological parent of the children whose adoption was being sought.²³ Canada’s Child and Family Services Act permitted applications for adoption by individuals regardless of their sexual orientation, and it also permitted joint applications by

²² Organization of Am. States, Am. Convention on Human Rights Preamble.

²³ *Id.* at 681.

spouses. The Act, however, defined “spouse” as a person of the “opposite sex.”²⁴ The question before the Ontario court was whether the lesbian couples, who were not technically “spouses,” should be allowed to apply for joint adoption.²⁵ In analyzing this question, the court stated that the “paramount and overriding objective of the legislation” was “to promote the best interests, protection and well-being of the children.”²⁶

In reaching the conclusion that same-sex couples may jointly adopt, the Ontario court reviewed extensive social science research confirming that gays and lesbians can be excellent parents.²⁷ Specifically, the court debunked the same stereotypes that the Chilean Supreme Court used to justify the Decision in Ms. Atala’s case. The Ontario court specifically stated the following:

- “Homosexual individuals do not exhibit higher levels of psychopathology than do heterosexual individuals, and there is no good evidence to suggest that homosexual individuals are less healthy psychologically and therefore less able to be emotionally available to their children.”²⁸
- “[T]here is no evidence to support the suggestion that most gay men and lesbians have unstable or dysfunctional relationships.”²⁹
- “[T]here is no reason to believe the sexual orientation of the parents will be an indicator of the sexual orientation of the children in their care.”³⁰
- “[T]here is to date no indication that the possible stigma or harassment to which children of gay or lesbian parents may be exposed is necessarily worse than other possible forms of racial or ethnic stigma, or the stigma of having mentally ill parents”³¹

²⁴ *Id.* at 682-83.

²⁵ *Id.* at 683.

²⁶ *Id.* at 706.

²⁷ *Id.* at 689.

²⁸ *Id.* at 691.

²⁹ *Id.*

³⁰ *Id.* at 692.

³¹ *Id.* at 693.

The Ontario court further recognized that the “prevailing opinion of researchers in this area seems to be that the traditional family structure is no longer considered as the only framework within which adequate child care can be given.”³² Rather, a “multiplicity of pathways through which healthy psychological development can take place” exists in a “diversity of home environments.”³³ The Ontario court stated that it was “bound by law and common sense to decide this issue on the basis of the evidence . . . and not on speculation, unfounded prejudice and fears, or on a reaction to the vociferous comments of an isolated and uninformed segment of the community.”³⁴

The reasoning in *K. (Re)* has been applied in Canada in a cross-cultural context. In *Boots v. Sharrow*, No. 03-66, 2004 A.C.W.S.J. 696 (Ont. S.C. 2004), a case involving a custody battle between two members of the native Mohawk tribe, the Ontario Superior Court of Justice in Canada awarded a lesbian mother custody of her children. This decision relied on the social science findings analyzed in *K. (Re)*.³⁵ According to the court, past precedent that balanced the law with social science findings supported the conclusion that “same sex preference of a parent is merely one of the many factors which a court should consider when determining the best interests of children.”³⁶

Courts in the United Kingdom, New Zealand, Australia and South Africa also have reached results similar to these Canadian cases. In *In re W. (A Minor)*, [1998] Fam. 58 (U.K. Fam. 1997), a court in the United Kingdom granted a lesbian, who was in a same-sex relationship, the right to adopt a child over the biological mother’s objections. In concluding that

³² *Id.* at 690.

³³ *Id.* at 691 (citation omitted).

³⁴ *Id.* at 707.

³⁵ *Boots*, 2004 A.C.W.S.J. 696 ¶¶ 105-108.

³⁶ *Id.* ¶ 136.

the adoption law at issue permitted lesbians to adopt, the court held that “[a]ny other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court’s duty is to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood.”³⁷ In *B. v. P.*, [1992] N.Z.F.L.R. 545 (N.Z.D.C.), a New Zealand court granted a lesbian mother custody of her biological son over the protests of the deceased father’s family. The court was not persuaded by arguments that the child might be the subject of taunts or that he would lack a male role model.³⁸ In *In the Marriage of C and JA Doyle*, [1992] 15 Fam. L.R. 274 (Austl.), an Australian court granted a gay father custody of his children despite his ex-wife’s objections. In granting the father custody, the court applied a “nexus approach,” for which “[t]he parent’s lifestyle is of no relevance without a consideration of its consequences on the child’s well-being.”³⁹

In *Du Toit v. Minister of Welfare and Population Development*, 2002 (10) BCLR 1006 (CC) (S. Afr.), two women in a long-standing lesbian relationship challenged sections of the South African Child Care Act that prevented them from jointly adopting siblings that had been in their joint care for several years. The couple challenged the law on several grounds, maintaining that the adoption would be in the best interests of the child and that the law violated equality provisions of the South African Constitution, limiting their human dignity. The South African Constitution Court sided with the couple on every ground, determining it necessary to take the drastic step of revising the Child Care Act without first giving the legislature the opportunity to do so. In reaching its decision, the court ruled:

[T]he applicants constitute a stable, loving and happy family. Yet the first applicant’s status as a parent of the siblings cannot be

³⁷ [1998] Fam. 58 at 6.

³⁸ [1992] N.Z.F.L.R. 545 at 2-3.

³⁹ [1992] 15 Fam. L.R. 274 at 3.

recognized. This failure by the law to recognize the value and worth of the first applicant as parent to the siblings is demeaning. I accordingly hold that the impugned provisions limit the right of the first applicant to dignity.⁴⁰

In custody cases in the United States, a majority of states have adopted the “nexus test,” a standard that rejects the discriminatory presumption that a gay parent is unfit, and instead requires a case-by-case determination of whether a gay or lesbian parent’s conduct has caused harm to the child.⁴¹ Thus, for example, in applying the nexus test, the Supreme Court of Alaska found “sexual preference discrimination” in lower court decisions that denied a lesbian mother custody and that referred repeatedly to the fact that she was a lesbian but presented no evidence that this fact had affected or was “likely to affect the child adversely.”⁴²

3. Latin American Courts Have Granted Custody Of Children To Gays And Lesbians, And Latin American Institutions Have Started Addressing The Needs Of Diverse Families.

Notwithstanding societal and judicial prejudices, there are, of course, gays and lesbians raising families in Latin America, just as they are elsewhere.⁴³ Courts and other institutions in Latin America are now recognizing these relationships.

Courts in Latin America have granted gays and lesbians custody of their children and recognized their right to adopt. In 2003, an Argentinean court granted a gay father custody of his two children.⁴⁴ The court held that consideration of the father’s sexual orientation in its custody

⁴⁰ *Id.* ¶ 29 (internal footnote omitted).

⁴¹ Jennifer Naeger, *Note: And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 St. John’s L. Rev. 397, 415 (2004) (citations omitted).

⁴² *S.N.E. v. R.L.B.*, 699 P.2d 875, 878, 879 (Alaska 1985).

⁴³ See Gabriela Granados, *Las Otras Familias*, <http://www.rompiendoelsilencio.cl/reportenero04.htm> (last visited January 10, 2006) (discussing study of gay and lesbian families in Mexico); see also www.lasotrasfamilias.cl (last visited January 10, 2006) (website resource for Chilean lesbians).

⁴⁴ *Juzgado de Menores de Cuarta Nominación de Córdoba*, No. 473 (Jurisprudencia de Córdoba, Arg. Aug. 6, 2003), http://www.graciamedina.com/archivos/auni/Cursos/Jurisprudencia_16_001.pdf (last visited Jan. 16, 2006) (see Tab 3).

determination would be unacceptable discrimination. In fact, the court criticized the mother's derogatory remarks about the father's sexual orientation as harmful to the children in terms of raising them in a diverse and inclusive society.

In January 2002, a family court in Rio de Janeiro, Brazil, granted custody of an eight-year-old child to Maria Eugenia Vieira, the lesbian partner of late rock star Cassia Eller. Eller died in December 2001, and the child's biological father had passed away earlier.⁴⁵ More recently, in July 2005, a court approved a gay couple in Brazil as adoptive parents.⁴⁶

Latin American non-judicial institutions have also taken significant steps toward recognizing non-traditional families. In March 2003, the Costa Rican child welfare agency granted a transgender woman provisional custody of a young boy she had been caring for since infancy.⁴⁷ In addition, in June 2003, the Costa Rican National Insurance Institute confirmed that insurance holders may designate any person of their choice as an insurance beneficiary "without any discrimination based on race, age, sexual preference or other criteria."⁴⁸

The Chilean Supreme Court's decision to deny Ms. Atala custody of her children stands in stark contrast to these other decisions and recent reforms.

C. Well-Established Empirical Research Contradicts The Chilean Supreme Court's Negative Stereotypes Of Gay And Lesbian Parents.

The Chilean Supreme Court's decision to deprive Ms. Atala of custody of her children was not based on individualized findings regarding Ms. Atala. Rather, the court based its decision on several unfounded generalizations about how a lesbian's sexual orientation *might*

⁴⁵ Mario Osava, *Rights-Brazil: Courts Start to Recognize Same-Sex Couples*, IPS-Inter Press Service, Jan. 14, 2002.

⁴⁶ *Gay Couple in Brazil Begin Landmark Search to Adopt Child*, BBC Worldwide Monitoring, July 8, 2005.

⁴⁷ See International Gay and Lesbian Human Rights Commission, *Action Alert Update: Transwoman Mairena Is Granted Custody of Her Child*, Apr. 4, 2003, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=417>.

⁴⁸ See International Gay and Lesbian Human Rights Commission, *National Insurance Institute Confirms the Eligibility of Same-Sex Partners and Their Families For Social Security*, July 16, 2003, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=457>.

affect her children. Far from being unique to Ms. Atala's case, these speculative assumptions commonly surface in custody cases involving gay and lesbian parents. Nearly thirty years of research, however, has *disproven* the misconception that children raised by gay or lesbian parents suffer any emotional or developmental harm as a consequence of their parents' sexual orientation. Instead, the research reveals that there are no significant differences between the psychological and emotional development of children raised by heterosexual and gay parents or between the parenting skills of heterosexual and gay parents. A comprehensive review in 2001 demonstrated that "every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment."⁴⁹

The Chilean Supreme Court ignored this research and, instead, speculated that Ms. Atala's children may suffer impaired psychological and emotional development, gender identity confusion, and social isolation and discrimination.⁵⁰ As detailed below, reputable research has proven each of these stereotypical assumptions to be false.

1. Being Raised In A Gay Or Lesbian Household Does Not Harm A Child's Psychological Development.

The Chilean Supreme Court speculated that Ms. Atala's relationship with her same-sex partner "could" negatively affect the well-being and the psychological and emotional

⁴⁹ Judith Stacey & Timothy J. Biblarz, (*How*) *Does Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 176 (2001) (emphasis added).

⁵⁰ Decision ¶¶ 17-18. Although the Supreme Court speculated repeatedly about negative effects that "could" occur, it made only brief mention of one potentially negative incident in the record: apparently, visits from friends of the children to their home had diminished. *Id.* ¶ 15. The court did not explain how the decrease in visits could be attributed to the children living with Ms. Atala or to what extent, if any, this decrease prevented the children from other interactions with their friends, let alone how it rose to the level of "qualifying cause" to deprive Ms. Atala of custody. The Supreme Court also concluded that testimony from maids "indicate[d]" the children were confused about their mother's sexuality. *Id.* Whatever confusion the children may have about their mother will only be intensified, not remedied, by taking them away from Ms. Atala under the pretense that she is an unfit mother.

development of the children.⁵¹ Studies have found no differences between children raised in heterosexual and gay households in the areas of independence, ego functions, sociability, conduct problems, moral maturity or intelligence.⁵² Instead, on key psychological development outcomes, children of heterosexual and gay parents are comparable.⁵³ In fact, two researchers who reviewed the scientific literature concluded that a:

striking feature of the research on lesbian mothers, gay fathers, and their children . . . is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies.⁵⁴

Children of gay parents do not differ, in any statistically significant way, from those raised by heterosexual parents in areas such as “I.Q., favorite television programs, the sex of favorite television characters, peer group relationships, favorite games or toys, gender identity, sex role behavior, sexual orientation, and self-esteem scores.”⁵⁵ Researchers have also found no

⁵¹ Decision ¶ 17.

⁵² Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 *Child Dev.* 1025, 1032-33 (1992) (see Tab 4) (citing Alison Steckel, *Separation-Individuation in Children of Lesbian and Heterosexual Couples* (1985) (unpublished doctoral dissertation, The Wright Institute Graduate School), and Richard Green *et al.*, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 *Archives of Sexual Behav.* 167 (1986)); see also Katrien Vanfraussen *et al.*, *What Does It Mean For Youngsters To Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 *J. Reproductive & Infant Psych.* 237, 249 (2002); Beth Perry *et al.*, *Children’s Play Narratives: What They Tell Us About Lesbian-Mother Families*, 74 *Am. J. Orthopsychiatry* 467 (2004); Jennifer Wainright *et al.*, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 *Child Dev.* 1886 (2004); Norman Anderssen *et al.*, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 *Scandinavian J. Psychol.* 335 (2002); Raymond Chan *et al.*, *Psychological Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 *Child Dev.* 443 (1998).

⁵³ Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 *J. Dev. & Behav. Pediatrics* 224 (2005).

⁵⁴ G. Dorsey Green & Frederick Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications for Public Policy*, at 197, 213 (John C. Gonsiorek & James Weinrich eds., 1991).

⁵⁵ D.L. Hawley, *Custody and Visitation of Children by Gay and Lesbian Parents*, 64 *Am. Jur. Proof of Facts* 3d 403, § 7 (2005); see also Joseph R. Price, *Bottoms v. Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 *Wm. & Mary Bill Rts. J.* 643, 648 (1997) (since the 1980s, there has been a surge in publication of academic research finding no developmental difference between children of heterosexual parents and children of gay parents); 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*, at 131, 151-52 (A.E. Gottfried and A.W. Gottfried eds., 1994) (there is no empirical evidence that children of lesbian mothers suffer any detrimental effects, and legal decision-makers should not focus on the sexual orientation of a parent or guardian

differences in the prevalence of emotional or behavioral problems such as sociability, emotional difficulty, hyperactivity or conduct problems.⁵⁶ Assessing adolescent responses to moral dilemmas, research has shown that children raised in gay and heterosexual households display no differences in moral maturity.⁵⁷ A study of children raised by divorced mothers in two-adult households revealed no difference in the levels of self-esteem of adolescents who lived with a lesbian mother and her same-sex partner and adolescents who lived with a heterosexual mother and her opposite-sex partner.⁵⁸

The Chilean Supreme Court's ruling may also encourage gay parents to hide their sexual orientation to maintain custody of their children. This can have a detrimental effect on children. Studies show that the healthiest parental relationships for children in gay and lesbian households are those where the parent can be open about his or her sexuality.⁵⁹ A recent study of children raised by gay parents in Mexico reached this same conclusion, finding that if the parent is comfortable with his or her sexual orientation, the child benefits because he or she does not feel ashamed.⁶⁰ A professor of psychology who conducted a landmark study of gay and lesbian families in Spain and who testified before the Spanish senate regarding the country's gay marriage laws also confirmed that it is always better for children of gay parents to grow up

when making custody decisions); Shelley Casey, *Homosexual Parents and Canadian Child Custody Law*, 32 Fam. & Conciliation Courts Rev. 379, 386 (1994) ("Researchers have concluded that there is no significant difference in the emotional development, social behavior, [or] psychopathology of children raised by a gay or lesbian parent.").

⁵⁶ Susan Golombok *et al.*, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. Child Psychol. & Psychiatry 551 (1983).

⁵⁷ Patterson, *supra* note 52, at 1033.

⁵⁸ Wainright, *supra* note 52, at 1895 (citing Sharon Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *Homosexuality and the Family*, at 123, 132-35 (Frederick W. Bozett ed., 1989)).

⁵⁹ See, e.g., Hawley, *supra* note 55, at § 7 ("[T]he more open and relaxed a lesbian mother was about her sexual orientation, the more accepting the child was of this. The more realistic and understanding of issues and potential problems of being lesbian the mother was, the more successful were the children's adjustment.").

⁶⁰ Granados, *supra* note 43.

knowing their parents are gay rather than to feel later that they were misled.⁶¹ A court's preference for "discreet" lesbians and gay men who shelter their children from all knowledge of their sexual identity is "counter to any interest in the well-being of [the] children," as it encourages "the isolation of lesbian and gay parents, cutting them off from their most significant sources of support" and thus "ensure[s] the isolation of the children."⁶² It is also counter to the U.N. Declaration of the Rights of the Child which provides that each "child shall be protected from practices which may foster racial, religious and any other form of discrimination."⁶³

2. Studies Prove That Parent's Sexual Orientation Does Not Affect Child's Gender Identity Or Sexual Orientation.

Empirical research also disproves the Chilean Supreme Court's assumption that being raised by a lesbian mother affects the development of a child's gender identity.⁶⁴ Studies of gender identity patterns have uncovered no differences in children raised by gay or heterosexual parents.⁶⁵ Nor have studies found any differences in gender role behaviors as evidenced in toy preferences, activities, interests, or occupational choices.⁶⁶ A study of adult children of lesbian mothers also confirms that there are no differences in their gender role preferences.⁶⁷ As a panel

⁶¹ Interview with Maria del Mar Gonzalez, <http://www.rompiendoelsilencio.cl/entrestudio.htm> (last visited Jan. 10, 2006).

⁶² Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbians and Gay Parents and Their Children*, 71 Ind. L.J. 623, 647-49 (1995-96).

⁶³ U.N. Comm. on Human Rights, Decl. of the Rights of the Child, G.A. Res. 1386 (XIV) principle 10 (Nov. 20, 1959).

⁶⁴ Decision ¶ 17. This is an assumption frequently relied on by courts in denying custody to gay and lesbian parents. See Hawley, *supra* note 55, at § 5 (noting fear that children will become gay or lesbian or will not have "normal" gender and sex role development as some of the misconceptions and untruths used to deny custody to gay or lesbian parents); Donald H. Stone, *The Moral Dilemma: Child Custody when One Parent Is Homosexual or Lesbian — An Empirical Study*, 23 Suffolk U.L. Rev. 711, 724 (1989) (noting that "[t]he position that homosexual and lesbian parents will influence their children to develop same[-]sex orientation" is often raised in custody cases).

⁶⁵ Patterson, *supra* note 52, at 1030 (citing Martha Kirkpatrick *et al.*, *Lesbian Mothers and Their Children: A Comparative Survey*, 51 Am. J. Orthopsychiatry 545 (1981)).

⁶⁶ *Id.* (citing Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 692 (1978)).

⁶⁷ Wainright, *supra* note 52, at 1887.

of the American Academy of Pediatrics concluded, “[n]one of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior.”⁶⁸

Research also demonstrates that children of gay or lesbian parents are no more likely to be gay or lesbian than children of heterosexual parents.⁶⁹ Studies confirm that sexual orientation “is developed independent of one’s parents and should not be a factor that courts weigh in custody determinations.”⁷⁰

In any event, the assumption manifested in the Decision that lesbian parents will raise gay and lesbian children “betrays a projection of judicial fear . . . of lesbians as contagious or converting.”⁷¹ At base, it also reflects the invidiousness of the Decision — the idea that for an individual to be a gay or lesbian is a tragedy which must be prevented at all costs. This presumption undermines the very protections that Article 1.1 seeks to protect.

3. Studies Show That Children Raised By Gay And Lesbian Parents Are No More Affected By Stigma Than Other Children.

The Chilean Supreme Court erroneously relied on the potential for social ostracism as a basis for its Decision.⁷² This fear is premised on “the presumption that the children of gay

⁶⁸ Ellen C. Perrin & Committee on Psychological Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002).

⁶⁹ Patterson, *supra* note 52, at 1031; Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 *Law & Sexuality* 133, 157-61 (1991).

⁷⁰ Stone, *supra* note 64, at 724; *see also* Katja M. Eichinger-Swainston, *Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families*, 32 *Tulsa L.J.* 57, 67 (1996) (general consensus in scientific community is that sexuality is not a learned behavior); Casey, *supra* note 55, at 387 (studies have proven unfounded the assumption “that children develop their sexual orientation based on environmental factors and parental modeling”); Sandra Pollack, *Lesbian Mothers: A Lesbian-Feminist Perspective on Research, in Politics of the Heart: A Lesbian Parenting Anthology*, at 320 (Sandra Pollack and Jeanne Vaughn eds., 1987) (“[c]ourts need to be educated” to combat the “wrong assumption . . . that children of gay parents will grow up to be gay or will have confused sex-role identification”).

⁷¹ Jenni Millbank, *Lesbians, Child Custody, and the Long Lingering Gaze of the Law, in Challenging the Public/Private Divide: Feminism, Law and Public Policy*, 280, 288 (Susan B. Boyd ed., 1997).

⁷² Decision ¶ 18.

parents will be stigmatized by societal indignation of homosexuality.”⁷³ Like the other assumptions in the Decision, “[t]he assumption that the child with a homosexual mother will be stigmatized . . . is based on anticipated fear which, in many cases, goes unverified.”⁷⁴ Judges often exaggerate the harm of possible childhood teasing, assuming erroneously that “teasing based on a parent’s sexual orientation is more serious than teasing based on other attributes such as physical characteristics, intelligence, or ethnicity.”⁷⁵

The Chilean Supreme Court’s conclusion is refuted by years of research. Studies comparing gay and heterosexual families uncovered “no evidence to support the concern that children of lesbian mothers would experience more teasing or bullying and more difficulties in their relationships with their peers.”⁷⁶ Moreover, children raised in gay families exhibit no differences in their perceptions of their popularity or in the quality of their friendships with peers.⁷⁷

The “social stigma” presumption is a particularly inappropriate basis for custody decisions because it “is not linked to parental fitness or the parent-child relationship.”⁷⁸ In other words, by making presumptions about social stigma, the Chilean Supreme Court made assumptions about how persons *other than* Ms. Atala would treat her children.

⁷³ Felicia Meyers, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 Whittier L. Rev. 839, 843-44 (1993).

⁷⁴ Kelly Causey and Candan Duran-Aydintug, *Tendency to Stigmatize Lesbian Mothers in Custody Cases*, 28 J. Divorce & Remarriage 171, 173 (1997).

