

IN THE SUPREME COURT, STATE OF WYOMING

PAMELA M. HERTZLER,	)	
	)	
Appellant	)	
(Plaintiff),	)	
	)	
v.	)	No. 94-262
	)	
DEAN B. HERTZLER,	)	
	)	
Appellee	)	
(Defendant):	)	

BRIEF OF AMICI CURIAE AMERICAN PSYCHOLOGICAL
ASSOCIATION AND WYOMING PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

The American Psychological Association, a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The American Psychological Association has more than 120,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the American Psychological Association's major functions are promoting psychological research and promulgating the results of this research as it applies to important human concerns. A substantial number of the American Psychological Association's members are concerned with research and the provision of psychological services pertaining to families and children, human sexuality, and attitudes toward stigmatized groups.

The American Psychological Association has submitted amicus briefs in important cases throughout the country that raise issues to which psychological research and opinion are pertinent. The American Psychological Association's amicus briefs have been relied upon by the majority, as well as key concurring and dissenting opinions, in many cases of national significance. E.g., Maryland v. Craig, 497 U.S. 836, 855 (1990); Hodgson v. Minnesota, 497 U.S. 417, 437 n.24, 454 n.38 (1990) (plurality opinion); id. at 494 (Kennedy, J., concurring in part and dissenting in part); Bowers v. Hardwick, 478 U.S. 186, 199,

202 n.2, 208 n.3 (1986) (Blackmun, J., dissenting); Kentucky v. Wasson, 842 S.W.2d 487, 490 & n.1 (Ky. 1992).

The Wyoming Psychological Association is a professional association for psychologists and masters' level psychological practitioners in Wyoming. Among the Wyoming Psychological Association's major functions are advancing psychology as a science, as a profession, and as a means of promoting human welfare. The Wyoming Psychological Association subscribes to the Ethical Principles of the American Psychological Association and works closely with the Wyoming Board of Psychology on licensing issues. The Wyoming Psychological Association is available for consultation with judiciary authorities in Wyoming and is often called upon to provide expert testimony in legal cases.

Amici believe that parent-child bonding is crucial to a child's development and well-being. Interference with this relationship should be based only on compelling reasons, such as concern for the life, physical safety, or mental health of the child. A parent's sexual orientation, however, is not a compelling reason to restrict an established parent-child relationship. The relevant social science research shows that an individual's sexual orientation does not correlate with the individual's fitness as a parent.

Amici submit this brief to bring to this Court's attention the principal body of scientific knowledge pertinent to the issue of a parent's sexual orientation in the context of a visitation order. It is particularly important that the Court

consider such scientific research in view of the widespread prejudice and stereotyping that exists with respect to gay men, lesbians, and bisexual people in the United States.

STATEMENT OF ISSUE PRESENTED

Amici will address the following issue:

Whether the trial court erred in holding that a mother's involvement in an open lesbian relationship provided an independent basis for restricting visitation with her children.

STATEMENT OF THE CASE

This case involves an appeal from the trial court's modification of a custody and visitation order. During their 15-year marriage, Pamela and Dean Hertzler adopted two children, Joshua (now 8 years old) and Miriam (now 5 years old). In January, 1991, Pamela filed for divorce, and she and the children moved to Nebraska. The divorce became final in July 1991. In the spring of 1991, Pamela determined that she is a lesbian. Since early 1992, she has lived in Ohio with Peggy Keating in an open lesbian relationship.

As part of the divorce decree, Pamela was awarded custody of the children, and Dean was granted liberal visitation rights. In December 1991, in response to Dean's threat of legal action, Pamela agreed to a modification of the original custody and visitation order. Under that modification, custody was

transferred to Dean, and Pamela received liberal visitation rights.

In January 1994 Dean petitioned for further modification of the custody and visitation decree. In March 1994 the trial court entered a temporary restraining order restricting Pamela's visitation rights, citing allegations of sexual abuse made by Dean and his new wife against Pamela.

During a four-day hearing held in July 1994, a number of witnesses testified. Among other things, Dean testified about his belief, which he conveyed to the children, that homosexuality is a sin and that Pamela was living an evil life. Tr. at 85-86, 158-62, 168-69. J. Lynn Rhodes, the individual who testified as an expert witness in support of Dean, stated that his recommendation that contact between Pamela Hertzler and her children be terminated was based in part on his moral and religious convictions that homosexuality is wrong. Tr. at 472-79.