⁷⁵ *Id.*

⁷⁶ Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy*, 45 J. Child Psychol. & Psychiatry 1407, 1416 (2004); see also Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 Marriage & Family R. 57, 65 (1999).

⁷⁷ Golombok *et al.*, *supra* note 56.

⁷⁸ Causey & Duran-Aydintug, *supra* note 74.

In addition, article 2 of the United Nations Convention on the Rights of the Child, ratified by Chile, protects children from discrimination based on their parents' status.⁷⁹ The Convention provides that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."⁸⁰ The Chilean Supreme Court's decision to remove Ms. Atala's children from her custody encourages discrimination that this article seeks to eradicate.

4. Lesbian Mothers' Parenting Skills Are Equivalent To Those Of Heterosexual Mothers.

Empirical research refutes the Supreme Court's assumption that gays and lesbians are unfit parents:

The research suggests that lesbian and gay parents have parenting skills that are at least equivalent to those of heterosexual parents. Studies of lesbian mothers illustrate a remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of lesbian mothers and heterosexual mothers.⁸¹

Lesbian and heterosexual mothers have proven to be equally good parents, have similar attitudes toward child rearing and display no differences in self-esteem and psychological adjustment.⁸²

⁷⁹ U.N. Comm. on Human Rights, The Convention on the Rights of the Child, G.A. Res. 44/25, art. 2, 28 I.L.M. 1456 (Sept. 2, 1990) ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.").

⁸⁰ *Id.*

⁸¹ Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 Duke J. Gender L. & Pol'y 207, 211 (1995) (citation omitted).

⁸² Katrien Vanfraussen *et al.*, *Family Functioning in Lesbian Families Created by Donor Insemination*, 73 Am. J. Orthopsychology 78, 88(2003); David K. Flaks *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Dev. Psychol. 105, 111 (1995); Green, *supra* note 52; Eileen S. Shavelson *et al.*, *Lesbian Women's Perceptions of Their Parent-Child Relationships*, 5 J. Homosexuality 205-15 (1980); Mildred D. Pagelow, *Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions*, 5 J. Homosexuality 189 (1980); Sally L. Kveskin & Alicia S. Cook, *Heterosexual and*

The research has refuted the stereotype that lesbian mothers are not as child-oriented or maternal as heterosexual mothers.⁸³ A study of children's play narratives showed that children from gay and heterosexual families represented their mothers as equally positive and having similar levels of discipline.⁸⁴

The Supreme Court specifically faulted Ms. Atala for purportedly putting her "own interests first" in choosing to live with her lesbian partner in the same home in which she was raising her daughters.⁸⁵ As discussed above, however, there was no evidence that Ms. Atala's relationship with Ms. Acevedo actually, or even potentially, harmed her children. To the contrary, the evidence showed that Ms. Atala's children had a positive relationship with Ms. Acevedo and wanted to live with Ms. Atala and Ms. Acevedo.

The Supreme Court's criticism of Ms. Atala's relationship with Ms. Acevedo is simply another example of the discriminatory nature of the Decision. The Supreme Court's criticism is unfair for several reasons.⁸⁶ First, the assumption that "mothers will be selfless, never putting their needs above those of other family members, especially children . . . ignores the interrelationship between a parent's needs being met and her ability to parent effectively."⁸⁷ Studies have confirmed that a lesbian parent's relationship with her partner can provide a

Homosexual Mothers' Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children, 4 Nat'l J. Sexual Orientation L. 967 (1982).

⁸³ Cheryl A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 Am. J. Orthopsychiatry 376 (1998); Susan Golombok *et al.*, *Children with Lesbian Parents: A Community Study*, 39 Dev. Psychol. 20 (2003).

⁸⁴ Perry, *supra* note 52.

⁸⁵ Decision ¶ 16.

⁸⁶ Susan B. Boyd, *Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?*, 15 Can. J. Fam. L. 131, 139 (1998); *see also* Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 Am. Psychol. 941, 942 (1989) (courts commonly make erroneous assumption about lesbians being less maternal).

⁸⁷ Boyd, *supra* note 86, at 139.

“healthy, happy, and stable family unit.”⁸⁸ Where a mother’s conduct does not at all harm her children, denying her the right to have intimate, private relationships is simply punitive. Furthermore, this assumption unfairly discriminates against lesbian mothers when similar restrictions are not imposed on heterosexual men and women.⁸⁹ The Chilean Supreme Court’s Decision ignored all of these considerations.

D. The Chilean Supreme Court’s Decision Is Based On Improper Bias, Not The Best Interests Of Ms. Atala’s Children.

The Chilean Supreme Court purported to base its Decision on the “best interests of the children.”⁹⁰ The “best interest” standard is present both in the Chilean Civil Code (Articles 22, 225, 242) and in the International Convention of Children’s Rights (Articles 3, 9), which has been ratified by Chile. It is also commonly used by courts throughout the world in making custody decisions. *See, e.g., supra* Section IV.B.

As discussed above, the Chilean Supreme Court based its Decision not on specific findings of fact, but rather on unsupported assumptions. As the Court of Villarrica held, there was no evidence that Ms. Atala’s sexual orientation or cohabitation with another woman had harmed the children. In fact, the lower court relied on reports of psychologists and social workers that supported this finding.⁹¹ The Chilean Supreme Court specifically criticized the

⁸⁸ *Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993); *see also, e.g., In the Matter of Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (child raised by lesbian couple had “a rich family life” and “a family structure in which to grow and flourish”).

⁸⁹ *See Shapiro, supra* note 62, at 648 (courts’ preference for “discreet” homosexual parents leads them “to penalize lesbian and gay parents for conduct that would be entirely unremarkable for heterosexual parents” such that any display of affection may be basis to deny lesbian mother or gay father custody, with no similar results following for heterosexual parents); *see also M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 966-67 (Sup. Ct. Suffolk County 1986) (noting that no adverse impact was suggested from heterosexual mother’s cohabitation with boyfriend); *In re W.*, [1998] Fam. 58 ¶ 7 (argument that it was contrary to public policy for cohabitating homosexual couple to adopt necessarily raises question whether similar policy would be applied to cohabitating heterosexual couple).

⁹⁰ Decision ¶¶ 9-10.

⁹¹ Decision ¶ 15.

court's reliance on these sources, however, favoring instead the use of speculation and bias.⁹² To base custody decisions on perceived harms is to reinforce derogatory stereotypes and place a judicial seal of approval on the very homophobic prejudice that creates and fosters a hostile environment in the first instance. The Chilean Supreme Court's Decision runs counter to the children's best interests as articulated by the lower court decisions and must, accordingly, not be permitted to stand.

In an analogous context, the United States Supreme Court refused to treat social prejudices and potential condemnation resulting from a mother's inter-racial marriage as grounds for denial of custody.⁹³ The Court noted that while the United States Constitution "cannot control such prejudices[,] neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁹⁴

Denying a lesbian mother custody because of societal homophobia is directly analogous to denying a parent in an inter-racial marriage custody of his or her children due to racism. An increasing number of courts recognize that "it is impermissible to rely on any real or imagined social stigma" attaching to gays and lesbians in denying them custody.⁹⁵ "Of overriding importance is that within the context of a loving and supportive relationship there is no reason to think that the [children] will be unable to manage whatever anxieties may flow from the

⁹² *Id.* ¶¶ 14-18.

⁹³ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (private bias was unconstitutional consideration for divesting natural mother of custody of her infant child because of her remarriage to person of different race).

⁹⁴ *Id.* at 433.

⁹⁵ *S.N.E.*, 699 P.2d at 879; see also *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) ("Would a court restrict a handicapped parent's custody because other people made remarks . . . which embarrassed, confused and angered the child? We think not."); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) ("This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.").

community's disapproval of their [parent]."⁹⁶ Courts serve the children's best interests by "recogniz[ing] the reality of children's lives, however unusual or complex."⁹⁷ The failure to do so "perpetuat[es] the fiction of family homogeneity at the expense of the children whose reality does not fit this form."⁹⁸

In short, the Chilean Supreme Court's discriminatory decision works a grave injustice not only against Ms. Atala but also against her children, whose best interests are unquestionably paramount.

As eloquently summarized by a court nearly thirty years ago in granting custody to a lesbian mother:

[I]t may be that because the community is intolerant of [the mother's] differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [their mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their

⁹⁶ *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979).

⁹⁷ *Blew*, 617 A.2d at 36.

⁹⁸ *Id.*; see also *Diálogo Abierto: Comentario a los Artículos Publicados en el Boletín Informativo (No. 2, 2002 y No. 4, 2001)*, *Boletín Informativo de la Sociedad Argentina de Peditría*, Año XIX, 2002, No. 3 (recognizing diversity of family structures caring for children).

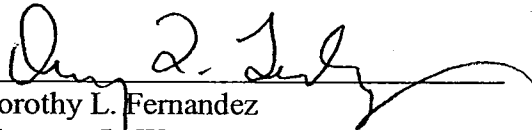
regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.⁹⁹

V. CONCLUSION

In deciding what custodial arrangement would be in the best interests of a child, a court should consider many different factors. The Supreme Court of Chile went too far, however, when it applied its own discriminatory beliefs to this analysis. The Court's consideration of broad and unfounded generalizations about Ms. Atala's sexual orientation violated not only her rights under the American Convention but also those of her children. If allowed to stand unchallenged, the Supreme Court's ruling would help foster, rather than eradicate, discrimination against gays and lesbians in the member states. For the foregoing reasons, the Commission should rule in favor of Ms. Atala.

Date: January 19, 2006

MORRISON & FOERSTER LLP

By: 

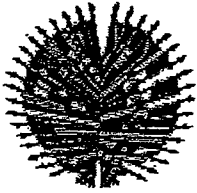
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⁹⁹ *M.P.*, 404 A.2d at 1263.

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INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT N° 71/99*

Admissibility

CASE 11.656

MARTA LUCÍA ÁLVAREZ GIRALDO

COLOMBIA

May 4, 1999

I. SUMMARY

1. On May 18, 1996, Marta Lucía Álvarez Giraldo (hereinafter "the victim" or "the petitioner") presented a complaint against the Republic of Colombia (hereinafter "the State" or "the Colombian State") to the Inter-American Commission on Human Rights (hereinafter "the Commission") alleging violations of rights protected under Articles 5(1) (2), 11(1), and 24 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention").

2. The petitioner alleges that her personal integrity, honor and equality are violated by the prison authorities' decision not to authorize the exercise of her right to intimate visits because of her sexual orientation. The State argues that allowing homosexuals to receive intimate visits would affect the internal disciplinary regime of prison establishments and that Latin American culture has little tolerance towards homosexual practices in general.

3. After analyzing the positions of both parties, the domestic remedies available to the petitioner, and all other admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission finds the case admissible:

II. PROCESSING BY THE COMMISSION

4. On August 1, 1996, the Commission opened case 11.656 and forwarded the pertinent parts of the complaint to the State, giving it 90 days in which to present its reply. The State presented its reply on November 21, 1996, and this was duly forwarded to the petitioner. On October 15, 1996, the petitioner presented additional information. On February 6, 1997, the State sent additional information, and on March 5, 1997, the petitioner sent a further communication. The pertinent parts of each communication were duly forwarded to the opposing party.

5. On September 23, 1997, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter. The petitioner presented her reply on October 21, 1997. On November 18, 1997 and April 2, 1998, the State requested successive extensions in order to examine the petitioner's proposals. Finally, on August 12, 1998, the State rejected the possibility of a friendly settlement. On November 5, 1998, the petitioner, through her legal representative, presented written observations which were duly forwarded to State.

III. POSITIONS OF THE PARTIES

A. THE POSITION OF THE PETITIONER

6. During the time pertinent to this complaint, the petitioner had been serving a lower court prison sentence in the Dosquebradas "La Badea" Women's Prison, in Pereira, since March 14, 1994. The legislation in force in Colombia enshrines the right of inmates to intimate visits. Therefore Marta Lucía Alvarz Giraldo requested the Ombudsman for Pereira to present a request to the competent authorities for permission to be visited by her female life partner. On July 26, 1994, the 33rd Prosecutor's Office in Santuario, the judicial office that was carrying out the criminal investigation at the time, issued the corresponding authorization. This decision was communicated to the Dosquebradas Women's Prison Directorate on July 27, 1994, and ratified in official letter N° 635, dated August 19, 1994.

7. The petitioner alleges that, on receiving the official letter confirming her authorization to receive intimate visits, the Director of the Prison requested that the Sectional Director of the Prosecutor's Office review the decision of the 33rd Prosecutor's Office in Santuario. In view of this situation, the Ombudsman for Pereira sent the decision of the 33rd Prosecutor's Office authorizing the intimate visit to the Director of the "La Badea" Women's Prison. The following day, the Director of the prison applied to the competent judge of the Santuario Circuit for authorization to transfer the petitioner to another prison. On October 20, 1994, the Ombudsman for Pereira requested information on the matter, since the Director of the Women's Prison had still not issued a decision on the request for an intimate visit. In response, he was told that the petition had been forwarded to the Regional Directorate of the National Penitentiary and Prison Institute (hereinafter "INPEC").

8. In response, the Ombudsman for Pereira filed a *tutela* (a motion for protective relief) on behalf of the petitioner. The Criminal Court of Dosquebradas allowed the motion on the basis that the petitioner's right to petition had been violated. Consequently, the Director of the Women's Prison of Pereira was ordered to decide on the petitioner's request. On February 7, 1995, the Director of the Prison issued a decision on the petition, denying authorization for the intimate visit on the basis of the prisoner's sexual orientation.

9. The Ombudsman for Pereira appealed the Director's decision, which was upheld on June 13, 1995, by the Criminal Court of the Santa Rosa de Cabal Circuit. Finally, on May 22, 1995, the Constitutional Court refused to review the decision on the action for protective relief.

10. With regard to the legal arguments on the merits, the petitioner argues that the applicable Colombian legislation does not take exception to intimate visits for prisoners on the basis of their sexual orientation. She maintains that there are no provisions allowing a distinction to be made between the right of a heterosexual prisoner to intimate visits and that of a homosexual. She argues, therefore, that the penitentiary authorities have engaged in discriminatory treatment that is not authorized by domestic law and that, from any standpoint, violates Articles 5, 11, and 24 of the American Convention.

B. THE POSITION OF THE STATE

11. The State has not questioned the admissibility of the case. As regards the merits of the case, the State initially sought to justify its refusal to allow the intimate visit on the grounds of security, discipline, and morality in penitentiary institutions.

12. Subsequently, the Colombian State recognized the legitimacy of the complaint presented, based on a report of the Ministry of Justice and Law acknowledging that the petitioner is being treated in an inhuman and discriminatory manner. Nevertheless the State maintained the arguments presented in support of its initial position, that the prohibition is based upon a deeply rooted intolerance in Latin American culture of homosexual practices.

13. In support of its position, the State cited considerations regarding prison policy and personal behavior. In its view, accepting the petitioner's request would involve

"applying an exception to the general banning of such [homosexual] practices which would affect the internal discipline of prisons." It also referred to the alleged "bad behavior" of the inmate, who was apparently involved in some incidents relating to the functioning of the human rights committee of the prison.

IV. ANALYSIS

A. Competence

14. The Commission is competent to examine the petition in question. The petitioner has legal standing to appear and has presented claims regarding noncompliance with provisions of the Convention by a State party. When the events alleged in the petition took place, the obligation to respect and guarantee the rights set forth in the Convention was already in force for the Colombian State.^[1] The Commission will now determine the admissibility of this case in the light of the requirements set forth in Articles 46 and 47 of the Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies

15. The Commission finds that the appropriate administrative and judicial actions were taken to correct the alleged violations. Domestic remedies were effectively exhausted with the decision of the Constitutional Court of Colombia not to review the decision on the *tutela*. Therefore, the Commission finds that the admissibility requirement set forth in Article 46(1)(a) has been met.

b. Timeliness

16. The petition was filed on May 18, 1996. Article 46(1)(b) of the American Convention establishes that petitions must be presented within a period of **six months from the date on which the party alleging violation of his rights was notified of the final judgment.**^[2]

17. The final judgment in this case, the decision of the Constitutional Court not to review the *tutela* decision, was rendered on May 22, 1995.

18. The petitioner maintains that she was never notified of the judgment of the Constitutional Court and therefore the six-month period established in Article 46(1)(b) should not be calculated as from May 22, 1995. This allegation has not been disputed by the State. Indeed, as the Commission has confirmed in previous decisions,^[3] the six-month period established in Article 46(1)(b) should be calculated from notification of the final judgment. Given that this judgment was never formally notified, the requirement could not have been satisfied.

19. The Commission also observes that, despite having had several opportunities to do so, the State has never disputed compliance with this requirement, which amounts to a tacit waiver of the right to object to the admissibility of the case on this basis. Consequently, it must be concluded that the time limit stipulated in Article 46(1)(b) does not apply to this case.

c. Duplication of proceedings and *res judicata*

20. The Commission finds that the matter addressed in the petition is not pending settlement before another international organ and is not substantially the same as any matter previously examined by this or any other international organization. Therefore,

the requirements set forth in Articles 46(1)(c) and 47(1)(d) have been met.

d. Colorable claim of violation

21. The Commission finds that, in principle, the claim of the petitioner refers to facts that could involve, *inter alia*, a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with her private life. In the merits phase, the Commission will determine the scope of this concept and the protection to be afforded to persons legally deprived of their liberty.

22. Therefore, given that the claim is not manifestly groundless or out of order, the Commission finds that the requirements provided for in Articles 47(b) and 47(c) of the Convention have been met.

VI. CONCLUSIONS

23. The Commission concludes that it is competent to hear this case and that it is admissible pursuant to Articles 46 and 47 of the Convention.

On the basis of the legal and factual arguments presented above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

1. To declare this case admissible;
2. To send this report to the Colombian State and to the petitioner;
3. To continue analyzing the merits of the case, including the scope and meaning of Article 11(2) of the American Convention;
4. To reiterate its offer to place itself at the disposal of the parties with a view to reaching a friendly settlement based on respect for the rights protected in the American Convention; and to invite them to present their positions on such a possibility; and
5. To publish this decision and include it in the Annual Report to the General Assembly of the OAS.

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* Commissioner Alvaro Tirado Mejía, a Colombian national, did not participate in the discussion and decision of this report as required by Article 19(2)(a) of the Commission's Regulations.

[1] Colombia ratified the American Convention on Human Rights on July 31, 1973.

[2] Emphasis added.

[3] *Report 11/96, Case 11,230, Chile, IACHR Annual Report 1996, paras. 34 and 35.*

2

1 of 1 DOCUMENT

Salgueiro da Silva Mouta v Portugal

EUROPEAN COURT OF HUMAN RIGHTS (FOURTH SECTION)

[2001] 1 FCR 653

28 September, 9, 21 December 1999

21 December 1999

PANEL: PELLONAPAA (P), REES, PASTOR RIDRUEJO, CAFLISCH, MAKARCZYK, CABRAL BARRETO, VAJIAE JJ AND BERGER (REGISTRAR)

CATCHWORDS:

Human rights -- Right to respect for family life -- Discrimination -- Residence -Homosexual father applying for residence of child of former marriage -- Lisbon Court of Appeal finding that homosexuality was an abnormality and awarding residence to mother -- Whether father discriminated against by court -- European Convention on Human Rights, arts 8 and 14.

HEADNOTE:

The applicant father and the mother were married in 1983 and on 2 November 1987 they had a daughter M. They separated in 1990 and since that time the father had lived with another man. In 1991 the parents signed a parental responsibility agreement whereby the mother was to have parental responsibility and the father a right to contact. The mother failed to comply with the agreement and the father was denied contact. In March 1992 the father applied for parental responsibility on the basis that the mother had failed to comply with the agreement and alleged that the child resided with the maternal grandparents who were Jehovah's Witnesses. In response the mother alleged that the father's partner had sexually abused the child. On 14 July 1994, after obtaining court psychologists' reports, the Lisbon Family Affairs Court awarded the father parental responsibility. The court psychologists' reports had recommended that the child not live with the grandmother as her religious fanaticism condemned and excluded the father on the grounds of his sexual preferences and had further dismissed as unfounded the allegation of sexual abuse. The court found that the mother was most uncooperative and that it was improbable that her attitude would change. Pursuant to the court order the child lived with the father until 3 November 1995 at which time the father alleged that she was abducted by the mother. The mother appealed to the Lisbon Court of Appeal and on 9 January 1996 the decision of the lower court was reversed and parental responsibility was awarded to the mother with contact to the father. In reaching its decision, whilst the Court of Appeal stated that as a general rule custody of young children should be awarded to the mother unless there were overriding reasons to the contrary, it found that in any event custody would still have been awarded to the mother as the child should live in a traditional Portuguese family. The Court found that homosexuality was an abnormality and that children should not grow up in the shadow of abnormal situations. The mother never respected the contact ordered and the father lodged enforcement proceedings. On 12 February 1996 he also lodged an application against the Republic of Portugal with the European Commission of Human Rights. In the latter application the father argued that in awarding parental responsibility to the mother based exclusively on his sexual orientation the judgment of the Court of Appeal amounted to an unjustifiable interference with his right to respect for family life under art 8 of the European Convention on Human Rights. He further argued that the wording of the decision of the Court of Appeal clearly showed that the decision had been based mainly on his sexual orientation and that the attitude of the court had been out of touch with the realities of life and had discriminated against him in a manner prohibited by art 14 of the Convention.

Held -- The judgment of the Court of Appeal, in so far as it set aside the judgment of the lower court, constituted an interference with the father's right to respect for family life and attracted the application of art 8 of the Convention. Further, a difference of treatment was discriminatory within the meaning of art 14 if it had no objective and reasonable justification; if it did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between

the means employed and the objective. In the present case the Lisbon Court of Appeal had introduced a new factor when making its decision, namely the father's sexuality. It was clear from the wording of the judgment that the father's homosexuality was a decisive factor in reaching its decision. That conclusion was supported by the fact that the Court of Appeal warned the father not to adopt conduct that would make the child realise the nature of his relationship with his partner. The court had made a distinction based on considerations regarding the father's sexual orientation that was not acceptable under the Convention and which did not reflect proportionality between the means and the objective. Accordingly there had been a violation of art 8 of the Convention taken in conjunction with art 14.

Engel v Netherlands (No 1) (1976) 1 EHRR 647, ECt HR.

Hoffmann v Austria (1994) 17 EHRR 293, ECt HR.

Irlen v Germany (1987) 53 DR 225, E Com HR.

Schmidt v Germany (1994) 18 EHRR 513, ECt HR.

INTRODUCTION:

Complaint

The applicant father complained to the European Court of Human Rights alleging a violation of arts 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the decision of the Lisbon Court of Appeal made 9 January 1996 which reversed the judgment of the lower court and awarded parental responsibility to the mother with contact to the father. The facts are set out in the judgment of the European Court of Human Rights.

21 December 1999. The European Court of Human Rights (fourth section) delivered the following judgment.

OPINION BY: THE COURT

OPINION:

THE COURT: PROCEDURE

1. The case originated in an application (no 33290/96) against the Republic of Portugal lodged with the European Commission of Human Rights (the Commission) under former art 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) by a Portuguese national, Mr Joco Manuel Salgueiro da Silva Mouta (the applicant), on 12 February 1996.

2. On 20 May 1997 the Commission decided to give notice of the application to the Portuguese Government (the Government) and invited them to submit observations in writing on its admissibility and merits. The Government submitted their observations on 15 October 1997 after an extension of the time allowed and the applicant replied on 6 January 1998.

3. Since the entry into force of Protocol No 11 on 1 November 1998 and pursuant to art 5(2) thereof, the application has been examined by the Court.

4. In accordance with r 52(1) of the Rules of Court, the President of the Court, Mr L Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that section included ex officio Mr I Cabral Barreto, the judge elected in respect of Portugal (art 27(2) of the Convention and r 26(1)(a)), and Mr M Pellonpää, the President of the Section (r 26(1)(a)). The other members appointed by the President of the Section to complete the Chamber were Mr G Ress, Mr A Pastor Ridruejo, Mr L Caflisch, Mr J Makarczyk and Mrs N Vajif (r 26(1)(b)).

5. On 1 December 1998 the Chamber declared the application admissible, considering that the complaints lodged by the applicant under arts 8 and 14 of the Convention should be examined on the merits.

6. On 15 June 1999 the Chamber decided to hold a hearing in private on the merits of the case. The hearing took place in the Human Rights Building, Strasbourg, on 28 September 1999.

There appeared before the Chamber: (a) for the Government Mr A Henriques Gaspar, Deputy Attorney General, agent, Mr P Guerra, lecturer, Legal Service Training College, adviser; (b) for the applicant Ms T Coutinho, lawyer, counsel, Mr R Gongalves, trainee lawyer, adviser. The applicant also attended the hearing. The Court heard addresses by Ms Coutinho and Mr Henriques Gaspar, and also their replies to questions put by one of the judges.

7. In accordance with the decision of the President of the Chamber of 28 September 1999, the applicant filed an additional memorial on 8 October 1999 in respect of his claims under art 41 of the Convention. The Government replied on 28 October 1999.

THE FACTS

(I) The circumstances of the case

8. The applicant is a Portuguese national born in 1961. He lives in Queluz (Portugal).

9. In 1983 the applicant married CDS. On 2 November 1987 they had a daughter, M. The applicant separated from his wife in April 1990 and has since then been living with a man, LGC. Following divorce proceedings instituted by CDS, the divorce decree was pronounced on 30 September 1993 by the Lisbon Family Affairs Court (Tribunal de Fammlia).

10. On 7 February 1991, during the divorce proceedings, the applicant signed an agreement with CDS concerning the award of parental responsibility (poder paternal) for M. Under the terms of that agreement CDS was to have parental responsibility and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because CDS did not comply with the agreement.

11. On 16 March 1992 the applicant sought an order giving him parental responsibility for the child. He alleged that CDS was not complying with the terms of the agreement signed on 7 February 1991 since M was living with her maternal grandparents. The applicant submitted that he was better able to look after his child. In her memorial in reply CDS accused LGC of having sexually abused the child.

12. The Lisbon Family Affairs Court delivered its judgment on 14 July 1994 after a period in which the applicant, M, CDS, LGC and the child's maternal grandparents had been interviewed by psychologists attached to the court. The court awarded the applicant parental responsibility, dismissing as unfounded -- in the light of the court psychologists' reports -- CDS's allegations that LGC had asked M to masturbate him. It also found, again in the light of the court psychologists' reports, that statements made by M to that effect appeared to have been prompted by others. The court added:

The mother continues to be most uncooperative and it is wholly improbable that her attitude will change. She has repeatedly failed to comply with the Court's decisions. The finding is inescapable that the mother has not shown herself capable at present of providing M with conditions conducive to the balanced and calm life she needs. The father is at present better able to do so. In addition to providing the economic and living conditions necessary to have the child with him, he has shown himself capable of providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents.'

13. M stayed with the applicant from 18 April to 3 November 1995, when she was allegedly abducted by CDS. The applicant reported the abduction and criminal proceedings are pending in that connection.

14. CDS appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal (Tribunal de Relagco), which gave judgment on 9 January 1996, reversing the lower court's judgment and awarding parental responsibility to CDS, with contact to the applicant. The judgment was worded as follows.

In the proceedings for the award of parental responsibility for the child M, born on 2 November 1987, daughter of the [applicant] and CDS, the decision given on 7 February 1991 confirmed the agreement between the parents as to parental responsibility for the child, contact and the amount of maintenance payable by the father, since custody of M was awarded to the mother. On 16 March 1992 the [applicant] applied for a variation of the order granting parental responsibility, alleging that the child was not living with her mother in accordance with what had been decided, but with her maternal grandparents, which -- he argued -- was unsatisfactory. It was for that reason that the custody arrangements should be varied so as to allow him to have his daughter and apply to the mother the contact and maintenance arrangements which had hitherto been applied to him. The child's mother not only opposed the application lodged by the applicant, but also relied on evidence supporting her contention that the child should not remain in the company of her father because he was a homosexual and was cohabiting with another man. After a number of steps had been taken in connection with those proceedings, the following decision was given on 14 July 1994. (1) Custody and care of the child is awarded to the father, in whom parental responsibility shall be vested. (2) The child may see her mother on alternate weekends, from Friday to Monday. Her mother shall collect her from school on the Friday and bring her back to school on Monday morning before lessons start. (3) The child may also see her mother every Tuesday and Wednesday; her

mother shall fetch her from school after lessons and bring her back the following morning. (4) The child shall spend Christmas Eve and Christmas Day alternately with her father and her mother. (5) The child shall spend the Easter holidays with her mother. (6) During the school summer holidays the child shall spend 30 days with her mother. The dates must be agreed on with the father at least 60 days beforehand. (7) The mother shall pay the father maintenance of 30,000 escudos per month, payable before the eighth of every month. Those maintenance payments shall be adjusted once annually on the basis of the inflation index for the previous year published by the INE (National Institute of Statistics).--That decision specifically governed arrangements applicable to the year 1994. CDS, who was dissatisfied with the decision, appealed. She had previously appealed against the decision appearing on p 238, which dismissed an application for a stay of the proceedings, and the decision given at the hearing of 29 April 1994 on the application for an examination of the document appearing on p 233; both those appeals were adjourned and did not have the effect of staying the proceedings.

The appellant sets out the following grounds in her appeal :

In his pleadings the [applicant] submitted that the judgment of the first-instance court should be upheld. State counsel attached to the Court of Appeal has recommended that the decision be set aside, but not on the grounds relied on by the appellant. After examining the case, we shall give our decision. We shall first examine the following facts, which the first-instance court considered to be established.

1. The child, M, who was born on 2 November 1987, is the daughter of the [applicant] and CDS.
2. Her parents married on 2 April 1983.
3. Divorce was granted on 30 September 1993 and their marriage dissolved.
4. The parents have been living separately since April 1990, when the [applicant] left his home to go and live with another man, whose first name is L.
5. On 7 March 1991 the Loures Court gave a decision in case no 1101/90 confirming the following agreement on the exercise of parental responsibility for the child:
 - I. the mother shall have custody of the child;
 - II. the father may visit his daughter whenever he likes provided that he does not disrupt her schooling;
 - III. the child shall spend alternate weekends and Christmas and Easter with her father;
 - IV. the child shall spend the father's holidays with him unless those holidays coincide with those of the mother, in which case the child shall spend 15 days with each parent;
 - V. on the weekends which the child spends with her father, he shall collect her from her mother's house on Saturday at about 10 am and bring her back on Sunday at about 8 pm;
 - VI. the child shall go to a kindergarten as soon as possible, the enrolment fees to be paid by the father;
 - VII. the father shall pay maintenance of 10,000 escudos per month, which shall be adjusted once annually by the same percentage as the net increase in his salary. That sum shall be paid into the account of the child's mother -- account no : before the fifth day of the following month;
 - VIII. the father shall also pay half his daughter's kindergarten fees;
 - IX. the father shall pay half of any special expenses for his child's health.
6. From April 1992 the child stopped seeing her father on the agreed terms, against his wishes.
7. Until January 1994 the child lived with her maternal grandparents [name] at Camarate [address].
8. From that date the child went to live with her mother and her mother's boyfriend [address] in Lisbon.
9. She continued, however, to stay overnight at her maternal grandparents' house from time to time.
10. On schooldays when the child had not stayed overnight with her grandparents, her mother used to drive her to her grandparents' house where she used to stay after school from 5 pm.
11. During that school year M was in the first year primary at . . . school, for which the fees came to 45,400 escudos per month.

12. Her mother has been cohabiting with J for at least two years.
13. J, who is a business manager, works in the imports and exports sector, the major part of his activity being in Germany where he has immigrant status. His income amounts to some 600,000 escudos per month.
14. The mother, CDS, is the manager of DNS, the partners of which are her boyfriend and his brother, JP.
15. She has been registered with the state agency for employment and vocational training since 17 February 1994.
16. Her expenses are paid for jointly by herself and her boyfriend.
17. She states that she pays 120,000 escudos in rent and spends approximately 100,000 escudos per month on food.
18. The father, Joco Mouta, is in a homosexual relationship with LGC, with whom he has been living since April 1990.
19. He is the head of his sector at A, and his net monthly income, plus commission, comes to just over 200,000 escudos.
20. The child is very close to her maternal grandmother, who is a Jehovah's Witness.
21. Following her failure to comply with the decision referred to in para 5, the child's mother was ordered, on 14 May 1993, to pay a fine of 30,000 escudos because since April 1992 she had been refusing to allow the father to exercise his "right to contact with his daughter in accordance with the decision given".
22. On 25 June 1994, after interviewing the father and mother both individually and together, and M without her parents or her maternal grandmother being present, and the maternal grandmother and the father's partner individually, and performing a psychological examination of M, the Court psychologists drew up the following report: "M is a communicative child of normal intellectual development for her age and above average intelligence. She is very attached to her father and mother, and the conflict between her parents is a source of some insecurity. She would like her parents to live closer together because she finds it difficult to understand why she has to live with her grandparents and not see her father or to accept this. She has a very good relationship with her father, who is very affectionate and attentive towards his daughter. Both the [applicant] and his ex-wife are affectionate and flexible parents and both invest in their daughter's upbringing and emotional security. The reasons for their separation were subsequently a source of substantial conflict between them, exacerbated by M's maternal grandmother who does not accept the [applicant's] lifestyle and unconsciously tries to keep him away from his daughter. To sum up, both parents are capable of overseeing their daughter's satisfactory psychoaffective development, but we do not feel that it is right for her to live with her grandmother, who exacerbates the conflict between the two parties and fuels it by trying to keep the [applicant] away because she does not accept his lifestyle."
23. On 16 August 1993 M told the psychologist and her father that the latter's partner had asked her, while her father was out, to go into the bathroom with him, that he had locked the door and asked her to masturbate him (she made gestures imitative of masturbation) and then told her that she did not need to wash her hands and that she should not say anything to her father. The psychologist stated that the manner in which the child had related that episode had made her doubt the truthfulness of the story, which might have been suggested by repeated promptings. She added that while the daughter was describing the episode, the applicant had been understanding and asked for clarification, which confirmed that the father and daughter had a good relationship.
24. During the interview with the psychologist on 6 December 1993 the child stated that she was still living with her maternal grandmother and that from time to time she stayed with her mother where she would sleep on a sofa in the living room because there was no bedroom for her.
25. In a report dated 17 January 1994, drawn up following a meeting between the daughter and her father, the psychologist concluded that "although M had observed during her meetings with her father that he was living with another man, her parental images had been fully assimilated and she presented no problem relating to psychosexual identity, be it her own or that of her parents".
26. Dr V, a psychiatrist, stated, after interviewing the boyfriend of the [applicant], the child's father, that in his opinion the partner was well adjusted and of satisfactory emotional and cognitive development. He found nothing abnormal about the boyfriend either as an individual or in terms of his relationship with the child's father. He considered it wholly improbable that the episode related by the child, as described in para 23, had really occurred.

27. The final report drawn up by the Court psychologists, dated 12 April 1994, indicated that M was suffering from a degree of insecurity due in part to the conflict between her mother's side of the family and her father, and that she had a defensive attitude which manifested itself in a refusal to confront potentially stressful situations. The child is aware that her family opposes her meetings with her father, their opposition being justified by the child's description of an episode which had allegedly occurred between her and her father's boyfriend, LGC, in which LGC had asked her to masturbate him. With regard to that account, it is difficult to imagine how a six-year-old child could relate in detail an episode which had occurred several years earlier. The experts conclude in their report that the fact that M had described in detail the above-mentioned masturbation episode did not mean that it had actually occurred. They reiterate that the father is a very affectionate father, full of understanding and kindness towards his daughter, while also imposing on her, satisfactorily and instructively, limits which were necessary and made her feel secure.

The experts also reiterate that the child's mother is a very affectionate mother, but rather permissive, which is not conducive to a feeling of security, although she is capable of improving. They also conclude that it is not advisable for the child to live with her grandmother because the religious fanaticism present in her environment not only condemns the father, but excludes him on grounds of the individual and emotional choices he has made. This has contributed to sowing confusion in the child's mind and exacerbating her sense of conflict and anxiety, thus compromising her healthy psychoaffective development.

28. At the hearing on 24 January 1994 the following interim decision was given with the agreement of both parents: I -- M could spend every Saturday from 10 am to 10 pm with her father, II -- to that end, her father would fetch her from her mother's house accompanied by her paternal grandmother and/or her paternal great-grandmother.

29. The mother did not allow her daughter to see her father on the terms fixed by the above-mentioned decision.

30. On 22 April 1994 the Child Psychiatry department of D Estefbnea Hospital decided that M should be monitored because her feelings of anxiety were such as might inhibit her psychoaffective development.

Those facts, found at first instance, are considered to have been definitively established, without prejudice to the possibility of considering a further factor in delivering this judgment. With regard to the other appeals, since the mother has not submitted any pleadings they are considered to be inoperative under arts 292 (1) and 690(2) of the Code of Civil Procedure. Apart from the fact that factual evidence has not been submitted, these aspects appear to us to be sufficient to give a ruling here as we understand that the lower Court ruled on the essential issue of the case, that is to which of the two parents custody of the child should be awarded. The shortcomings in the decision referred to by state counsel, although relevant, do not warrant setting it aside.

Let us now examine the appeal:

Article 1905(1) of the Civil Code provides that in cases of divorce, judicial separation of persons and possessions, declarations of nullity or annulment of marriage, child custody, maintenance and the conditions of payment are governed by agreement between the parents, that agreement being subject to confirmation by the Court; confirmation is refused if the agreement is contrary to the child's interests, including the child's interest in maintaining a very close relationship with the non-custodial parent. Paragraph 2 adds that, in the absence of an agreement, the Court shall decide, while protecting the child's interests, including his or her interest in maintaining a very close relationship with the non-custodial parent, it being possible to award custody of the child to one or other parent or, if one of the cases provided for in art 1918 applies, to a third party or to an educational or welfare establishment.

The Guardianship Act also deals with this point. Section 180(1) of that Act provides that any award of parental responsibility must be in the child's interests.

A judgment of the Lisbon Court of Appeal of 24 April 1974, summarised in BMJ (Bulletin of the Ministry of Justice) no 236, p 189, states: "The Convention on the Rights of the Child -- Resolution of 20 November 1989 of the General Assembly of the United Nations -- proclaims with rare concision that children, for the full and harmonious development of their personality, require love and understanding; they should, as far as possible, grow up under the protection and responsibility of their parents and, in any event, in a climate of affection and psychological and material security, with young children not being separated from their mother save in exceptional cases."

We do not have the slightest hesitation in supporting that declaration, which fully corresponds to the realities of life. Despite the importance of paternal love, a young child needs the care which only the mother's love can provide. We think that M, who is now aged eight, still needs her mother's care. See on this point the judgment of the Porto Court of Appeal of 7 June 1988, in BMJ no 378, p 790, in which that Court held that "in the case of young children, that is

until seven or eight years of age, the emotional tie to the mother is an essential factor in the child's psychological and emotional development, given that the special needs of tenderness and attentive care at this age can rarely be replaced by the father's affection and interest".

The relationship between M and her parents is a decisive factor in her emotional well-being and the development of her personality, particularly as it has been demonstrated that she is deeply attached to her parents, as it has also been shown that both of them are capable of guiding the child's psychoaffective development.

In the official record of the decision of 5 July 1990 awarding parental responsibility, the [applicant] acknowledged that the appellant was capable of looking after their daughter and suggested that custody be awarded to the mother, a statement he repeated in the present proceedings to vary that order, as recorded in the transcript of the hearing of 15 June 1992, declaring that he wished to waive his initial application for custody of the child because she was living with her mother again. M's father expresses the wish that his daughter not stay with her maternal grandparents, referring to the numerous difficulties he encounters when trying to see his daughter, given the conduct of the appellant and her mother who do all they can to keep him away from his daughter because they do not accept his homosexuality.

Section 182 of the Guardianship Act provides that previous arrangements can be varied if the agreement or final decision is not complied with by both parents or if subsequent circumstances make it necessary [to vary] the terms. Consideration needs to be given, however, to whether there is a justified ground for varying the decision awarding custody of the child to her mother.

On examining the content of the initial application for a variation of the order it can be seen that emphasis is placed on the fact that the child was living with her maternal grandparents who are Jehovah's Witnesses. The truth of the matter, however, is that the [applicant] has not produced any evidence to prove that this religion is harmful and has merely stressed the grandparents' stubborn refusal to allow the father and daughter to see each other. To the Court's knowledge, the beliefs of Jehovah's Witnesses do not incite to evil practices, although fanaticism does exist.

Are there adequate reasons for withdrawing from the mother the parental responsibility which was granted her with the parents' agreement?

There is ample evidence in this case that the appellant habitually breaches the agreements entered into by her with regard to the father's right to contact and that she shows no respect for the Courts trying the case, since on several occasions, and without any justification, she has failed to attend interviews to which she has been summoned in the proceedings. We think, however, that her conduct is due not only to the [applicant]'s lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner.

On this point, which is particularly important, we agree that it is not possible to accept as proven that such an episode really occurred. However, we cannot rule out the possibility that it did occur. It would be going too far -- since there is no conclusive evidence -- to assert that the boyfriend of M's father would never be capable of the slightest indecency towards M. Thus, although it cannot be asserted that the child told the truth or that she was not manipulated, neither can it be concluded that she was telling an untruth. Since there is evidence to support both scenarios, it would be wrong to give greater credence to one than the other.

In the same way, the accepted principle in cases involving awards of parental responsibility is that the child's interests are paramount, completely irrespective of the -- sometimes selfish -- interests of the parents. In order to establish what is in the child's interests, a Court must in every case take account of the dominant family, educational and social values of the society in which the child is growing up.

As we have already stated and as established case law authority provides, having regard to the nature of things and the realities of daily life, and for reasons relating to human nature, custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see the Evora Court of Appeal's judgment of 12 July 1979, in BMJ no 292, p 450).

In the instant case parental responsibility was withdrawn from the mother despite the fact that it had been awarded her, we repeat, following an agreement between the parents, and without sufficient evidence being produced to cast doubt on her ability to continue exercising that authority. The question which therefore arises, and this should be stressed, is not really which of the two parents should be awarded custody of M, but rather whether there are reasons for varying what was agreed.

Even if that were not the case, however, we think that custody of the child should be awarded to the mother.

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The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is the [applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

No doubt is being cast on the father's love for his daughter or on his ability to look after her during the periods for which she is entrusted to his care, for it is essential that they do see each other if the objectives set out above are to be met, that is ensuring the child's well-being and the development of her personality. M needs to visit her father if her feelings of anxiety and insecurity are to be dissipated. When children are deprived of contact with their father, their present and future development and psychological equilibrium are put at risk. The mother would be wise to try to understand and accept this if she is not to cast doubt on her own ability to exercise parental responsibility.

At present, the failure to comply with the decision confirming the contact arrangements does not amount to a sufficient reason for withdrawing from the appellant the parental responsibility awarded to her by that decision.

Accordingly, we reverse the judgment of the lower Court as regards the child's permanent residence with her father, without prejudice to the father's right to contact during the periods which will be stipulated below.

It should be impressed upon the father that during these periods he would be ill advised to act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife.

For all the foregoing reasons the Court of Appeal reverses the impugned decision and rules that the appellant, CDS, shall continue to exercise parental responsibility for her daughter, M.

The contact arrangements shall be established as follows:

1. The child may see her father on alternate weekends from Friday to Monday. To that end the father shall fetch his daughter from school at the end of classes on Friday and bring her back on Monday morning before classes start;
2. The father may visit his daughter at school on any other day of the week provided that he does not disrupt her schooling;
3. The child shall spend the Easter holidays alternately with her father and her mother;
4. The Christmas holidays shall be divided into two equal parts: half to be spent with the father and the other half with the mother, but in such a way that the child can spend Christmas Eve and Christmas Day with one and New Year with the other alternately.
5. During the summer holidays the child shall spend 30 days with her father during the latter's holidays, but if that period coincides with the mother's holidays the child shall spend 15 days with each of them;
6. During the Easter, Christmas and summer holidays the father shall fetch the child from the mother's house and bring her back between 10 am and 1 pm unless the parents agree on different times;
7. In accordance with the date of this decision, the child shall spend the next Easter and Christmas holidays with the parent with whom she did not spend those holidays in 1995;
8. The matter of maintenance payable by the father and the manner of payment shall be examined by the third section of the third chamber of the Lisbon Family Affairs Court in case no 3821/A, which has been adjourned pending the present decision regarding the child's future. Costs are awarded against the respondent.'