The trial court subsequently issued a decision letter, holding that there had been a significant change in circumstances since the earlier custody and visitation order. The court determined that it was in the best interests of the children that Pamela's visitation be restricted. The court concluded that "eroticization" of the children had occurred during their visits with Pamela and that this was not in the children's best interests. The court further held that Pamela's involvement in an open lesbian relationship provided an independent basis for reducing her visitation with her children. The court stated:

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

Decision Letter, July 21, 1994, at 5.

The trial court placed strict limits on the number and timing of contacts between Pamela and her children, required that visits be supervised by another adult, and prohibited any contact between Peggy Keating and the children. The court also ordered that the parties and the children participate in counselling.

INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court's decision raises important issues regarding prejudices and stereotypes surrounding homosexuality and the impact of a parent's sexual orientation on his or her children. Amici are in a position to offer expert assistance to the Court in its consideration of these matters. Amicus American Psychological Association has previously submitted briefs on these subjects, advising courts of a wide body of social science research relating to the parenting abilities of lesbian mothers and gay fathers and the effect on children of being raised by a gay or lesbian parent.

This case raises a number of other important and difficult issues, including the appropriateness of certain child

abuse assessment procedures and the requisite qualifications for expert witnesses in this area. Due to the fact-specific nature of these additional issues, amici have concluded that they are not now in a position to address them. Amici also wish to make clear that they in no way condone sexual abuse of children, and they have not attempted to reach a conclusion about whether any abuse actually occurred in this case. Amici address only the question whether an open lesbian relationship presents an independent basis for restricting a mother's visitation with her children.

It is clear that homosexuality does not constitute a proper basis for reducing a mother's visitation rights. Under Wyoming law, orders involving visitation are to be made on the basis of what will best serve the well-being of the children. There is no support in the social science research for the proposition that contacts between gay parents and their children are contrary to the best interests of the children. Indeed, that research has reported no significant differences between children raised by lesbian mothers or gay fathers and those raised by heterosexual parents. Moreover, social science research does not suggest that lesbian mothers and gay fathers are likely to be unfit parents.

The decision regarding visitation rights should be made without reference to the fact that a parent is in an openly lesbian or gay relationship. Any assumption that contact between a parent and child should be reduced due to the parent's

homosexuality is not supported by the relevant social science research. Thus, a court's invocation of such an assumption as the basis for reduction of a parent's visitation rights is contrary to Wyoming law, which requires that visitation determinations be based on the welfare of the child.

ARGUMENT

Under Wyoming law, orders involving custody and visitation are to be made according to what will be "most expedient and beneficial for the well-being of the children." Wyo. Stat. § 20-2-113(a) (1994). If "both parents have shown the ability to act in the best interest of the child, the court may order any arrangement that encourages parents to share in the rights and responsibilities of rearing their children" following a divorce. Id. The divorce decree may be modified with respect to visitation "as the circumstances of the parents and the benefit of the children requires." Id. In matters of visitation rights, "the welfare and needs of the children are to be given paramount consideration." Rowan v. Rowan, 786 P.2d 886, 890 (Wyo. 1990). See also Cosner v. Ridinger, 882 P.2d 1243, 1247 (Wyo. 1994); Henson v. Henson, 384 P.2d 721, 723 (Wyo. 1963) (prime objective in modification of divorce decree is to serve best interests of the child).

The court below held that the fact that Pamela Hertzler is living in an open lesbian relationship provided an independent basis for reducing her visitation with her children. The court

stated that Pamela's "open homosexuality has and is likely to create confusion and difficulty for the children" and "is likely to negatively affect the development of the children's moral values." Decision Letter, July 21, 1994, at 5. The court also asserted that "the State has an interest in supporting conventional marriages and families." Id.

As amici show below, there is no support in the social science research for the proposition that relationships and contacts between gay parents and their children are contrary to the best interests of the children or that a parent's sexual orientation is a proper ground for interfering with the parent-child relationship through restriction of visitation with that parent.¹ A court's assumption of a proposition that has no

¹ This brief reviews empirical research from the social and behavioral sciences pertaining to children and to sexual orientation. Amici describe data collected in studies that have been conducted using the "scientific method." This approach requires that data be collected through procedures that minimize the likelihood that a particular researcher's personal biases and values will influence the observations he or she makes. Thus, for example, in a valid study, research subjects should be unaware of the study's hypotheses because such knowledge might influence their responses or behavior. In addition, scientific studies typically are subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

basis in fact precludes an evaluation of an individual's parental abilities and relationship with the child; it therefore conflicts with Wyoming law, which requires that visitation decisions be based on the best interests of the child.