15. One of the three Court of Appeal judges gave the following separate opinion:

I voted in favour of this decision, with the reservation that I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which -- accordingly --

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cannot, as such, in any circumstances be described as abnormal. The right to be different should not be treated as a "right" to be ghettoised. It is not therefore a matter of belittling the fact that the [applicant] has come to terms with his sexuality and consequently of denying him his right to bring up his daughter, but rather, since a decision has to be given, of affirming that it cannot be declared in our society and in our era that children can come to terms with their father's homosexuality without running the risk of losing their reference models.'

16. No appeal was lodged against that decision.

17. The right to contact granted to the applicant by the judgment of the Lisbon Court of Appeal was never respected by CDS.

18. The applicant therefore lodged an application with the Lisbon Family Affairs Court for enforcement of the Court of Appeal's decision. On 22 May 1998, in connection with those proceedings, the applicant received a copy of a report drawn up by the medical experts attached to the Lisbon Family Affairs Court. He learnt from this that M was in Vila Nova de Gaia in the north of Portugal. The applicant made two unsuccessful attempts to see his daughter. The enforcement proceedings are apparently still pending.

(II) Relevant domestic law

19. Article 1905 of the Civil Code provides:

'1. In the event of divorce : child custody, maintenance and the terms of payment shall be determined by agreement between the parents, which is subject to confirmation by the : Court :

2. In the absence of an agreement, the Court shall decide on the basis of the interests of the child, including the child's interest in maintaining a very close relationship with the non-custodial parent :'

20. Certain provisions of the Guardianship Act are also relevant to the instant case.

'Section 180

1. . . . a decision as to the exercise of parental responsibility shall be made on the basis of the interests of the child, custody of whom may be awarded to one of the parents, a third party or an educational or welfare establishment.

2. Contact arrangements shall be made unless, exceptionally, this would not be in the child's interests :

Section 181

If one of the parents does not comply with the agreement or decision reached in respect of the child's situation, the other parent may apply to the court for enforcement :

Section 182

If the agreement or final decision is not complied with by both the father and the mother or if fresh circumstances make it necessary to vary the terms, one of the parents or the guardian may apply to the : court for variation of the award of parental responsibility :'

THE LAW

(I) Alleged violation of art 8 of the Convention, taken alone and in conjunction with art 14

21. The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M, to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of art 8 of the Convention, taken alone and in conjunction with art 14 of the Convention.

The Government disputed that allegation.

22. Under art 8 of the Convention:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of art 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see *Hoffmann v Austria* (1994) 17 EHRR 293 at 299 (para 29); see also *Irlen v Germany* (1987) 53 DR 225).

That finding is not affected by the Government's submission that since the judgment of the Court of Appeal did not ultimately vary what had been decided by friendly settlement between the parents on 7 February 1991, there was no interference with the rights of Mr Salgueiro da Silva Mouta.

The Court observes in that connection that the application lodged – successfully – by the applicant with the Lisbon Family Affairs Court was based on, among other things, the fact that his ex-wife had failed to comply with the terms of that agreement (see para 11 above).

(A) Alleged violation of art 8 taken in conjunction with art 14

23. Given the nature of the case and the allegations of the applicant, the Court considers it appropriate to examine it first under art 8 taken in conjunction with art 14, according to which

'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

24. Mr Salgueiro da Silva Mouta stressed at the outset that he had never disputed the fact that his daughter's interests were paramount, one of the main ones consisting in seeing her father and being able to live with him. He argued, none the less, that the Court of Appeal's judgment, in awarding parental responsibility to the mother exclusively on the basis of the father's sexual orientation, amounted to an unjustifiable interference with his right to respect for his family life. The applicant submitted that the decision in issue had been prompted by atavistic misconceptions which bore no relation to the realities of life or common sense. In doing so, he argued, the Court of Appeal had discriminated against him in a manner prohibited by art 14 of the Convention.

The applicant pointed out that judgment had been given in his favour by the Court of first instance, that Court being the only one to have had direct knowledge of the facts of the case since the Court of Appeal had ruled solely on the basis of the written proceedings.

25. The Government acknowledged that art 8 could apply to the situation in question, but only as far as the applicant's right to respect for his family life with his child was concerned. They stressed, however, that no act had been done by a public authority which could have interfered with the applicant's right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.

With regard to family life, however, the Government pointed out that, as far as parental responsibility was concerned, the contracting states enjoyed a wide margin of appreciation in respect of the pursuit of the legitimate aims set out in para 2 of art 8 of the Convention. They added that in this field, in which the child's interests were paramount, the national authorities were naturally better placed than the international Court. The Court should not therefore substitute its own interpretation of things for that of the national courts, unless the measures in question were manifestly unreasonable or arbitrary.

In the instant case the Lisbon Court of Appeal had taken account, in accordance with Portuguese law, of the child's interests alone. The intervention of the Court of Appeal had been prescribed by law (art 1905(2) of the Civil Code and ss 178 to 180 of the Guardianship Act). Moreover, it had pursued a legitimate aim, namely the protection of the child's interests, and was necessary in a democratic society.

The Government concluded that the Court of Appeal, in reaching its decision, had had regard exclusively to the overriding interests of the child and not to the applicant's sexual orientation. The applicant had not therefore been discriminated against in any way.

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, art 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see *Hoffmann v Austria* (1994) 17 EHRR 293 at 314 (para 31)).

It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

(1) Existence of a difference in treatment

27. The Government disputed the allegation that in the instant case the applicant and M.'s mother had been treated differently. They argued that the Lisbon Court of Appeal's decision had been mainly based on the fact that, in the circumstances of the case, the child's interests would be better served by awarding parental responsibility to the mother.

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.

The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M's mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by art 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French 'notamment') (see the case of *Engel v Netherlands* (No 1) (1976) 1 EHRR 647 at 674 (para 72)).

(2) Justification for the difference in treatment

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of art 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Schmidt v Germany* (1994) 18 EHRR 513 at 527 (para 24)).

30. The decision of the Court of Appeal undeniably pursued a legitimate aim, namely the protection of the health and rights of the child; it must now be examined whether the second requirement was also satisfied.

31. In the applicant's submission, the wording of the judgment clearly showed that the decision to award parental responsibility to the mother was based mainly on the father's sexual orientation, which inevitably gave rise to discrimination against him in relation to the other parent.

32. The Government submitted that the decision in question had, on the contrary, merely touched on the applicant's homosexuality. The considerations of the Court of Appeal to which the applicant referred, when viewed in context, were merely sociological, or even statistical, observations. Even if certain passages of the judgment could arguably have been worded differently, clumsy or unfortunate expressions could not in themselves amount to a violation of the Convention.

33. The Court reiterates its earlier finding that the Lisbon Court of Appeal, in examining the appeal lodged by M's mother, introduced a new factor when making its decision as to the award of parental responsibility, namely the applicant's homosexuality (see para 28 above). In determining whether the decision which was ultimately made constituted discriminatory treatment lacking any reasonable basis, it needs to be established whether, as the Government submitted, that new factor was merely an obiter dictum which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive.

34. The Court notes that the Lisbon Family Affairs Court gave its decision after a period in which the applicant, his ex-wife, their daughter M, LGC and the child's maternal grandparents had been interviewed by court psychologists. The court had established the facts and had had particular regard to the experts' reports in reaching its decision.

The Court of Appeal, ruling solely on the basis of the written proceedings, weighed the facts differently from the lower court and awarded parental responsibility to the mother. It considered, among other things, that 'custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this' (see para 14 above). The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.

However, after that observation the Court of Appeal added 'Even if that were not the case : we think that custody of the child should be awarded to the mother'. The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that 'The child should live in : a traditional Portuguese fam-

ily' and that 'it is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations'.

35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere obiter dicta, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man 'in conditions resembling those of man and wife'.

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, *Hoffmann v Austria* (1994) 17 EHRR 293 at 316 (para 36)).

The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of art 8 taken in conjunction with art 14.

(B) Alleged violation of art 8 taken alone

37. In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of art 8 taken alone; the arguments advanced in this respect are essentially the same as those examined in respect of art 8 taken in conjunction with art 14.

(II) Application of art 41 of the Convention

38. Article 41 of the Convention provides:

'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

(A) Damage

39. The applicant requested the Court to award him 'just satisfaction' without, however, quantifying his claim. In the circumstances the Court considers that the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction in respect of the damage alleged.

(B) Costs and expenses

40. The applicant requested reimbursement of the costs incurred in lodging his application, including those of himself and his advisers attending the hearing before the Court, namely 224,919 Portuguese escudos (PTE), 5,829 French francs, 11,060 Spanish pesetas and 67 German marks, that is a total sum of PTE 423,217.

He also requested reimbursement of the fees billed by his lawyer and by the adviser who had assisted her in preparing for the hearing before the Court, that is PTE 2,340,000 and PTE 340,000 respectively.

41. The Government left the matter to the Court's discretion.

42. The Court is not satisfied that all the costs claimed were necessary and reasonable. Making an equitable assessment, it awards the applicant an aggregate sum of PTE 350,000 under that head.

As regards fees, the Court considers that the sums claimed are also excessive. Making an equitable assessment and having regard to the circumstances of the case, it decides to award PTE 1,500,000 for the work done by the applicant's lawyer and PTE 300,000 for that done by her adviser.

(C) Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of art 8 taken in conjunction with art 14 of the Convention;
2. Holds that there is no need to rule on the complaints lodged under art 8 of the Convention taken alone;

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3. Holds that the present judgment constitutes in itself sufficient just satisfaction for the damage alleged;

4. Holds (a) that the respondent state is to pay the applicant, within three months from the date on which the judgment becomes final according to art 44(2) of the Convention, the following amounts: (i) 350,000 (three hundred and fifty thousand) Portuguese escudos in respect of costs; (ii) 1,800,000 (one million eight hundred thousand) Portuguese escudos in respect of fees; (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

5. Dismisses the remainder of the claim for just satisfaction.

DECISION-1:

Order accordingly. WordStar 4.0B Messages 14 Feb 87 Copyright (C) 1983, 1987 MicroPro International Corp. All

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11 de Septiembre de 2003

DERECHO DE FAMILIA. Tenencia de hijos menores. Principio del interés superior del menor. Valoración del Juzgador.

Condición de homosexual de uno de los padres.

Juzgado de Menores de 4ª Nominación de Córdoba, A.I. 473 del 6/08/2003

JURISPRUDENCIA DE CORDOBA

REGLA DEL CASO

A los fines de decidir el otorgamiento de la tenencia de los hijos menores de un matrimonio disruptivo, sólo puede juzgarse el modo de vida, las orientaciones sexuales y las convicciones políticas o ideológicas de los progenitores en la medida que incidan negativamente en el desenvolvimiento del niño. La preocupación del juzgador debe ser averiguar si los padres reúnen las condiciones necesarias para desempeñar y cumplir el rol parental adecuadamente y tratar de desentrañar qué es lo mejor para el menor, más allá de la orientación sexual que los mismos tengan.

DATOS

Juzgado de Menores de 4ª Nominación de Córdoba, A.I. 473 del 6/08/2003.

SUMARIOS

DERECHO DE FAMILIA. TENENCIA DE HIJOS MENORES. PRINCIPIO DEL INTERÉS SUPERIOR DEL MENOR. VALORACIÓN DEL JUZGADOR. CONDICIÓN DE HOMOSEXUAL DE UNO DE LOS PADRES.

1. En los casos de familias disruptivas, una de las cuestiones más importantes a dilucidar es el régimen de convivencia al que quedarán sujetos los hijos menores, es decir cuál de los progenitores ejercerá su guarda sin perjuicio de las responsabilidades parentales que le corresponderán al otro progenitor. En estos supuestos los acuerdos de partes son por excelencia la mejor solución para el hijo, ya que en ellos confluyen la armónica decisión de quienes son los responsables por antonomasia de su orientación y dirección en el proceso hacia la "humanización del niño", es decir en el proceso de socialización primaria, por el cual se hará efectiva su naturaleza humana.

2. Cuando el acuerdo no es posible, es el juez el llamado a decidir, debiendo conformar su resolución a la pauta de idoneidad prevista en el art. 206 del C.C. y la directriz rectora ineludible del "interés superior del niño" contenida en el art. 3 de la Convención sobre los

Derechos del Niño.

3. La idoneidad está relacionada con la elección de aquél de los progenitores que sea más apto y esté en mejores condiciones naturales para satisfacer los requerimientos que apunten a garantizar el pleno e integral desarrollo del hijo, a través del cumplimiento acabado de las funciones nutritivas cubriendo las necesidades de amor, protección, abrigo, alimento; y las normativas que establecen el sistema de reglas, pautas y normas que permiten la adaptación del hijo a la realidad y su paulatina incorporación como miembro activo de la sociedad.

4. Estas funciones que en la crianza del niño se encuentran íntimamente ligadas y entrelazadas, son el contenido esencial del instituto de la patria potestad, y determinan su objetivo y finalidad que es "...la protección y formación integral" de la prole. Asimismo la idoneidad está íntimamente relacionada con la mayor disposición y posibilidad que tenga el progenitor para garantizar y concretar todos aquellos derechos que, en el marco de la Convención sobre los derechos del Niño le corresponden a la infancia, entendida ésta como el proceso socializador y educativo por el cual cada ser humano adquiere su autonomía personal.

5. No puede dejar de señalarse la intolerancia y hostilidad que subyace en la sociedad frente a la elección en la orientación sexual de las personas distinta a la esperada, y que cuando se habla de homosexualidad no se señala una conducta o comportamiento humano, sino que la misma categorización pretende, peligrosamente, hacer de ello un "diagnóstico"; trasladando, equivocadamente, el eje de la discusión, al hecho de si ser homosexual es bueno o malo, si es beneficioso o perjudicial, cuando en realidad la preocupación del juzgador debe ser, cualquiera sea la orientación sexual de los progenitores, averiguar si éstos reúnen las condiciones necesarias para desempeñar y cumplir el rol parental adecuadamente y tratar de desentrañar que es lo mejor para el hijo.

6. Sólo puede juzgarse el modo de vida y las convicciones religiosas, políticas o ideológicas de los progenitores en la medida que incidan negativamente en el desenvolvimiento del niño.

7. Aún en aquellos autores que consideran que la inclinación sexual ostensible de uno de los progenitores, debe ser necesariamente uno de los elementos a valorar para otorgar la guarda de los hijos, sin embargo atemperan esta postura haciendo jugar otras pautas tan importantes y decisivas a la hora de resolver como las circunstancias particulares del caso, entre las que se incluyen la mayor o menor aptitud del otro progenitor, la eventual preferencia legal materna en razón de la edad del vástago, y sobre todo, el fundamental principio de estabilidad.

8. Por ello el análisis no puede ni debe centrarse, en el comportamiento sexual "no convencional" del progenitor, ya que éste en manera alguna constituye per se un factor que marque la falta de idoneidad en la función parental; lo importante y trascendente cuando de guarda de hijos se trata es la investigación si este progenitor o aquel progenitor, más allá de su condición sexual, es o puede ser un buen padre, lo contrario implicaría establecer meras especulaciones sin basamento, que se convertirían en una fuente de discriminación inaceptable en la actualidad.

9. Las consecuencias psíquicas de ser hijo de un padre homosexual en la actualidad son, al menos, desconocidas, manejándose más conjeturas que verdades en dicho tema; sin embargo no cabe la menor duda que la tendencia generalizada en la sociedad, y en especial demostrada en estos autos por la progenitora, de ocultar, disfrazar la realidad, omitiendo en su demanda nombrar la homosexualidad paterna, tratándola de "peligro moral" para los menores, entraña una conducta descalificadora ab initio y sin fundamento, que sólo puede influir negativamente en sus hijos, quienes requieren para crecer un discurso claro y despejado de todo fundamentalismo, que les permita insertarse en una sociedad pluralista, inclusiva, comprensiva y sin discriminaciones.

10. Las pruebas aportadas en autos y ya analizadas, demuestran a las claras que la guarda ejercida por el progenitor durante más de cinco años, ha sido beneficiosa para ellos, no encontrándose indicio alguno que la conducta sexual del progenitor haya sido contraproducente o ponga en riesgo el pleno desarrollo de la prole, ni tampoco existe indicación alguna en los dictámenes obrantes en autos que en el futuro la continuación de esta situación puede ser perjudicial para ellos.

11. Tampoco puede constituir un presupuesto nuevo a tener en cuenta para variar la tenencia, toda vez que la homosexualidad del progenitor, conforme ha reconocido la madre, era ampliamente conocida por ésta a la fecha de entrega de la tenencia de los menores, considerando en dicha oportunidad que "ningún riesgo" corrían con el padre.

12. Ya que los niños no son objetos de reparto ni susceptibles de adquisición, sino que debió demostrar de manera indubitable, además de su mayor idoneidad, que el cambio de guarda implicaba un beneficio real y concreto para los menores, lo que en autos no ocurrió. En el caso particular, entonces, cobra vigencia y actualidad la pauta de estabilidad o respeto del statu quo, aceptada en forma unánime y pacífica por la doctrina y jurisprudencia, que consiste en no innovar situaciones de hecho consolidadas, cuando no existan razones que aconsejen o justifiquen el quiebre en la continuidad afectiva, espacial, social y educativa del niño, evitando así el replanteo de conflictos de adaptación y adecuación a un nuevo medio, con las consecuencias de angustia y desorientación que esto acarrea.

TEXTO COMPLETO

AUTO NUMERO: Cuatrocientos setenta y tres.-
Córdoba, seis de Agosto de dos mil tres.- Y VISTOS: Estos autos caratulados "L.S.F Y A.C.P DIVORCIO VINCULAR", de los que resulta que a fs. 67 y 70 la Sra. A.C.P solicita la tenencia de sus hijos A. y J. L., atento a que tiene graves inconvenientes (de índole moral con el padre de sus hijos S.F. L.. Manifiesta que contrajo matrimonio con el Sr. L. con fecha 21 de agosto de 1992, naciendo sus dos hijos quienes cuentan en la actualidad con 8 y 6 años de edad. Señala que la tenencia de los mismos fue acordada a su favor por Sentencia N° ... de fecha, dictada por la Excma. Cámara de Familia de ° Nominación. Expresa que debido a su precario estado de salud y de común acuerdo, los niños quedaron bajo la tenencia del padre, lo que fue homologado por este Tribunal mediante Auto N° ... de fecha Asimismo, manifiesta que a comienzos del año 2001 solicitó la tenencia de sus hijos no

habiendo arribado a acuerdo alguno en la audiencia del art. 40 de la ley 7676 recepcionada en el mes de junio de dicho año. Relata que actualmente ha recuperado totalmente su estado de salud y que no existe ninguna causa para que los niños continúen bajo la tenencia de su padre, aún más cuando se encuentran en situación de peligro moral. Impreso al presente, el trámite previsto en el art. 87 y siguientes de la ley 7676 se corre traslado a la contraria quien lo evacua a fs. 88/90.- Niega que la progenitora haya recuperado su estado de salud, ni se encuentre en condiciones apropiadas para ejercer la tenencia de los niños y observar el cumplimiento de las obligaciones que tal ejercicio impone. Niega asimismo, que la madre pueda proveer lo indispensable para el crecimiento y desarrollo de sus hijos, pues nunca colaboró con los gastos de alimentación, vivienda, salud, educación, etc., pese habérselo solicitado en numerosas oportunidades, por ser una obligación que recae sobre ambos progenitores. Niega que los menores se encuentren en "situación de peligro moral" según la definición que transcribe, asimismo pone de relieve que la progenitora no ha ofrecido ninguna prueba tendiente a acreditar este extremo que temerariamente invoca. Manifiesta que muy por el contrario sus hijos cuentan con todo lo necesario para su desarrollo psico-físico y afectivo, pudiendo ejercer en plenitud todos sus derechos consagrados en la Ley 23.849 (Cs.D.N).- Expresa que en el mes de abril de 1999, con motivo de una denuncia vecinal por la situación en la que se encontraban los niños cuando estaban en el hogar de la madre, interviene el Juzgado de Menores de ... Nominación, Secretaría a cargo del Dr. - Señala que a raíz de la situación mencionada, con fecha.... por Auto N° acordaron la tenencia a su favor de sus hijos A. y J. L., situación que de hecho ejercía desde el 3 de junio de 1998. Agrega, que en dicha oportunidad la Sra.P. manifestó y reconoció expresamente que, "por motivos de índole personal no puede hacerse cargo de la atención y cuidado que los menores requieren..." y que desde esa fecha fueron a su exclusivo cargo todos los gastos que demandan la manutención y educación de sus hijos. Manifiesta asimismo, que a favor de la madre se acordó un régimen de visitas amplio, pudiendo retirar a los niños de la escuela dos veces a la semana y acompañándolos en sus tareas escolares, lo que no fue cumplido por la progenitora, limitándose a estar con los niños los fines de semana. Señala que en el convencimiento de que sus hijos necesitan fortalecer el vínculo con su madre, para hacer posible tal contacto en numerosas oportunidades debió llevar y buscar a los niños al domicilio de la misma quien alegaba no tener vehículo. Expresa que la progenitora incumplió de manera irresponsable el régimen de visitas, ya que cuando los niños estaban con ella no asistían a la escuela y ante la reiteración de tales situaciones se vio obligado a realizar exposición policial y formular denuncia penal. Además, señala que la Sra.P. puso en evidencia otras actitudes negligentes al punto de afectar el estado de salud de los niños, así por ejemplo dejó de suministrar medicación al mayor de sus hijos por encontrarse bajo tratamiento, lo que obligó a la suspensión del mismo según criterio médico. Pone de relieve que el "derecho de la madre a estar con sus hijos", como lo pide la demandante, debe subordinarse al principio del interés superior del niño, establecido en la Convención sobre los Derechos del Niño, en su art. 3.1 que a continuación transcribe. Manifiesta que en el nuevo contexto de la Convención, que plasma derechos del niño y deberes del Estado, la familia y la comunidad, el principio del interés del niño debe ser interpretado como garantía de cumplimiento de los derechos y deberes que consagra. Cita doctrina. Expresa que por las razones expuestas considera que la Sra. A.C.P no se encuentra en condiciones de ejercer la tenencia de sus hijos, por lo que solicita se confirme la tenencia a su favor de los menores A. y J. L.- A fs.69 la incidentista ofrece la prueba para acreditar los extremos invocados, consistente en Documental, Pericial Psicológica y Presuncional.- Por su parte, a fs. 89/90 el

progenitor ofrece la que hace a su derecho consistente en Documental, Documental-Instrumental, Informativa, Testimonial, Pericial Psicológica, Encuesta Socio Ambiental, Instrumental y Confesional. Diligenciada la que obra en autos, se corre vista a la Sra. Asesora de Familia del Cuarto Turno quien a fs. 273 la evacua, manifestando que analizados los antecedentes de la causa y teniendo especial consideración las particulares circunstancias en que se debate la conflictiva familiar planteada, merece especial atención la impugnación del Informe Interdisciplinario realizado por los profesionales del CATEMU.- Considera pertinente la producción de un nuevo dictamen por un profesional psicólogo del Equipo Técnico de Menores o de Peritos Oficiales de la nómina del T.S.J, a fin de que se pronuncie sobre la idoneidad de ambos progenitores para ejercer la guarda de sus hijos menores. A fs. 308/311 obra glosado el informe realizado por la Lic. en Psicología M.C.B. Corrido nuevamente traslado a la Representante del Ministerio Pupilar a fs. 322/328 lo evacua, expresando que la incidentista Sra.P. no ha probado que un cambio de tenencia favorezca a J. y A., como así tampoco que esté en mejores condiciones para ejercer la guarda, ni que por la etapa evolutiva por la que atraviezan sus representados deban vivir con uno u otro progenitor.- Concluye la Sra. Asesora interviniente, que la guarda de los niños debe seguir en cabeza del Sr. L., ya que ha logrado demostrar con suficiencia que cumple con todas las obligaciones que le impone el desempeño paterno, de lo contrario importar trasladar el análisis del incidente incoado, esto es guarda de los menores, al examen de su orientación sexual.- Pone de manifiesto que doctrina y jurisprudencia son contestes en sostener como principio rector el criterio de estabilidad en la vida de los menores, salvo que tal cambio aparezca como sumamente beneficioso para ellos. Dictado el proveído de autos, el mismo queda firme y la causa en estado de resolver.-

Y CONSIDERANDO: 1) Que en los casos de familias disruptivas, una de las cuestiones mas importantes a dilucidar es el régimen de convivencia al que quedarán sujetos los hijos menores, es decir cuál de los progenitores ejercerá su guarda sin perjuicio de las responsabilidades parentales que le corresponderán al otro progenitor.- En estos supuestos los acuerdos de partes son por excelencia la mejor solución para el hijo, ya que en ellos confluyen la armónica decisión de quienes son los responsables por antonomasia de su orientación y dirección en el proceso hacia la "humanización del niño", es decir en el proceso de socialización primaria, por el cual se hará efectiva su naturaleza humana.- Cuando el acuerdo no es posible, es el juez el llamado a decidir, debiendo conformar su resolución a la pauta de idoneidad prevista en el art. 206 del C.C. y la directriz rectora ineludible del "interés superior del niño" contenida en el art. 3 de la Convención sobre los Derechos del Niño.- La idoneidad está relacionada con la elección de aquél de los progenitores que sea más apto y esté en mejores condiciones naturales para satisfacer los requerimientos que apunten a garantizar el pleno e integral desarrollo del hijo, a través del cumplimiento acabado de las funciones nutritivas cubriendo las necesidades de amor, protección, abrigo, alimento; y las normativas que establecen el sistema de reglas, pautas y normas que permiten la adaptación del hijo a la realidad y su paulatina incorporación como miembro activo de la sociedad.- Estas funciones que en la crianza del niño se encuentran íntimamente ligadas y entrelazadas, son el contenido esencial del instituto de la patria potestad, y determinan su objetivo y finalidad que es "...la protección y formación integral" de la prole.- Asimismo la idoneidad esta íntimamente relacionada con la mayor disposición y posibilidad que tenga el progenitor para garantizar y concretar todos aquellos derechos que, en el marco de la Convención sobre los derechos del Niño le corresponden a la infancia, entendida ésta como el proceso socializador y educativo por el cual cada ser

humano adquiere su autonomía personal.- Esto determina también que tanto los acuerdos de partes, como las decisiones judiciales respecto a la custodia de los hijos, sean siempre mutables y revisables, pues pueden surgir causas o hechos sobrevinientes que desaconsejen el mantenimiento de dicha guarda, y aún cuando ningún presupuesto se vea alterado puede el propio crecimiento de los hijos hacer nacer nuevos requerimientos y necesidades que determinen el mayor beneficio de un cambio en este sentido.- En definitiva se trata de seleccionar al progenitor que pueda dar mayores garantías de cumplimiento de la función social que implica la patria potestad.- II) Que en el sub lite, encontrándose controvertida la custodia de los hijos menores, corresponde establecer, cuál de los padres resulta ser el más idóneo para ejercerla en este momento evolutivo de la vida de los niños, de acuerdo a las pautas mencionadas en el Considerando precedente, y conforme las constancias de autos, las pruebas incorporadas al proceso y el contexto general de la causa.- Que de la historia vital de esta familia en conflicto judicial contenidas en las presentes actuaciones, se desprende que en un principio, por acuerdo de partes la guarda de los hijos menores se estableció a cargo de la madre, (Sentencia número ...de fecha..., dictada por la Exma. Cámara de Familia de ° Nominación, fs. 18/20).- Que, luego, según surge de las constancias de fs.38 de autos, ambas partes acuerdan el cambio de guarda de los hijos menores a favor del progenitor, reconociendo la imposibilidad de la genitora de hacerse cargo de los mismos y que tal situación de hecho se viene manteniendo desde el 3 de junio de 1998, convenio que fuera homologado por este Tribunal mediante Auto Número ...de fecha (fs. 41/42).- Que luego de ello, a casi dos años de la homologación del acuerdo y casi tres de convivencia de los hijos con el padre, con fecha 20 de abril de 2001, se presenta la Sra.P. solicitando la fijación de una audiencia del art. 40 de la ley 7676 a los fines de tratar el cambio de guarda, alegando que "han cesado" las causales de enfermedad y particulares que determinaron la entrega al padre y el hecho que ambos menores, de 8 y 5 años, le habían manifestado que querían vivir con ella (fs. 51).- Que en dicha audiencia, llevada a cabo con fecha 26/06/2001, pese a ser entrevistadas las partes por el Juez y la Sra. Asesora de Familia interviniente, parece no haberse arribado a acuerdo alguno en el sentido pedido por la Sra. P., aunque ello no surja de la certificación obrante a fs. 64.- Que recién, luego de ocho meses, con fecha 4 de marzo de 2002 se presenta nuevamente la progenitora solicitando la tenencia de sus hijos, en un libelo obscuro que fue motivo de aclaración posterior (fs. 67 y 70), de los cuales se desprende que los fundamentos de su pedido son: 1)"graves inconvenientes (de índole moral) con el padre de sus hijos", 2) "la gravedad de la situación", 3) la necesidad de "salvaguardar la moral y el bienestar de los menores", 4) "la recuperación total de su estado de salud", y "el derecho que tienen los hijos a vivir con la madre", 5) "la falta de causa para que continúen bajo la tenencia del padre", 6) y "la situación de peligro moral en que se encuentran bajo la tenencia de su padre".- Que pese a la invocación genérica y no explicitada en la petición, de cuál sería la razón de los "graves inconvenientes de índole moral, la grave situación y el peligro moral en que supuestamente se encontrarían los niños bajo la guarda de su progenitor, corresponde al Tribunal investigar, conforme la prueba aportada e incorporada en autos si existe algún motivo que justifique estas aseveraciones, más allá de determinar la idoneidad de ambos progenitores para resolver el cambio de guarda solicitada.- III) Que antes de entrar en el análisis de la prueba corresponde dilucidar la impugnación interpuesta por el Sr. L. en contra de las conclusiones del informe interdisciplinario elaborado por el CATEMU y agregado a fs. 197 y 202 de autos.- Al respecto ha dicho la jurisprudencia unánime "...es necesario algo más que disentir, es menester armar evidencias capaces de convencer al juez de que lo dicho

por el especialista es incorrecto, que sus conclusiones son erradas o que los datos proporcionados como sostén de sus afirmaciones son equivocadas" (CN. Civ., Sala A 13/10/81, J.A.1982-IV-236).- Las observaciones efectuadas por el Sr. L. (fs. 205/216) han sido suficientemente explicitadas por los Licenciados en Trabajo Social y Psicología intervinientes, al evacuar la vista corrida a fs. 249/250 y 251/253, respectivamente.- En el área psicológica sus conclusiones han sido en general coincidentes con las que fueran elaboradas por el Perito oficial en su informe, ya que el CATEMU no ha señalado en modo alguno la falta de idoneidad paterna para ejercer la tenencia de sus hijos, sino que la madre se encuentra también en condiciones de ejercerla, considerando en función de los deseos expresados por los menores que un cambio sería positivo, esto último constituye una conclusión personal, que no obsta a la validez del dictamen.- Por otro lado los errores que se señalan en los datos recolectados por los Trabajadores sociales intervinientes, resultan inócuos con relación a los hechos a probar y por lo cual el dictamen pericial resulta conducente, como por ejemplo que el progenitor sea o no el propietario de la casa donde habita el grupo familiar, que haya renunciado o se haya acogido a un retiro voluntario de su trabajo anterior, etc. y el resto de las objeciones, sobre todo las referidas al cariz discriminatorio que el mismo contiene, tiene mas relación con la discrepancia que el impugnante tiene con la conclusión a la que se arriba, que la finalidad de demostrar cuáles han sido los errores en que se puede haber incurrido, ni los vicios procedimentales del acto de pericia que necesariamente le quiten valor convictivo al dictamen emitido.- Por lo que no corresponde hacer lugar a la impugnación incoada, sin perjuicio de valorar las conclusiones del Informe interdisciplinario a la luz de las otras pruebas aportadas en autos y fundamentalmente del informe pericial de fs. 308/311 que ha sido aceptado por ambas partes sin objeciones.- IV) Así las cosas corresponde efectuar el análisis de la prueba ofrecida y diligenciada en autos. De la Instrumental agregada (fs.155/189), a fs. 160 surge que con fecha 22 de abril de 1998 se formula una denuncia telefónica anónima por ante el Juzgado de Menores de ° Nominación Prevencional, sobre la situación de "peligro que correrían unos menores llamados A. y J. L. de cinco y dos años de edad.....junto a su progenitora.....que los niños no son bien cuidados, que a veces se los deja solos, que la madre fuma marihuana, que a veces se la observa perdida, que en el lugar se hacen fiestas con un montón de parejas que andan desnudas por cualquier lado..."- Que ordenada la constatación de dicha situación en el domicilio de la progenitora, luego de varios fracasos para su encuentro, se determina que los menores no se encuentran en el mismo por estar con el padre, y que respecto "de la conducta sexual de la madre y el eventual consumo de drogas no se constata ningún tipo de indicio que permita corroborar ni desestimar lo señalado en el oficio, siendo necesario otro tipo de investigación para acceder a la información requerida.." (fs. 166).- Se ordena una encuesta ambiental, familiar y vecinal en el domicilio de la madre, la que no se puede llevar a cabo porque según informa un tío materno, su hermana (la progenitora de los niños) vive en otro barrio, y que los menores se encontrarían viviendo con el padre sin poder determinar el lugar (fs. 173).- Que luego de ello, con fecha 23 de diciembre de 1998, comparece la propia Sra.P. y manifiesta que a esa fecha los niños se encuentran viviendo con el padre, "...quien los cuida bien, los atiende... Que se los dió momentáneamente... en razón de que está la compareciente efectuando un tratamiento psiquiátrico" (fs.174).- Que el Juzgado de Menores ordena una encuesta ambiental y familiar en el domicilio del progenitor, en cuya evaluación se expresa "Se observó a los niños de aspecto cuidado y en relación afectuosa con su padre... Según lo observado, aparentemente, los niños estarían contenidos afectivamente, atendidos en sus

necesidades y siendo educados por su padre en un ambiente que les ofrecería seguridad. Se los observó de buen ánimo y de apariencia saludable. Según lo manifestado por el entrevistado, él no pone obstáculos para el encuentro de la madre y familia, con los niños ..." (fs. 178).- Que estas aseveraciones fueron materia de expreso reconocimiento por la Sra.P. en la audiencia del art. 16 de la ley 4873 (hoy reformada) según constancias obrantes a fs. 182, de donde surge que la progenitora manifestó "no estando (los niños) en situación alguna de riesgo...", lo que determinó el cese de la intervención del Tribunal de menores dictado por Auto Interlocutorio N° de fecha (fs. 188).- Que de lo analizado se desprende que efectivamente a la fecha de entrega de los menores a su progenitor la Sra. P., según sus propias manifestaciones, no se hallaba en condiciones de salud para atenderlos y cuidarlos (fs. 38) y que estaba efectuando un tratamiento psiquiátrico (fs.174), encontrándose los niños según sus propias manifestaciones y la encuesta ambiental, ya referida, cuidados, protegidos y contenidos por su progenitor, sin ningún tipo de situación de riesgo tanto moral como física.- En consecuencia, corresponde determinar si desde aquella fecha hasta el presente, se ha producido una variación en los presupuestos de hecho que se tuvieron en cuenta, que sea motivo de la situación de riesgo o peligro moral alegada por la madre para fundamentar su pedido.- De la documental obrante a fs. 75, 78/85 y 130 a 133, correspondiente a los informes sobre progreso escolar (libretas escolares), los niños han tenido un desempeño en el área educativa inmejorable durante el tiempo de guarda de su progenitor, lo que se ve también corroborado con la documental acompañada a fs. 220/224, y debidamente reconocida a fs. 261, 261 vta y 262, de la que también surge el permanente apoyo del progenitor a las tareas escolares, como que los niños realizan todos sus trabajos y asisten con todos los útiles necesarios, participando el progenitor activamente en la vida escolar.- Asimismo con la documental de fs. 76/77 se acredita que los niños han recibido las vacunas correspondientes a su edad; y con los certificados médicos obrantes a fs. 86 se acredita el buen estado de salud del que gozan.- Que con las testimoniales rendidas en autos se prueba la preocupación y permanente ocupación del padre por el cuidado de la salud de sus hijos (declaración de la Sra. C.F., respuesta a la pregunta tercera y octava- fs. 110/110 vta y 111 supra-, declaración de la Sra. C.C., respuesta a la pregunta tercera, declaración de la Sra. A.S. de M., respuesta a la pregunta quinta y aclaratoria- fs. 126 vta, declaración de la médica que atiende a los niños Dra. E. C., respuesta a la pregunta segunda, tercera, Cuarta, quinta, decimoprimera y vigésima- fs. 151 y 151 vta.).- También ha quedado acreditado en autos la buena relación que tiene el Sr. L. con sus dos hijos y el mutuo afecto que se prodigan, lo cual ha surgido de las declaraciones testimoniales rendidas en autos, en forma concordante y coincidente (testimonial de la Sra.F., respuesta a la pregunta segunda, fs.110, de la Sra. C. respuesta a la pregunta segunda, fs. 115, de la Sra. S. de M., respuesta a la pregunta segunda, fs. 126). Como así también, de la encuesta ambiental y familiar efectuada por el Juzgado de menores ya relacionada, fs. 178, del informe social efectuado por el CATEMU (201 vta. Supra) y de la entrevista personal mantenida por la suscripta con intervención de la Sra. Asesora de Familia con ambos menores, según lo certifica la acturia a fs. 264.- Asimismo, ha quedado acreditado que el Sr. L. cuenta con un inmueble, hogar o morada, que tiene todas las comodidades necesarias para el pleno y total desarrollo de los menores, contando con una habitación para ellos, que está "....decorada con motivos infantiles, tiene televisor color, placard y juguetes, encontrándose provista de lo necesario...Los ambientes son amplios e iluminados y se encuentran decorados con sobriedad y buen gusto.-El mobiliario es bueno y de buena calidad. La casa luce impecable ordenada y aseada...", en tal sentido de la testimonial de la Sra. S. de M. surge que ella

desempeña tareas de empleada doméstica en la casa del progenitor, (respuesta a la pregunta primera fs.126).- De las conclusiones de la pericia oficial incorporada en autos a fs. 308/311, que fuera ordenada por pedido de la Sra. Asesora de familia y aceptada por ambas partes, surge que "...En cuanto al punto de pericia sobre la idoneidad para ejercer la guarda de los hijos menores, de acuerdo a lo que pueden confirmar los hechos, en el período de tenencia de los hijos, ha podido hacerse cargo (el Sr. L.), sin inconvenientes de su paternidad, dirigida al cuidado y educación de sus hijos, en todo lo que ésta implica: afecto, educación, salud, recreación, etc. No hay indicios que esto haya sido contraproducente.- Además de acuerdo a los resultados de esta pericia psicológica se puede concluir que el entrevistado (Sr. S. L.) está capacitado y es idóneo para continuar ejerciendo la guarda de sus hijos.. "(fs. 309 infra y 310 supra).- Cabe analizar también, la conducta de colaboración y facilitamiento del vínculo materno-filial que el Sr. L. ha demostrado a lo largo de estos cinco años de ejercicio de la guarda, resguardando con ello el derecho a la coparentalidad, que resulta ser un derecho básico de la niñez, lo que surge tanto de las constancias de autos, como del informe social elaborado en el expediente de menores (fs. 178 infra) y las propias declaraciones realizadas por la Sra. P. que "...Que a los niños los ve siempre, los visita.." (fs.182 infra).- Lo que es corroborado, por el dictamen emitido por el CATEMU (fs.200 vta supra), las declaraciones testimoniales (Sra. F. respuesta a la pregunta novena y decima - fs. 111-, Sra. C. respuestas a las preguntas quinta y aclaratoria- fs. 115/115 vta- Sra. S. de M. respuesta a la pregunta novena-fs.126 vta-) y la propia confesional rendida por la Sra.P. en sus respuestas a las posiciones decimosexta y decimoséptima fs. 270 vta y 271.- Demostrando también una actitud madura de preservación del vínculo materno-filial al no descalificar la figura materna frente a las circunstancias que produjeron en su momento la entrega de la tenencia, ya que conforme surge del informe del CATEMU, como bien lo señala la Sra. Asesora de Familia, "ninguno de los menores manifiesta tener recuerdos y/o conocer el motivo por el cual no viven actualmente con la progenitora" (fs. 201 vta. primer párrafo).- Por otra parte cabe resaltar la actitud altamente solidaria demostrada por el Sr. L. en la preservación de la salud de la madre, lo que sin duda repercute en beneficio de los menores, permitiendo que ésta hiciera uso de su obra social no sólo para el tratamiento de la problemática relacionada con la adicción a las drogas y depresión, sino el posterior embarazo de su actual pareja, lo que surge de las constancias de fs. 141 de autos.- De todo lo analizado precedentemente no surge en manera alguna acreditada la situación de "inconvenientes de índole moral", "situación grave", ni "el peligro moral" alegado por la progenitora como fundamento principal de su petición, sino que por el contrario se ha demostrado acabadamente que el Sr. L. cumple con todas las responsabilidades parentales correspondientes al ejercicio de la patria potestad.- V) Sin embargo no escapa a la suscripta que las razones, ocultadas en el escrito donde expone su petición, se fundan en la orientación sexual del progenitor y su conformación de una pareja homosexual con la cual convive, lo que se desprende de sus propias manifestaciones vertidas en oportunidad de la declaración testimonial de la Sra. F., obrante a fs. 112 vta. infra y que fuera señalado por la Sra. Asesora de Familia en su meduloso dictamen.- En este espinoso y difícil tema traído de manera tangencial a consideración, no puede dejar de señalarse la intolerancia y hostilidad que subyace en la sociedad frente a la elección en la orientación sexual de las personas distinta a la esperada, y que cuando se habla de homosexualidad no se señala una conducta o comportamiento humano, sino que la misma categorización pretende, peligrosamente, hacer de ello un "diagnóstico"; trasladando, equivocadamente, el eje de la discusión, al hecho de si ser

homosexual es bueno o malo, si es beneficioso o perjudicial, cuando en realidad la preocupación del juzgador debe ser, cualquiera sea la orientación sexual de los progenitores, averiguar si éstos reúnen las condiciones necesarias para desempeñar y cumplir el rol parental adecuadamente y tratar de desentrañar que es lo mejor para el hijo.- En consecuencia como bien lo señala Cecilia Grosman "....sólo puede juzgarse el modo de vida y las convicciones religiosas, políticas o ideológicas de los progenitores en la medida que incidan negativamente en el desenvolvimiento del niño.." (Los Derechos del Niño en la Familia-Discurso y realidad, pag.59).- Cabe señalar que aún en aquellos autores que consideran que la inclinación sexual ostensible de uno de los progenitores, debe ser necesariamente uno de los elementos a valorar para otorgar la guarda de los hijos, sin embargo atemperan esta postura haciendo jugar otras pautas tan importantes y decisivas a la hora de resolver como "....las circunstancias particulares del caso, entre las que se incluyen la mayor o menor aptitud del otro progenitor, la eventual preferencia legal materna en razón de la edad del vástago, y sobre todo, el fundamental principio de estabilidad..." (Mizrahi, Mauricio Luis " Familia, matrimonio y divorcio" pag. 417).- Por ello el análisis no puede ni debe centrarse, en el comportamiento sexual "no convencional" del progenitor, ya que éste en manera alguna constituye per se un factor que marque la falta de idoneidad en la función parental, lo importante y trascendente cuando de guarda de hijos se trata es la investigación si este progenitor o aquel progenitor, más allá de su condición sexual, es o puede ser un buen padre, lo contrario implicaría establecer meras especulaciones sin basamento, que se convertirían en una fuente de discriminación inaceptable en la actualidad.- Por otro lado las consecuencias psíquicas de ser hijo de un padre homosexual en la actualidad son, al menos, desconocidas, manejándose mas conjeturas que verdades en dicho tema, sin embargo no cabe la menor duda que la tendencia generalizada en la sociedad, y en especial demostrada en estos autos por la progenitora, de ocultar, disfrazar la realidad, omitiendo en su demanda nombrar la homosexualidad paterna, tratándola de "peligro moral" para los menores, entraña una conducta descalificadora ab initio y sin fundamento, que sólo puede influir negativamente en sus hijos, quienes requieren para crecer un discurso claro y despejado de todo fundamentalismo, que les permita insertarse en una sociedad pluralista, inclusiva, comprensiva y sin discriminaciones.-Es en este marco que las pruebas aportadas en autos y ya analizadas, demuestran a las claras que la guarda ejercida por el progenitor durante más de cinco años, ha sido beneficiosa para ellos, no encontrándose indicio alguna que la conducta sexual del progenitor haya sido contraproducente o ponga en riesgo el pleno desarrollo de la prole, ni tampoco existe indicación alguna en los dictámenes obrantes en autos que en el futuro la continuación de esta situación puede ser perjudicial para ellos. Sin perjuicio de señalar, que tampoco puede constituir un presupuesto nuevo a tener en cuenta para variar la tenencia, toda vez que la homosexualidad del progenitor, conforme ha reconocido la madre era ampliamente conocida por ésta a la fecha de entrega de la tenencia de los menores, considerando en dicha oportunidad que "ningún riesgo" corrían con el padre(fs. 182).- Por lo dicho corresponde rechazar los argumentos esgrimidos por la progenitora para fundar su pretensión basados en "graves inconvenientes de índole moral", "situación grave" y "peligro moral" relacionados, también, con la orientación sexual del progenitor.- VI) Conforme ha quedado planteada la cuestión litigiosa debe en el presente hacerse mérito de la idoneidad de la progenitora para ejercer la tenencia de sus hijos, en relación a la posibilidad y necesaria evaluación que ésta le pueda ser atribuida si resultara mas beneficiosa para los menores.- La progenitora manifiesta que actualmente "ha recuperado

totalmente su estado de salud", como argumento para fundar su pretensión, sin embargo no ha explicitado en su escrito de pedido de tenencia cuál era la dolencia que determinó la entrega de los niños a su progenitor.- De la prueba aportada en autos, en especial, de la informativa expedida por S., obrante a fs. 141/146 de autos, surge que la Sra. P. recibió atención médica ambulatoria en el Sanatorio M., por primera vez el día , y fue internada en esa institución el día , por orden del Dr. L., con el siguiente diagnóstico: "Trastorno excitomotriz; dependencia a Cannabis; consumo habitual de otras drogas, depresión", recibiendo tratamiento psicofarmacológico, siendo dada de alta con fecha para continuar tratamiento en forma ambulatoria.- Asistiendo a consulta por última vez con fecha ", (fs.142).- De ello se puede colegir que el problema de salud materno, más allá de la causas que determinaron este comportamiento, fue el consumo "habitual de drogas", lo que se ve corroborado por el dictamen del CATEMU de fs. 197 a 202, donde se transcriben las manifestaciones vertidas por la Sra.P. en oportunidad de las entrevistas, y ellas son que "...A raíz de esto sufrió una fuerte crisis depresiva que la llevó al consumo de drogas(fs.198 supra)...refiere haberse recuperado del consumo de drogas.."(fs. 202).- Sin embargo llamativamente, y pese a encontrarse en autos acreditada la dolencia materna, esta es negada en forma categórica por la Sra.P. en su respuesta a la posición sexta (fs. 270), esa negación resulta muy importante de evaluar en el presente, puesto que sólo la conciencia de enfermedad por parte del paciente, la asunción que padece un problema que debe y necesita ser tratado, es la única posibilidad de acceder a su restablecimiento.- Esto unido al hecho que la alegación de "ha recuperado totalmente su estado de salud", no ha sido probado en forma alguna, no se han acompañado los tratamientos a los que se sometió para su restablecimiento contando con sólo la constancia de fs. 142, en que si bien se le da de alta, lo es a los fines de continuar con el tratamiento ambulatorio el que parece no haber finalizado, ya que del mismo no existe ninguna constancia, sólo la indicación de una última consulta con fecha .- Del informe de la perito control, Licenciada P., que luce a fs. 316/317, surge que la Sra.P. abandonó dicho tratamiento, que luego fue al "programa C."(centro especializado en tratamientos por adicciones) en el que indicaron internación en Granja, que tampoco cumplimentó, que de la misma pericia oficial surge que es "...necesario que la Sra.P. cuente con apoyo terapéutico para sobrellevar la función materna en esta circunstancia, y ayudar a prevenir posibles crisis en el futuro", esto está relacionado - en el mismo informe - con el desequilibrio psíquico que sufriera y que no le permitiera hacerse cargo de sus hijos, que no puede ser interpretado, pese a no mencionarse, sino exclusivamente con el consumo de drogas y la depresión que sufriera en el año 1999, y a la que ya me he referido anteriormente.-También del informe del CATEMU surge que "desde principio de este año (2002), la entrevistada se encuentra bajo tratamiento psicológico"(fs.200 vta), no existiendo en autos ninguna prueba que acredite la existencia y continuidad de este tratamiento, lo que unido a la recomendación de la perito oficial ya referida, es un fuerte indicio que por lo menos a la fecha no se encuentra asistida terapéuticamente.- Que siendo un argumento de sostén de su petición el hecho de haber recuperado totalmente su estado de salud, y dado las características de la dolencia sufrida por la progenitora, es a ella a quien incumbía la prueba indubitable de esta circunstancia, lo que no hizo.- Esta carencia no puede ser cubierta por los informes psicológicos obrantes en autos que sólo refieren dichos de la peticionante de haberse recuperado del consumo de drogas como en el caso de CATEMU (fs 202), o como en el caso de la pericia oficial que refiere que, al "momento de la entrevista no hay indicios manifiestos del estado de desequilibrio psíquico.....Actualmente parece haber superado el estado crítico anterior..."(fs. 311), pero

ninguna de ellas puede acreditar que se halla totalmente restablecida de su adicción.- Además, ambas pericias también han señalado aspectos preocupantes en la personalidad de la progenitora como "Personalidad de características infantil y dependiente.....Defensas lábiles. Que la dejan expuesta a las presiones del medio.."(Informe CATEMU, fs. 200 vta), "...se observan sentimientos de inseguridad, en función de los cuales tiende a entablar relaciones de dependencia afectiva.-También se evidencia agresividad hacia sí misma....Su personalidad no cuenta con importantes recursos para defenderse ante la angustia de situaciones adversas, y por lo tanto su psiquismo puede verse desbordado ante situaciones críticas de gran presión..." (fs. 310 informe perito oficial).- Lo expuesto en los informes referidos, evidencia que el rol materno no puede sostenerse sin un tratamiento terapéutico, que la progenitora no se ha ocupado de probar que realiza y puede continuar, demostrando con ello una falencia importante, ya que el cuidado de la salud no es una conducta autorreferente toda vez que ella se proyecta sobre terceros - los hijos -, incluyéndose dentro de los deberes paternos atender su salud psíquica y mental como un modo de asumir su responsabilidad realizando todo lo necesario para evitar o corregir conductas que puedan poner en riesgo la integridad de su prole.- Pero aún cuando partamos de la base que desde el punto de vista psicológico, conforme lo han señalado, tanto el informe del CATEMU (fs. 202) como el informe de la perito oficial (fs.311), la madre es idónea para ejercer la tenencia de sus hijos, ésta no ha demostrado ser más idónea que el padre, o que esté en mejor situación para tener la guarda de sus hijos, ni que de su custodia resulte un beneficio mayor para A. y J.- Por el contrario de las constancias de autos surge su falta de compromiso real por la educación de sus hijos, no sólo por la ausencia en el ámbito escolar manifestada por las docentes del Colegio en la Informativa glosada a fs. 221, 223 y 224, sino también de sus propias declaraciones vertidas en oportunidad de la confesional rendida.- En dicha audiencia, reconoce expresamente que no asiste a las reuniones de padres, tratando de justificar o excusar esta omisión en la falta de información por parte del progenitor de los niños sobre lo relacionado con el aspecto educativo (respuesta a posición decimosegunda).- En tal sentido, considero que el derecho-deber de supervisar la educación de los hijos, implica una actitud activa, positiva y encaminada con dicho objetivo, pudiendo ella misma realizar las averiguaciones y pedir los informes que fueren necesarios para su cumplimiento, máxime cuando no se ha probado en autos ninguna causa de impedimento por parte del Colegio o el padre para que se efectivice este derecho.-deber.- Asimismo en cuanto al deber de asistencia moral y espiritual de los hijos que se traduce en el derecho - deber de comunicación, la Sra.P. ha manifestado que goza de un régimen de visitas amplio sin restricciones, lo que implica que puede verlos y retirarlos cuando quiera, sin embargo ella lo ha limitado a los fines de semana,(respuesta a la posición decimosexta-fs.270 infra y 270 supra) con la excusa de la distancia que existe entre su domicilio y el domicilio del progenitor, recortando ella misma el deber de comunicación con sus hijos y limitando con ello su propia responsabilidad parental.- En este punto cabe resaltar que no surge del informe social del CATEMU (fs. 197/202) que la madre se encuentre en una situación económica apremiante que le impide afrontar los gastos de traslado para visitar a sus hijos, sin perjuicio que los obstáculos económicos o de otra índole de la peticionante, no pueden - per se - fundar un cambio de guarda.- Por otra parte, es necesario analizar las conclusiones del informe del CATEMU en cuanto afirma que "...No se registran indicadores de que la Sra. P. se encuentre actualmente imposibilitada de ejercer la tenencia de sus hijos y atento el deseo manifiesto de los niños de restablecer la convivencia con su madre, se considera que este sería positivo para los mismos..".(Fs. 202).- Esta conclusión en nada contradice lo

analizado precedentemente, ya que es coincidente en cuanto a la idoneidad materna con el informe de la pericia oficial (fs. 311), sólo agrega un elemento a considerar que es el supuesto "deseo de los menores" de vivir con su madre, para calificar de positiva la posibilidad.- En este sentido cabe resaltar que en la entrevista personal mantenida por la suscripta y la Sra. Asesora de Familia interviniente con ambos menores, no pudo ser corroborado lo dicho por ellos, con la contundencia con que se encuentra expresado.- Si bien es cierto que manifestaron que amaban a ambos padres por igual, que "les gustaba estar en la casa de su madre" y "que querían pasar más tiempo con su progenitora", también señalaron algunos problemas menores en la convivencia con su progenitor, como por ejemplo que estaban enojados con L. (quien convive en la casa como pareja de su progenitor, aunque en habitaciones separadas), porque nos los dejaba "jugar a la pelota en el living", o con su padre porque no los dejaba salir a jugar a la calle, debiendo todas las tardes permanecer en la peluquería (medio de trabajo del progenitor) haciendo los deberes o tareas escolares.- Corresponde entonces analizar cuál debe ser el peso del deseo de los niños en relación a la decisión de con quién deben vivir.- A partir de la Convención sobre los derechos del niño, se introdujo el más trascendente principio innovador en relación a la infancia, que es nada mas y nada menos que: "el reconocimiento de la autonomía y subjetividad del niño", lo que implica considerar al niño como sujeto de derecho, con capacidad y facultad de intervenir en los procesos decisionales sobre su destino. Al poder expresar no sólo su deseo, sino su opinión y pudiendo y debiendo ser escuchado por las autoridades administrativas y/o judiciales que intervengan, las que deberán evaluar y tener en cuenta "debidamente" estas expresiones de la niñez.- Pero de ninguna manera este principio implica o puede asimilarse a la posibilidad de poner en "cabeza del niño el poder decisorio sobre su destino", sino que significa proveer al niño de todas las herramientas necesarias para que vaya adquiriendo protagonismo en las acciones, gestos y actitudes en el contexto de la vida familiar, escolar o comunitaria como sujeto de su propio proceso de formación en el camino de la adquisición de la autonomía personal, todo eso dentro de los límites que derivan de su condición peculiar de persona en desarrollo.- Para ello es necesario escuchar al niño en sus deseos y opiniones, pues él no sólo es el destinatario de la decisión judicial, sino una persona cuyos intereses pueden ser oportunamente considerados y evaluados.- Ahora bien, no es menos cierto que cuando entra en colisión la opinión del menor y sus deseos, con su "interés superior", entendido éste como la satisfacción de todos los derechos que al niño le corresponden en su calidad de persona, y cuando no puedan ser ellos compatibilizados, deberá necesariamente privilegiarse éste por sobre aquél, pues lo contrario implicaría dejar sin sustento el régimen especial de protección del que gozan por su condición de " personas en desarrollo", dejando librado su proceso de maduración y desarrollo a su propio arbitrio.- En el caso particular de autos y conforme toda la prueba analizada, aún cuando los niños hubieran expresado en oportunidad del informe citado, esta preferencia o deseo, ello debe necesariamente ser valorado y sopesado a la luz de su "interés superior", que en el sub lite se traduce en la convivencia con su progenitor quien ha demostrado, de manera solvente y sin altibajos, durante cinco años poder ejercer su paternidad en toda su extensión y responsabilidad.- VII) Cabe por ultimo analizar los otros argumentos expuestos por la progenitora en su petición "el derecho que tienen los hijos a vivir con la madre"y "la falta de causa para que continúen bajo la tenencia del padre".- Con relación al primer argumento es cierto que el Código Civil establece la preferencia materna, pero sólo con relación a los menores de cinco años; con respecto a los que superen esta edad ha establecido como única pauta "la idoneidad" (art. 206) y a partir de la

incorporación de la Convención sobre los derechos del niño también la consideración de su "interés superior" (art. 3), por lo que esta invocación sin otro fundamento que el sexo del progenitor a los fines de decidir una guarda, carece de todo sustento en los hechos y en el derecho. Consecuentemente los hijos no tienen el "derecho a vivir con la madre" sin más, sino a vivir con aquél de los progenitores que esté en mejores condiciones de garantizar su pleno desarrollo, por lo que tal argumento debe ser rechazado.- En cuanto al segundo y último argumento resulta ininteligible a luz de las constancias de autos, ya que la causa que los niños se encuentren con el padre fue la entrega voluntaria de la tenencia por parte de la madre, lo que provocó la novación de la situación anteriormente convenida por la falta de aptitud por ella reconocida de sostener la crianza de sus hijos en ese momento; por lo que para poder revertir esa situación no le bastaba a la progenitora argumentar - sin prueba -, que tales causas habían cesado y sin más obtener la tenencia de sus hijos. Ya que los niños no son objetos de reparto ni susceptibles de adquisición, sino que debió demostrar de manera indubitable, además de su mayor idoneidad, que el cambio de guarda implicaba un beneficio real y concreto para los menores, lo que en autos no ocurrió.- En el caso particular, entonces, cobra vigencia y actualidad la pauta de estabilidad o respeto del statu quo, aceptada en forma unánime y pacífica por la doctrina y jurisprudencia, que consiste en no innovar situaciones de hecho consolidadas, cuando no existan razones que aconsejen o justifiquen el quiebre en la continuidad afectiva, espacial, social y educativa del niño, evitando así el replanteo de conflictos de adaptación y adecuación a un nuevo medio, con las consecuencias de angustia y desorientación que esto acarrea.- Si bien es cierto que esta regla no debe ser absoluta en ningún caso, permitiendo, como señala Cecilia Grosman "...la admisión de cambios destinados al mejoramiento de la situación del menor, y no sólo para evitar perjuicios, reconociéndose de este modo la absoluta incompatibilidad entre el carácter estático del statu quo y el esencialmente dinámico y mutable del desarrollo de un menor..." (Los Derechos del Niño en la Familia- Discurso y realidad, pag. 173). En el caso traído a resolución, no existe constancia ni prueba alguna que lleve a la convicción de la suscripta que un cambio en la guarda favorezca a A. y J., que por razones de la etapa evolutiva en la que se encuentran sea preferible que estén con uno u otro progenitor, ni que con la guarda de la progenitora se produzca un mejoramiento en la situación general ni especial de los niños.- Es por todo lo dicho y analizado que considero en coincidencia con el dictamen del Ministerio Pupilar que el incidente de cambio de tenencia interpuesto por la progenitora debe ser rechazado manteniéndose la guarda de A. y J. a cargo del progenitor.- VIII) Atento el resultado arribado en los presentes, y no encontrando la suscripta en autos ninguna causa que justifique el apartamiento de la regla general de imposición de costas (art. 130 C.P.C), las mismas deben ser impuestas a la progenitora, Sra. P.- Que en cuanto a la regulación de honorarios de las Dras. Q. y R. no existiendo disposición legal alguna que sirva de base a las peticiones resueltas, considero de aplicación lo dispuesto en los arts. 34 3º párrafo y 36 de la ley 8226, es decir el monto de pesos equivalente a veinticinco jus, en conjunto y proporción de ley.- Por lo expuesto, lo dispuesto por el art. 264 C.C, normas legales citadas y lo dictaminado por el Ministerio Pupilar.- RESUELVO: 1º) Rechazar el incidente de cambio de tenencia interpuesto por la Señora A.C.P y en consecuencia mantener la tenencia de los menores A. y J. L. a cargo de su progenitor, Señor S. F. L.- 2º) Imponer las costas del presente incidente a cargo de la Señora A.C.P.- 3º) Regular los honorarios de las Doctoras Q. y R. en conjunto y proporción de ley, en la suma de pesos seiscientos doce con setenta y cinco centavos.- Protocolícese, hagase, saber y dese copia.-

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Children of Lesbian and Gay Parents

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PATTERSON, CHARLOTTE J. *Children of Lesbian and Gay Parents*. CHILD DEVELOPMENT, 1992, 63, 1025-1042. This paper reviews research evidence regarding the personal and social development of children with gay and lesbian parents. Beginning with estimates of the numbers of such children, sociocultural, theoretical, and legal reasons for attention to their development are then outlined. In this context, research studies on sexual identity, personal development, and social relationships among these children are then reviewed. These studies include assessment of possible differences between children with gay or lesbian versus heterosexual parents as well as research on sources of diversity among children of gay and lesbian parents. Research on these topics is relatively new, and many important questions have yet to be addressed. To date, however, there is no evidence that the development of children with lesbian or gay parents is compromised in any significant respect relative to that among children of heterosexual parents in otherwise comparable circumstances. Having begun to respond to heterosexist and homophobic questions posed by psychological theory, judicial opinion, and popular prejudice, child development researchers are now in a position also to explore a broader range of issues raised by the emergence of different kinds of gay and lesbian families.

What kinds of home environments best foster children's psychological adjustment and growth? No question is more central to the field of child development research. Historically, researchers in the United States have often supposed that the most favorable home environments are provided by white, middle-class, two-parent families, in which the father is paid to work outside the home but the mother is not. Although rarely stated explicitly, it has most often been assumed that both parents in such families are heterosexual.

Given that decreasing numbers of American families fit the traditionally normative pattern (Hernandez, 1988; Laosa, 1988), it is not surprising that researchers have increasingly challenged implicit or explicit denigration of home environments that differ from it by virtue of race, ethnicity, income, household composition, and/or maternal employment (Harrison, Wilson, Pine,

Chan, & Buriel, 1990; Hetherington & Arasteh, 1988; Hoffman, 1984; McLoyd, 1990; Spencer, Brookins, & Allen, 1985). Together with the authors of cross-cultural and historical studies (Cole, 1988; Elder, 1986; Rogoff, 1990), these researchers have highlighted the multiplicity of pathways through which healthy psychological development can take place and the diversity of home environments that can support such development.

In this article, I examine evidence from the social sciences regarding the personal and social development of children with gay and lesbian parents. Beginning with estimates of the numbers of such children, I then outline sociocultural, theoretical, and legal reasons that justify attention to their development. In this context, I then review research evidence on sexual identity, personal development, and social relationships among children of gay and/or lesbian parents. I first describe research on possible dif-

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ferences between children of gay or lesbian versus heterosexual parents; I then examine the beginnings of research on sources of diversity among children of gay and lesbian parents. In a final section, I draw a number of conclusions from the results of research to date and offer suggestions for future work.

How Many Children of Lesbian or Gay Parents Are There?

How many children of gay and/or lesbian parents live in the United States today? No accurate answer to this question is available. Because of fear of discrimination in one or more domains of their lives, many gay men and lesbians take pains to conceal their sexual orientation (Blumenfeld & Raymond, 1988). It is especially difficult to locate gay and lesbian parents. Fearing that they would lose child custody and/or visitation rights if their sexual orientation were to be known, many lesbian and gay parents make special efforts to conceal their gay or lesbian identities (Lyons, 1983; Pagelow, 1980)—in some cases, even from their own children (Dunne, 1987; MacPike, 1989; Robinson & Barret, 1986).

Despite these difficulties, estimates of the numbers of gay and lesbian parents and children in the United States have been offered. Estimates of the number of lesbian mothers generally run from about 1 to 5 million (Falk, 1989; Gottman, 1990; Hoeffler, 1981; Pennington, 1987), and those for gay fathers from 1 to 3 million (Bozett, 1987; Gottman, 1990; Miller, 1979). Estimates of the numbers of children of gay or lesbian parents range from 6 million to 14 million (Bozett, 1987; Editors of the Harvard Law Review, 1990; Peterson, 1984; Schulenberg, 1985).¹

In addition to those who became parents in the context of heterosexual marriages before coming out, growing numbers of lesbians and gay men are becoming parents after coming out. One recent estimate holds that 5,000 to 10,000 lesbians have borne children after coming out (Seligmann, 1990).

The number of lesbians who are bearing children is also believed to be increasing (McCandlish, 1987; Pennington, 1987; Pies, 1985, 1990; Steckel, 1985). Additional avenues to parenthood, such as foster care, adoption, and coparenting, are also being explored increasingly both by lesbians and by gay men (Alpert, 1988; Pollack & Vaughn, 1987; Ricketts & Achtenberg, 1990; Rohrbach, 1988; Van Gelder, 1988). Estimates like those given above are therefore likely to underrepresent the actual numbers involved. Whatever the precise figures, it is clear that the numbers of children of gay or lesbian parents are substantial.

Perspectives on Children of Gay and Lesbian Parents

There are several perspectives from which interest in children of gay or lesbian parents has emerged. First, the phenomenon of openly gay or lesbian parents bearing and/or raising children represents a socio-cultural innovation that is specific to the present historical era; as such, it raises questions about the impact of nontraditional family forms on child development. Second, from the standpoint of psychological theory, children of lesbian or gay parents—especially those born into gay or lesbian homes—pose a number of challenging questions for existing theories of psychosocial development. Finally, both in resolution of custody disputes and in administration of adoption and foster care policies, the legal system in the United States has frequently operated under strong but unverified assumptions about difficulties faced by children of lesbians and gay men, and there are important questions about the veridicality of such assumptions. I introduce key issues from each of these three perspectives below.

Social and Cultural Issues

The emergence of large numbers of openly self-identified gay men and lesbians is a recent historical phenomenon (Boswell, 1980; D'Emilio, 1983; Faderman, 1981, 1991). Although the beginnings of homo-

¹ Such estimates can be based on extrapolations from what is known or believed about base rates in the population. According to Kinsey, Pomeroy, and Martin (1948) and others (see Blumenfeld & Raymond, 1988), approximately 10% of the 250 million people in the United States today can be considered gay or lesbian. According to large-scale survey studies (e.g., Bell & Weinberg, 1978; Saghir & Robins, 1973), about 10% of gay men and about 20% of lesbians are parents. Most have children from a heterosexual marriage that ended in divorce; many have more than one child. Calculations using these figures suggest that there are about 3–4 million gay or lesbian parents in the United States today. If, on average, each parent has two children, that would place the number of children of formerly married lesbians and gay men at about 6–8 million.

phile organizations date to the 1950s and even earlier (D'Emilio, 1983; Faderman, 1991; Lauritsen & Thorstad, 1974), the origins of contemporary gay liberation movements are generally traced to police raids on the Stonewall bar in the Greenwich Village neighborhood of New York City in 1969, and to resistance shown by members of the gay community to these raids (Adam, 1987; D'Emilio, 1983). In the years since that time, increasing numbers of lesbians and gay men have abandoned secrecy, come out of the closet, and joined the movement for gay and lesbian rights (Blumenfeld & Raymond, 1988).

In the wake of increasing openness among lesbian and gay adults, a number of family forms are emerging in which one or more of a child's parents identify themselves as gay or lesbian (Baptiste, 1987; Bozett & Sussman, 1990; Pies, 1985). The largest numbers of these are families in which children were born in the context of a heterosexual relationship between the biological parents (Falk, 1989). These include families in which the parents divorce when the husband comes out as gay or when the wife comes out as lesbian, families in which the parents divorce when both the husband and the wife come out as gay or lesbian, and families in which one or both of the parents come out and they decide not to divorce. Parental acknowledgment of gay or lesbian identity may precede or follow decisions about divorce. The gay or lesbian parent may be either the residential or the nonresidential parent, or children may live part of the time in both homes. Gay or lesbian parents may be single, or they may have same-sex partners. A gay or lesbian parent's same-sex partner may or may not take up stepparenting relationships with the children. If the partner has also had children, the youngsters may also be cast into step-sibling relationships with one another.

In addition to children born in the context of heterosexual relationships, both single and coupled lesbians are believed increasingly to be giving birth to children (Pies, 1985, 1990; Steckel, 1985; Rohrbaugh, 1988; Van Gelder, 1988). The majority of such children are believed to be conceived through donor insemination (DI). Although techniques for successful DI have been known for many years, it is only relatively recently that DI with known or unknown sperm donors has become widely available to unmarried heterosexual women and to lesbians (Noble, 1987; Wolf, 1990). Lesbians

who seek to become mothers using DI may choose a friend, relative, or acquaintance to be the sperm donor, or may choose instead to use sperm from an unknown donor. When sperm donors are known, they may take parental, avuncular, or other roles relative to children who are born using DI, or they may not (Pies, 1985; Van Gelder, 1988).

A number of gay men have also sought to become parents after coming out (Bigner & Bozett, 1990; Bozett, 1989; Ricketts & Achtenberg, 1990). Options pursued by these gay men include adoption and foster care of children to whom they are not biologically related. Through DI or through sexual intercourse, gay men may also become biological fathers of children whom they intend to coparent with a single woman (whether lesbian or heterosexual), with a lesbian couple, or with a gay male partner.

Although it is widely believed that family environments exert significant influences on children who grow up in them, authoritative scholarly treatments of such influences rarely consider children growing up in families with lesbian and/or gay parents (e.g., Jacob, 1987; Lamb, 1982; Parke, 1984). Given the multiplicity of new kinds of families among gay men and lesbians, and in view of their apparent vitality, child development researchers today are faced with remarkable opportunities to study the formation, growth, and impact of new family forms.

To the extent that parental influences are seen as critical in psychosocial development, and to the extent that lesbians and/or gay men may provide different kinds of influences than heterosexual parents, then the children of gay men and lesbians can be expected to develop in ways that are different from children of heterosexual parents. Whether any such differences are expected to be beneficial, detrimental, or nonexistent depends, of course, on the viewpoint from which the phenomena are observed. For instance, some feminist theorists have imagined benefits that might accrue to children growing up in an all-female world (e.g., Gilman, 1915/1979). Expectations based on many psychological theories are, however, more negative.

Theoretical Issues.

Theories of psychological development have traditionally emphasized distinctive contributions of both mothers and fathers to the healthy personal and social development of their children. As a result, many theories predict negative outcomes for children who

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are raised in environments that do not provide these two kinds of inputs (Nungesser, 1980). An important theoretical question thus concerns the extent to which such predictions are sustained by results of research on children of gay and/or lesbian parents.

Psychoanalytic and social learning theories of personal and social development during childhood emphasize the importance of children having both heterosexual male and heterosexual female parents (Bronfenbrenner, 1960; Chodorow, 1978; Dinnerstein, 1976; Huston, 1983); as a result, they predict negative outcomes for children whose parents do not exemplify these qualities. Although cognitive developmental theory (e.g., Kohlberg, 1966) and gender schema theory (e.g., Bem, 1983) do not require such assumptions, proponents of these views have not challenged them. As a result, prominent perspectives on individual differences in personal and social development are commonly believed to predict difficulties in development among children of lesbian and gay parents.

Empirical research with children of gay and lesbian parents thus provides an opportunity to evaluate anew theoretical assumptions that are often taken for granted. Most prominent among these is the view that parental sexual orientation has a significant impact on children's development. By evaluating this and related assumptions, research with children of lesbian and gay parents may also stimulate conceptual innovations in the understanding of human development.

Legal and Public Policy Issues

The legal system in the United States has long been hostile to gay men and to lesbians who are or who wish to become parents (Basile, 1974; Hitchens, 1979/80; Hitchens & Kirkpatrick, 1985; Kleber, Howell, & Tibbits-Kleber, 1986; Polikoff, 1986, 1990). Because of judicial and legislative assumptions about adverse effects of parental homosexuality on children, lesbian mothers and gay fathers have often been denied custody and/or visitation with their children following divorce (Basile, 1974; Editors of the Harvard Law Review, 1990; Falk, 1989). Although some states now have laws stipulating that sexual orientation is indeterminate of parental fitness in custody disputes, in other states parents who identify themselves as gay or lesbian are presumed to be unfit as parents (Editors of the Harvard Law Review, 1990). In addition, regulations governing foster care and adoption in many

states have made it difficult for lesbians and gay men to adopt children or to serve as foster parents (Ricketts & Achtenberg, 1990).

One issue underlying both judicial decision making in custody litigation and public policies governing foster care and adoption has been questions concerning the fitness of lesbians and gay men to be parents (Hitchens & Kirkpatrick, 1985). Courts have sometimes assumed that gay men and lesbians are mentally ill and hence not fit to be parents, that lesbians are less maternal than heterosexual women and hence do not make good mothers, and that lesbians' and gay men's relationships with sexual partners leave little time for ongoing parent-child interactions (Editors of the Harvard Law Review, 1990).

Although systematic empirical study of these issues is just beginning, results of research to date have failed to confirm any of these fears. The idea that homosexuality constitutes a mental illness or disorder has long been repudiated both by the American Psychological Association and by the American Psychiatric Association (Blumenfeld & Raymond, 1988). Lesbians and heterosexual women have been found not to differ markedly either in their overall mental health or in their approaches to child rearing (Kweskin & Cook, 1982; Lyons, 1983; Miller, Jacobsen, & Bigner, 1981; Mucklow & Phelan, 1979; Pagelow, 1980; Rand, Graham, & Rawlings, 1982; Thompson, McCandless, & Strickland, 1971), nor have lesbians' romantic and sexual relationships with other women been found to detract from their ability to care for their children (Pagelow, 1980). Research on gay fathers has been similarly unable to unearth any reasons to believe them unfit as parents (Barret & Robinson, 1990; Bozett, 1980, 1989). Studies in this area are still rather scarce, and more information would be helpful. On the basis of research to date, though, negative assumptions about gay and lesbian adults' fitness as parents appear to be without foundation (Cramer, 1986; Falk, 1989; Gibbs, 1988; Levy, 1989).

In addition to judicial concerns about gay and lesbian parents themselves, three major categories of fears about effects of lesbian or gay parents on children are reflected in judicial decision making about child custody and in public policies. The first is that children brought up by gay fathers or lesbian mothers will show disturbances in sexual identity (Falk, 1989; Hitchens & Kirkpatrick,

1985; Kleber et al., 1986). For instance, it is feared that children brought up by lesbian mothers or gay fathers will themselves become gay or lesbian (Falk, 1989; Green et al., 1986; Kleber et al., 1986), an outcome that the courts view as undesirable. A second category of fears is that these children will be less psychologically healthy than children growing up in homes with heterosexual parents (Falk, 1989; Editors of the Harvard Law Review, 1990; Kleber et al., 1986). Courts have expressed concern that children in the custody of gay or lesbian parents will be more vulnerable to mental breakdown, and/or that they will exhibit more adjustment difficulties and behavior problems. A third category of fears is that children of lesbian and gay parents may experience difficulties in social relationships (Editors of the Harvard Law Review, 1990; Falk, 1989; Hitchens & Kirkpatrick, 1985). For example, judges have expressed concern that children living with lesbian mothers may be stigmatized, teased, or otherwise traumatized by peers. Another common fear is that children living with gay or lesbian parents may be more likely to be sexually abused by the parent and/or by the parent's friends or acquaintances.

Because such negative assumptions have often been explicit in judicial determinations when child custody has been denied to lesbian and gay parents or when visitation with gay or lesbian parents has been curtailed (Basile, 1974; Polikoff, 1990), and because such assumptions are open to empirical test, they provide an important impetus for research. In the next section, I review the available research findings regarding these three categories of fears.

Comparisons between Children of Gay and Lesbian Parents and Children of Heterosexual Parents

Systematic research comparing children of gay and lesbian parents with those of heterosexual parents is a phenomenon of the last 15 years. Case reports began to appear in the psychiatric literature in the early 1970s (e.g., Agbayewa, 1984; Osman, 1972; Weeks, Derdeyn, & Langman, 1975). Beginning with the pioneering work of Martin and Lyon (1972), first person and fictionalized descriptions of life in lesbian mother families have also become available (e.g., Alpert, 1988; Clausen, 1985; Jullion, 1985; Mager, 1975; Perreault, 1975; Pollack & Vaughn, 1987; Rafkin, 1990). Systematic research on the children of lesbian and gay parents did

not, however, begin to appear in major professional journals until 1978, and most of the available research has been published more recently.

Despite the diversity of gay and lesbian communities, both in the United States and abroad, samples of children studied to date have been relatively homogeneous. With two exceptions (Golombok, Spencer, & Rutter, 1983; Miller, 1979), all of the research has been conducted in the United States. Samples for which demographic information was reported have been described as predominantly Caucasian, well-educated, and middle to upper middle class.

Although both lesbians and gay men may become parents in any of a variety of ways, the preponderance of research to date has focused on children who were born in the context of heterosexual marriages, whose parents divorced, and whose mothers have identified themselves as lesbians. Some research is available on children who have been born in the context of heterosexual relationships and whose fathers have identified themselves as gay (Barret & Robinson, 1990; Bozett, 1980, 1987, 1989; Miller, 1979; Paul, 1986). Two reports (McCandlish, 1987; Steckel, 1987) have focused on children born to lesbians in the context of ongoing lesbian relationships. Of the many other ways in which children might come to be brought up by lesbian or gay parents (e.g., through foster parenting, adoptive parenting, coparenting, or multiple parenting arrangements), no systematic research has yet appeared.

Reflecting issues relevant in the largest number of custody disputes, most of the research compares development of children with custodial lesbian mothers to that of children with custodial heterosexual mothers. Since many children living in lesbian mother-headed families have undergone the experience of parental separation and divorce, it has been widely believed that children living in families headed by divorced but heterosexual mothers provide the best comparison group. Although some studies focus exclusively on children of gay men or lesbians (e.g., Green, 1978; Paul, 1986), most compare children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families.

Research has also focused mainly on age groups and topics relevant to the largest numbers of custody disputes. There is a

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greater volume of research on children and youth than on infants or on adult children of gay or lesbian parents. Areas of research have also grown up around concerns of the courts like those described above. In the next section, I review the existing research, much of which was designed to evaluate such judicial concerns.

Sexual Identity

Following Money (e.g., Money & Ehrhardt, 1972), I consider research on three aspects of sexual identity here. Gender identity concerns a person's self-identification as male or female. Gender-role behavior concerns the extent to which a person's activities, occupations, and the like are regarded by the culture as masculine, feminine, or both. Sexual orientation refers to a person's choice of sexual partners—for example, heterosexual, homosexual, or bisexual.

Gender identity.—Gender identity among children of lesbian mothers has been assessed by several investigators using projective techniques. In this work, no evidence of special difficulties in gender identity among children of lesbian mothers has emerged. For instance, Kirkpatrick and her colleagues (Kirkpatrick, Smith, & Roy, 1981) compared development among 20 5–12-year-old children of lesbian mothers with that among 20 same-aged children of single heterosexual mothers. In the projective testing, sixteen of the 20 children in each of the two groups drew a same-sex figure first, a finding that fell within expected norms. Of the eight children who drew an opposite-sex figure first, only three (one girl with a lesbian mother, and two boys with heterosexual mothers) showed concern about gender issues in clinical interviews. In studies of children ranging in age from 5 to 14, results of projective testing and related interview procedures have revealed normal development of gender identity among children of lesbian mothers (Green, 1978; Green, Mandel, Hotvedt, Gray, & Smith, 1986; Kirkpatrick et al., 1981). Similarly, Golombok et al. (1983) also studied gender identity among 37 5–17-year-old children (average age 9–10 years) of lesbian and 38 same-aged children of single heterosexual mothers. All children in this study reported that they were happy with the sex to which they belonged, and that they had no wish to be a member of the opposite sex.

Gender-role behavior.—A number of studies have examined gender-role behavior among children of lesbian mothers. In the

earliest such study, Green (1978) reported that 20 of 21 children of lesbian mothers in his sample named a favorite toy consistent with conventional sex-typed toy preferences, and that all 21 children reported vocational choices within typical limits for conventional sex roles. Kirkpatrick and her colleagues (1981) also found no differences between children of lesbian versus heterosexual mothers in toy preferences, activities, interests, or occupational choices relevant to sex-role conventions. Similarly, Hoeffler (1981) studied toy and activity preferences among 20 6–9-year-old children of lesbian mothers and 20 same-aged children of single heterosexual mothers, and reported no significant differences in toy choices or activity preferences. Interestingly, Hoeffler (1981) also reported that most mothers in her study said that they believed the principal influence on their children's toy and activity choices at this age was not parents or siblings, but the child's peers.

In Golombok and her colleagues' study (1983), children's sex-role behavior was assessed in interviews with children and with their mothers. Both children and mothers agreed that children's interests and activities varied substantially as a function of sex. Results for both children of lesbian and heterosexual mothers were closely in accord with those for the general population, and there were no differences between children of lesbian and heterosexual mothers.

Sex-role behavior of lesbian and heterosexual mothers' children was also assessed by Green and his colleagues (1986). In interviews with the children, no differences between 56 children of lesbian and 48 children of heterosexual mothers were found with respect to favorite television programs, favorite television characters, or favorite games or toys. There was some indication in interviews with children themselves that the offspring of lesbian mothers had less sex-typed preferences for activities at school and in their neighborhoods than did children of heterosexual mothers. Consistent with this result, lesbian mothers were also more likely than heterosexual mothers to report that their daughters often participated in rough-and-tumble play or occasionally played with "masculine" toys such as trucks or guns; however, they reported no differences in these areas for sons. Lesbian mothers were no more or less likely than heterosexual mothers to report that their children often played with "feminine" toys such as dolls. In both family types, however, children's

sex-role behavior was seen as falling within normal limits.

Rees (1979) administered the Bem Sex Role Inventory to 12 children of lesbian mothers and 12 children of single heterosexual mothers. The children ranged in age from 10 to 20 years, with an average age of about 14 years. Children of lesbian and heterosexual mothers did not differ on masculinity or on androgyny, but children of lesbian mothers reported greater psychological femininity than those of heterosexual mothers. This result would seem to run counter to expectations based on stereotypes of lesbians as lacking in femininity, both in their own demeanor and in their likely influences on children. Although provocative, it should probably be interpreted with caution pending replication.

A study of 35 adult daughters of lesbian mothers was conducted by Gottman (1990), who compared their gender role preferences to those of 35 adult daughters of heterosexual mothers who had divorced and remarried and to those of 35 adult daughters of heterosexual mothers who had divorced but not remarried. The adult daughters ranged in age from 18 to 44 years, with a mean age of 24 years. Gottman reported no significant differences in gender role preferences of women in the three groups.

Sexual orientation.—A number of investigators have also studied a third component of sexual identity, sexual orientation. In an early study, Green (1978) assessed the erotic fantasies of pubertal and postpubertal offspring of lesbian mothers. In his sample, there were four children who were 11 years old or older, and all four reported fantasies that were exclusively heterosexual in their content. The adolescents in Rees's (1979) study were also asked about sexual orientation, and all described themselves as having a "heterosexual orientation with no inclination toward homosexuality" (Rees, 1979, p. 87).

Golombok and her colleagues (1983) also assessed the heterosexual versus homosexual interests of older children in their sample. Although precise ages of the older children were not reported, there were nine children of lesbian mothers and 11 children of heterosexual mothers for whom this assessment was done. Many children reported definite heterosexual interests, and there were no significant differences between children of lesbian and heterosexual mothers.

Huggins (1989) interviewed 36 youngsters, who were 13 to 19 years of age; 18 were offspring of lesbian mothers and 18 had mothers who were heterosexual in their orientation. No child of a lesbian mother identified as lesbian or gay, but one child of a heterosexual mother did; this difference was not statistically significant.

Miller (1979) studied a group of gay fathers, who had a total of 48 adult offspring. The ages of the adult sons and daughters ranged from 24 to 64 years; there were 27 adult daughters and 21 adult sons. According to fathers' reports, one son was gay and three daughters were lesbian. Thus, about 8% of the offspring of this group of gay fathers were themselves gay or lesbian in orientation, a figure which is within expected percentages in the population at large.

A study involving interviews with the young adult sons and daughters of lesbian, gay, or bisexual parents was reported by Paul (1986). In the interview, respondents (aged 18–28 years) were asked to report on their own sexual orientation. Of the 34 respondents, two identified themselves as bisexual, three identified themselves as lesbians, and two as gay men. Thus, about 15% of the sample identified themselves as gay or lesbian. Again, this figure was within the normal range of variability in the population.

In her study of adult daughters of lesbian and heterosexual mothers, Gottman (1990) reported figures similar to those of Paul (1986). About 16% of daughters in Gottman's study self-identified as lesbian. The percentages of lesbian daughters did not vary as a function of mothers' sexual orientation.

In two studies, Bozett (1980, 1982, 1987, 1989) investigated sexual preference among the sons and daughters of gay fathers. In one study (Bozett, 1980, 1982), 18 gay fathers were asked about the sexual orientations of their 25 children. Although some children had not yet reached puberty, no father reported having a gay son or lesbian daughter. In another study of 19 children of gay fathers, Bozett (1987, 1989) reported that two sons described themselves as gay and one daughter described herself as bisexual; the other 17 offspring described themselves as heterosexual. Thus, in neither study did the proportion of lesbian or gay offspring exceed that believed to characterize the population at large.

Overall, then, development of gender

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identity, of gender role behavior, and of sexual preference among offspring of gay and lesbian parents was found in every study to fall within normal bounds. Although studies have assessed over 300 offspring of gay or lesbian parents in 12 different samples, no evidence has been found for significant disturbances of any kind in the development of sexual identity among these individuals.

There is always a possibility that critical methodological problems will be identified and that future work will uncover hitherto unrecognized problems. For instance, many lesbian women do not self-identify as lesbians until adulthood (see, e.g., Golombok et al., 1983); for this reason, studies of sexual orientation among adolescents may count as heterosexual some individuals who will come out as lesbian later in life. Future research on sexual identity among offspring of lesbian and gay parents should certainly take account of methodological advances in the assessment of sexual identity (Bem, 1983; Yekel, Bigler, & Liben, 1991).

Other Aspects of Personal Development

Studies of other aspects of personal development among children of gay and lesbian parents have assessed a broad array of characteristics. Among these have been separation-individuation, psychiatric evaluations, assessments of behavior problems, personality, self-concept, locus of control, moral judgment, and intelligence. To explore the possibility that children of lesbian or gay parents experience difficulties in personal development, I review existing research on each topic in turn.

In the only systematic study of children born to lesbians, Steckel (1985, 1987) compared the progress of separation-individuation among 11 preschool children born via DI to lesbian couples with that among 11 same-aged children of heterosexual couples. Using parent interviews, parent and teacher Q sorts, and structured doll play techniques, Steckel compared independence, ego functions, and object relations among children in the two types of families. The main results documented impressive similarity in development among children in the two groups. Similar findings, based on clinical experience with seven children born to lesbian mothers, were also reported by McCandlish (1987).

Steckel (1985, 1987) did, however, report some suggestive differences between groups. Children of heterosexual parents saw themselves as somewhat more aggres-

sive than did children of lesbians, and they were seen by both parents and teachers as more bossy, domineering, and negativistic. Children of lesbian parents, on the other hand, saw themselves as more lovable and were seen by parents and teachers as more affectionate, more responsive, and more protective toward younger children. In view of the small sample size, and the large number of statistical tests performed, these results must be considered suggestive rather than definitive. Steckel's study (1985, 1987) is, however, worthy of special attention in that it is the first to make systematic comparisons of development among children born to lesbian and to heterosexual couples.

As in the literature on sexual identity, most studies compare development among children of divorced lesbian mothers with that among the offspring of divorced heterosexual mothers. For instance, severity of psychiatric disturbance was examined by Kirkpatrick and her colleagues (1981), and by Golombok and her colleagues (1983). In these studies, ratings for children of lesbian mothers were compared to those for children of heterosexual mothers; in both studies, raters were blind to mothers' sexual orientation. In neither study was there any significant difference in rated psychiatric disturbance between children of heterosexual and lesbian mothers.

Golombok et al. (1983) also collected ratings of children on a wide array of behavioral and emotional problems. The scales included problems such as hyperactivity, unsociability, emotional difficulty, and conduct problems. None of the comparisons between children of lesbian and heterosexual mothers was statistically significant.

Gottman (1990) examined personality characteristics among adult daughters of lesbian and heterosexual mothers, using the California Psychological Inventory. Comparisons for 17 of 18 scales employed were nonsignificant. On one scale, called Well-Being, daughters of lesbians scored more favorably than did daughters of heterosexual mothers. Given the number of comparisons that were made, however, the possibility of a chance result in this case must be considered, and caution should be exercised in its interpretation.

Two different investigators have studied self-concepts of children of lesbian mothers. Puryear (1983) studied self-concepts among 15 elementary school aged children of lesbians and 15 children of hetero-

sexual women. More recently, Huggins (1989) studied self-concept among adolescent offspring of lesbian versus heterosexual mothers. Self-concepts were within the normal range in both studies, and neither study reported any significant differences between the two groups in any aspect of self-concept.

Locus of control has also been a focus of research (Puryear, 1983; Rees, 1979). As assessed in these studies, the concept of internal versus external locus of control concerns the extent to which a person believes important events to be under his or her own control or subject to chance or to the control of others. Again, results were within the normal range for both samples. Neither among the elementary school children that Puryear (1983) tested nor among the teenagers that Rees (1979) studied was there any evidence for differences in locus of control between children of lesbian and heterosexual mothers.

The development of moral judgment among teenaged offspring of lesbian and heterosexual mothers was studied by Rees (1979). Using techniques developed by Kohlberg (1964, 1966), Rees assessed maturity of moral judgment using the adolescents' responses to hypothetical moral dilemmas. There were no differences in moral maturity between the children of lesbian versus heterosexual mothers.

Green and his colleagues (1986) assessed intelligence among children of heterosexual and lesbian mothers. Using standardized individual tests of intelligence, Green et al. reported that all of the children they tested had scores within a normal range. There were no differences in intelligence between children of lesbian and heterosexual mothers.

In summary, concerns about difficulties in personal development among children of gay and lesbian parents are not sustained by results of existing research. As was true for sexual identity, studies of other aspects of personal development—such as self-concept, locus of control, moral judgment, and intelligence—revealed no significant differences between children of lesbian or gay parents and children of heterosexual parents. It is always possible that future studies will identify hitherto overlooked difficulties. On the basis of existing evidence, though, fears that children of gay and lesbian parents suffer deficits in personal development appear to be without empirical foundation.

Social Relationships

Studies assessing potential differences between children of gay and lesbian versus heterosexual parents have sometimes included assessments of children's social relationships. Because of fears that children of gay fathers and/or lesbian mothers might encounter difficulties among their peers, the most common focus of attention has been on peer relations, but some information on children's relationships with adults is also available. To evaluate fears about disrupted social relationships among children of lesbian and gay parents, I describe relevant findings in this area. In light of concerns that children of gay and lesbian parents may be at greater risk for sexual abuse, I also outline research findings that address this issue.

The earliest study to assess peer relations among children of lesbian mothers was that of Green (1978). In an interview, children were asked to name their friends. As would be expected for this group of elementary school aged children, 19 of 21 children named a predominantly same-sex group of peer friends. Although this study did not include a comparison group of children with heterosexual mothers, the result was considered to be normal for this age group.

Golombok et al. (1983) also reported that most children in their study named a predominantly same-sex peer group. In addition, the overall quality of children's peer relations was rated by the investigators as good in most cases. This study included a comparison group of children with heterosexual mothers; there were, however, no significant differences between children of lesbian and heterosexual mothers in any of the outcomes.

Green and his colleagues (1986) asked children to rate their own popularity among same-sex and among opposite-sex peers, and they also asked mothers to rate their children's social skills and popularity among peers. Results showed that most mothers rated their children's social skills in a positive manner, and there were no differences between reports about their children given by lesbian and heterosexual mothers. In addition, self-reports of children of lesbian mothers did not differ from those of the offspring of heterosexual mothers.

Kirkpatrick and her colleagues (1981) were the first to investigate children's contacts with adult men in lesbian mother versus heterosexual mother homes. They reported that lesbian mothers in their sample

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were more concerned than heterosexual mothers that their children have opportunities for good relationships with adult men. Referring to further findings from this study, Kirkpatrick (1987) also indicated that lesbian mothers had more adult male family friends and included male relatives more often in their children's activities than did heterosexual mothers. She also described these findings as especially true of lesbian mothers who were living in committed relationships with partners (Kirkpatrick, 1987).

Golombok and her co-workers (1983) administered assessments of children's social relationships with their fathers. They found that children of lesbian mothers were more likely than children of heterosexual mothers to have contact with their fathers at least once a week. Specifically, 12 of 37 children of lesbian mothers, but only two of 38 children of heterosexual mothers, were reported as having contact with their fathers at least once a week. Children of lesbian mothers were also less likely to have had no contact with their fathers during the preceding year (15 of 37) than children of heterosexual mothers (22 of 38). In short, Golombok and her colleagues (1983) reported that most children of lesbian mothers in their sample had at least some contact with their fathers, whereas most children of heterosexual mothers did not.

Harris and Turner (1985/86) studied 10 gay fathers, 13 lesbian mothers, two heterosexual single fathers, and 14 heterosexual single mothers, most of whom had custody of their children. In all, the respondents had 39 children, who ranged in age from 5 to 31 years. Parents described their relationships with their children in generally positive terms, and there were no differences between gay, lesbian, and heterosexual parents in this regard. The majority of gay and lesbian parents reported that they did not feel that their homosexuality had created social problems for their children. Many parents also cited advantages of their homosexuality for their children, such as facilitating acceptance of their own sexuality, augmenting tolerance and empathy for others, and increasing exposure to new viewpoints. One significant difference between homosexual and heterosexual parents was that heterosexual parents were more likely to say that their children's visits with the other parent presented problems for them.

In the Golombok et al. (1983) study, children's contacts with adult friends of their lesbian mothers were also assessed. All of

the children were reported to have contact with adult friends of their mothers. One-third of the mothers reported that their friends were predominantly women, and two-thirds of the mothers reported that their friends included substantial proportions of both men and women. Two-thirds of the lesbian mothers also reported that their adult friends were a mixture of homosexual and heterosexual adults.

Concerns that children of gay or lesbian parents are more likely than children of heterosexual parents to be sexually abused have been addressed in the research literature on abuse. Results of work in this area show that the great majority of adults who perpetrate sexual abuse are male; sexual abuse of children by adult women is extremely rare (Finkelhor & Russell, 1984; Jones & MacFarlane, 1980; Sarafino, 1979). Lesbian mothers are thus at very low risk for sexual abuse of their children. Moreover, the overwhelming majority of child sexual abuse cases can be characterized as heterosexual in nature, with an adult male abusing a young female (Jones & MacFarlane, 1980). Available evidence reveals that gay men are no more likely than heterosexual men to perpetrate child sexual abuse (Groth & Birnbaum, 1978; Sarafino, 1979). Fears that children in custody of gay or lesbian parents might be at heightened risk for sexual abuse are thus without empirical foundation.

Overall, then, results of research to date suggest that children of lesbian and gay parents have normal relationships with peers and that their relationships with adults of both sexes are also satisfactory. In fact, the findings suggest that children in custody of divorced lesbian mothers have more frequent contact with their fathers than do children in custody of divorced heterosexual mothers. There is no evidence to suggest that children of lesbian or gay parents are at greater risk of sexual abuse than other children. The picture of lesbian mothers' children that emerges from results of existing research is thus one of general engagement in social life with peers, with fathers, and with mothers' adult friends—both female and male, both homosexual and heterosexual.

Research on Diversity among Children of Gay and Lesbian Parents

Despite the diversity evident within gay and lesbian communities (Blumenfeld & Raymond, 1988), research on variations

among lesbian and gay families with children is as yet quite sparse. In addition to documenting differences that exist among these families, such research can also describe conditions, interactions, and relationships that are associated with favorable or unfavorable outcomes for children of lesbian and gay parents. In this section, I first describe research findings on the impact of parental psychological and relationship status, and then examine research on the influence of other stresses and supports.

One dimension of difference among gay and lesbian families concerns whether or not the custodial parent is involved in a couple relationship, and if so, what implications this may have for children. Colombok et al. (1983), Kirkpatrick et al. (1981), and Pagelow (1980) all reported that, in their samples, divorced lesbian mothers were more likely than divorced heterosexual mothers to be living with a romantic partner; however, none of these investigators examined connections between this variable and children's adjustment or development in lesbian mother families.

Huggins (1989) reported that self-esteem among daughters of lesbian mothers whose lesbian partners lived with them was higher than that among daughters of lesbian mothers who did not live with a partner. Because of the small sample size and absence of statistical tests, this finding should be seen as a preliminary one. If replicated in future research, however, the finding suggests the possibility that judicial inclinations to award custody to lesbian mothers only with the stipulation that they not live with lesbian partners may be detrimental to the best interests of children in these families. On the basis of impressions from her own work, Kirkpatrick has also stated her view that "contrary to the fears expressed in court, children in households that included the mother's lesbian lover had a richer, more open and stable family life" than did those in single-parent lesbian mother households (Kirkpatrick, 1987, p. 204).

Another aspect of diversity among lesbian families relates to the psychological status and well-being of the mother. Research on parent-child relations in heterosexual families has consistently revealed that children's adjustment is often related to indexes of maternal mental health (Rutter, Izard, & Read, 1986; Sameroff & Chandler, 1975). Therefore, one might expect factors that enhance mental health among lesbian mothers also to benefit the children of these women.

It is worth noting in this regard that Rand, Graham, and Rawlings (1982) found that lesbian mothers' sense of psychological well-being was correlated with the extent to which they were open about their lesbian identity with employers, ex-husbands, and children. Mothers who felt more able to disclose their lesbian identity were more likely to express a positive sense of well-being. Unfortunately, no information about the relations of these findings to adjustment or development among children of these women has been reported to date.

Another area of diversity among families with a gay or lesbian parent involves the degree to which a parent's gay or lesbian identity is accepted by other significant people in children's lives. Huggins (1989) found a tendency for children whose fathers were rejecting of maternal lesbianism to report lower self-esteem than those whose fathers were neutral or positive. Due to small sample size and absence of significance tests, this finding should be regarded as suggestive rather than definitive. Huggins's (1989) finding does, however, raise questions about the extent to which reactions of important adults in a child's environment can influence responses to discovery of a parent's gay or lesbian identity.

Effects of the age at which children learn of parental homosexuality have also been a topic of study. Paul (1986) found that offspring who were told of parental gay, lesbian, or bisexual identity either in childhood or in late adolescence found the news easier to cope with than those who first learned of it during early to middle adolescence. Huggins (1989) also reported that those who learned of maternal lesbianism in childhood had higher self-esteem than did those who were not informed of it until they were adolescents. From a clinical perspective, it is widely agreed that early adolescence is a particularly difficult time for children to learn that a father is gay or that a mother is lesbian (Bozett, 1980; Pennington, 1987; Schulenberg, 1985).

Some investigators have also raised questions about the potential role of peer support in helping children to deal with issues raised by having a gay or lesbian parent. Lewis (1980) was the first to suggest that children's silence on the topic of parental sexual orientation with peers and siblings might add to their feelings of isolation from other children. Paul (1986) found that 29% of his young adult respondents had never known anyone else with a gay, lesbian, or

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bisexual parent, suggesting that the possibility of isolation is very real for some young people. Potentially negative effects of isolation have not, however, been documented to date. Lewis (1980) suggested that children would benefit from support groups consisting of other children of gay or lesbian parents, but systematic evaluations of such groups have not been reported.

In summary, research on diversity among families with gay and lesbian parents and on the potential effects of such diversity on children is only beginning (Freiberg, 1990; Martin, 1989). Existing data suggest that children may fare better when mothers are in good psychological health and living with a lesbian partner. There are indications that children find it easier to deal with issues raised by having lesbian or gay parents if they learn of parental sexual orientation during childhood rather than during adolescence. Existing data also suggest the value of a supportive milieu, in which parental sexual orientation is accepted by other significant adults, and in which children have contact with peers in similar circumstances. The existing data are, however, still very sparse. It is clear that much remains to be learned about differences among gay and lesbian families and about the impact of such differences on children growing up in these homes.

Conclusions

There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Despite long-standing legal presumptions against gay and lesbian parents in many states, despite dire predictions about their children based on well-known theories of psychosocial development, and despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.

Without denying the convergence of results to date, it is important also to acknowledge that research comparing children of gay or lesbian parents with those of hetero-

sexual parents has presented a variety of methodological challenges, not all of which have been surmounted in every case. For instance, questions can be raised with regard to individual studies about sampling issues, assessment techniques, statistical power, and other technical matters; no individual study would be entirely invincible to such criticism. A particularly notable weakness of existing research has been the tendency in most studies to compare development among children of a group of divorced lesbian mothers, many of whom are living with lesbian partners, to that among children of a group of divorced heterosexual mothers who are not currently living with heterosexual partners. It will be important for future research to separate the potential significance of maternal sexual orientation from that of mothers' partner status.

Despite shortcomings, however, results of existing research comparing children of gay or lesbian parents with those of heterosexual parents are extraordinarily clear, and they merit attention from a number of perspectives. In addition to its role in the empowerment of lesbian and gay parents, evidence from this research also has important implications for well-known psychological theories of psychosocial development. If, as McCandlish (1987) and Steckel (1987) have reported, the development of children born into lesbian mother homes is normal, then traditional emphases on the importance of heterosexual male and female parents for children's psychosocial development may need to be reconsidered.

A number of different approaches might be examined. It might be argued that certain kinds of family interactions, processes, and relationships are beneficial for children's development, but that parents need not be heterosexual to provide them. In other words, variables related to family processes (e.g., qualities of relationships) may be more important predictors of child adjustment than are variables related to family structure (e.g., sexual orientation, number of parents in the home).

A useful analogy in this regard is provided by research on the impact of parental divorce on children. While early studies of children's reactions to divorce focused on variables related to household composition and family structure (e.g., divorced vs. non-divorced families), more recent research has highlighted the important contributions of variables related to family processes and in-

teractions (e.g., conflict, warmth). For instance, a number of investigators (e.g., Emery, 1982; O'Leary & Emery, 1984) have argued that child behavior problems associated with parental divorce are best understood as the result of interparental conflict rather than changes in household composition or structure as such. Research on divorcing families has thus suggested the preeminence of process over structure in mediating outcomes for children.

Applied to the present concerns, this perspective implies the hypothesis that structural variables such as parental sexual orientation may be less important in mediating child outcomes in lesbian and gay families than qualities of family interactions, relationships, and processes. Many theoretical perspectives are compatible with an emphasis on function. For instance, attachment theory (Ainsworth, 1985a, 1985b; Bowlby, 1988) emphasizes the functional significance of sensitive parenting in creating secure relationships, but does not stipulate the necessity of any particular family constellation or structure. Similarly, self psychology (Kohut, 1971, 1974, 1984) describes the significance of mirroring and idealizing processes in human development, but does not insist on their occurrence in the context of any specific family structure. Theoretical perspectives such as attachment theory and self psychology would seem to be compatible with an emphasis on functional rather than structural aspects of family life, and hence to provide promising interpretive frameworks within which to conceptualize further research in these directions.

To evaluate the impact of both process and structural variables on child outcomes in lesbian, gay, and heterosexual families, research would need to assess variables of both types. Research with other kinds of nontraditional families (Eiduson & Weisner, 1978; Weisner & Wilson-Mitchell, 1990) has demonstrated the potential utility of this approach. Most research on lesbian and gay families, however, has focused on structural rather than process variables (e.g., on comparisons between children of lesbian and heterosexual mothers rather than on the qualities of interactions and relationships within these families). An adequate evaluation of the significance of process versus structure in lesbian and gay families therefore awaits the results of future research.

An alternative theoretical response might be to broaden the focus of attention

to include influences other than those from parents on children's development. Important forms of learning (e.g., about behavior considered appropriate for members of each sex) may be less dependent on parental input than traditionally believed (Maccoby, 1990). Other social influences, such as those of peers, should also be considered. It will also be important to identify and acknowledge contributions of genetic influences (Dunn & Plomin, 1990). By investigating the impact of new family forms on the development of children who are growing up in them, it seems likely that research on children of lesbian and gay parents will test existing theoretical positions, and in so doing, open up opportunities for conceptual innovation.

Results of research reviewed here also have significant implications for public policies governing child custody, foster care, and adoption in the United States (Falk, 1989; Green, 1982; Polikoff, 1986, 1990). Existing research evidence provides no justification for denial of parental rights and responsibilities to lesbians and gay men on the basis of their sexual orientation (Editors of the Harvard Law Review, 1990; Green, 1982; Ricketts & Achtenberg, 1990). Indeed, protection of the best interests of children in lesbian and gay families increasingly demands that courts and legislative bodies acknowledge realities of life in nontraditional families (Falk, 1989; Green, 1982; Polikoff, 1990).

Consider, for example, a family created by a lesbian couple who undertake the conception, birth, and upbringing of their child together. Should this couple separate, it is reasonable to expect that the best interests of the child will be served by preserving the continuity and stability of the child's relationships with both parents. In law, however, it is only the biological mother who is recognized as having parental rights and responsibilities. When courts and legislatures fail to acknowledge facts of children's lives in nontraditional families, they experience great difficulty in serving the best interests of children in these families (Polikoff, 1990).

A number of approaches to rectifying this situation have been proposed. For instance, a small number of families have obtained second-parent adoptions (Ricketts & Achtenberg, 1990), in which a nonbiological parent legally adopts a child without the biological parent giving up his or her legal

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rights and responsibilities; this avenue is not, however, widely available. Others (e.g., Polikoff, 1990) have advocated legislative reform, including changes in the standards for legal designation as a parent. As the numbers of lesbian and gay families with children increase, pressures for legal and judicial reform seem likely to mount.

Existing research has focused primarily on comparisons between children of gay or lesbian parents and those of heterosexual parents. This approach reflects a concern with addressing what can be considered heterosexual and/or homophobic questions. Heterosexism reflects the belief that everyone is or ought to be heterosexual. Homophobic questions are those which are based on prejudice against lesbians and gay men, and which are designed to raise the expectation that various negative outcomes will befall children of gay or lesbian parents as compared to children of heterosexual parents. Examples of such questions that were considered above include: Won't the children of lesbians and gay men have difficulty with sexual identity? Won't they be more vulnerable to psychiatric problems? Won't they be sexually abused? Now that research has addressed such heterosexual and/or homophobic questions, it would appear that the time has come for child development researchers to address a broader range of issues in this area.

Many important research questions can stem from an interest in the children of gay and lesbian parents. Such questions may raise the possibility of various desirable outcomes for these children. For instance, won't these children grow up with increased tolerance for viewpoints other than their own? Won't they be more at home in the multicultural environments that Americans increasingly inhabit? Children of lesbian mothers have described an increased tolerance for divergent viewpoints as a benefit of growing up in lesbian mother families (Rafkin, 1990), but systematic research in this area is still needed.

Alternatively, other approaches may involve study of the great diversity among gay and lesbian families. For example, researchers may ask how the experience of growing up with multiple gay and lesbian parents differs from that of growing up with a single parent or with two parents who are a gay or lesbian couple. Future research should explore ways in which family processes are related to child outcomes in different kinds of lesbian and gay families.

A few studies that provide information relevant to issues of diversity among children of gay and lesbian parents have already been reported. Results of work with families headed by divorced lesbian mothers suggest that children are better off when their mothers have high self-esteem and are currently living with a lesbian partner (Huggins, 1989; Kirkpatrick, 1987). Children in such families also appear to show more favorable adjustment when their fathers and/or other important adults accept their mothers' lesbian identities, and perhaps also when they have contact with other children of lesbians and gay men (Huggins, 1989; Lewis, 1980). In addition, there are indications that those who learn as children that they have a gay or lesbian parent experience less difficulty in adapting to this reality than do those who are not told until adolescence (Paul, 1986). These findings are best regarded as preliminary glimpses of a territory in need of future exploration.

Much remains to be done to understand differences between and among gay and lesbian families, and to comprehend the impact of such differences on children and youth (Martin, 1989; Pollack, in press; Riley, 1988). Information is needed about the economic, religious, racial, ethnic, and cultural diversity in gay and lesbian families, and about the ways in which parents and children in such families manage the multiple identities available to them. Almost no research has studied families in which gay men and lesbians have had or have adopted children after coming out. We need to know more about different kinds of parenting experiences—such as noncustodial parenting, nonbiological parenting, coparenting, multiple parenting, adoption, and foster care—and about their likely influences on the children involved. We also need to know more about the nature of stresses and supports encountered by children of lesbian and gay parents—in the parents' families of origin (e.g., with grandparents and other relatives), among parents' and children's friends, and in their larger communities. Research is needed to explore the pains and pleasures of growing up in gay and lesbian families, and also to identify the costs and benefits of court-ordered separations between children and their gay and lesbian parents. We need to know more about the ways in which effects of heterosexism and homophobia are felt by parents and children in lesbian and gay families, and about the ways in which they cope with ignorance and prejudice that they encounter.

To address these issues more effectively, future research should maintain an ecological perspective and should, where possible, employ longitudinal designs. Longitudinal studies of development, especially during middle and later childhood and adolescence, are badly needed. Such studies should seek to assess not only child adjustment over time, but also the family processes, relationships, and interactions to which child adjustment may be linked. Family processes, in turn, should be viewed in context of the surrounding ecological conditions of family life.

In conclusion, it would seem that research on children of gay and lesbian parents has reached a significant turning point. Having addressed heterosexist and homophobic concerns represented in psychological theory, judicial opinion, and popular prejudice, child development researchers are now in a position also to explore a broader range of issues raised by the emergence of different kinds of lesbian and gay families. Results of future research on such issues have the potential to increase our knowledge about nontraditional family forms and about their impact on children, stimulate innovations in theoretical understanding of human development, and inform legal rulings and public policies relevant to children of gay and lesbian parents.

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