I. THE SOCIAL SCIENCE RESEARCH HAS REPORTED NO SIGNIFICANT DIFFERENCES BETWEEN CHILDREN RAISED BY LESBIAN MOTHERS OR GAY FATHERS AND THOSE RAISED BY HETEROSEXUAL PARENTS.

Because the central issue in custody and visitation determinations is the best interests of the child (see page 7, supra), it is essential for this Court to be aware of the social science research addressing the effect on children of being raised by a lesbian mother or gay father. As shown below, the relevant social science research has consistently found that children raised by lesbian mothers or gay fathers do not differ significantly from those raised by heterosexual parents.² While

Because any single empirical study inevitably has limitations, amici try in this review to describe overall trends and patterns in the research data that are evident from examining multiple studies that address a particular research question.

² This literature is reviewed in Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Dev. 1025 (1992) [hereinafter Children of Lesbian and Gay Parents], and Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 157-61 (1991) [hereinafter Myths].

The research results have been consistent on this point regardless of the geographic region within the United States where the children were raised. See, e.g., 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) [hereinafter Richard Green et al. (1986)] (parents and children studied were living in rural and urban areas in Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin); David K. Flaks et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children (forthcoming in 31 Dev. Psychol. (Jan. 1995)) (manuscript on file with Covington & Burling) (parents and children studied were from the Pennsylvania area); Sharon L. Huggins, A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers, in Homosexuality and the Family 123 (Frederick W. Bozett, ed., 1989) (parents and children studied were from southern California); Judith A. Miller et al., The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research, 7 J. Homosexuality 49 (1981) (parents and children studied were from a "large western mountain city").

Several courts have found that the available social science research provides persuasive evidence that children raised in a gay or lesbian household are not disadvantaged

many of the studies cited below are based on research involving gay fathers or lesbian mothers who have custody over their children, the results can be applied to the visitation context.

A. The Research Indicates That the Overall Psychological Health of Children Raised by Lesbian Mothers or Gay Fathers Does Not Differ from That of Children Raised by Heterosexual Parents.

Scientific studies investigating the psychological effects on children of being raised by a lesbian or gay parent have concluded unanimously that there are no significant differences in the psychological health of these children and children raised by a heterosexual parent.

Studies comparing the psychological adjustment of children raised by a divorced lesbian mother and children raised by a divorced heterosexual mother indicate that there is no significant difference between the two groups.³ There are no statistically significant differences between the two groups for the presence of such behavioral and emotional problems as

relative to children raised in a heterosexual household. See, e.g., Bezio v. Patenaude, 410 N.E.2d 1207, 1215-16 (Mass. 1980); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. Ct. App. 1983); In re Adoption of Evan, 583 N.Y.S.2d 997, 1001 n.1 (Sur. Ct. 1992).

³ See, e.g., Martha Kirkpatrick et al., Lesbian Mothers and Their Children: A Comparative Study, 51 Am. J. Orthopsychiatry 545, 545-51 (1981); Susan Golombok et al., Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 J. Child Psychol. & Psychiatry 551 (1983).

hyperactivity, unsociability, emotional difficulty and conduct problems.⁴ A study that traced such behavioral issues through to adulthood found no differences between individuals raised by a lesbian mother and those raised by a heterosexual mother.⁵

Two of the more recent studies in this area have focused on children who have been raised since birth by a lesbian mother and who have never lived in a heterosexual household. Both studies support the conclusion that the homosexual orientation of the parent causes no adverse consequences to the children. In one study the children of the lesbian mothers did not differ on social competence or behavioral problems compared with children from the general population.⁶ Another study found

⁴ Susan Golombok et al., supra note 3, at 565, 570.

⁵ Julie S. Gottman, Children of Gay and Lesbian Parents, in Homosexuality and Family Relations 177 (Frederick W. Bozett, ed., 1990). Indeed, for the characteristic of "well-being," which measures the individual's sense of feeling secure in the world and in relationships, adult daughters of lesbians tended to have fewer worries and complaints and were freer of doubts and disillusionment; the adult daughters raised by heterosexual mothers exhibited more awkwardness, cautiousness and apathy. Id. at 189-90.

⁶ Charlotte J. Patterson, Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity in Lesbian and Gay Psychology 156, 165-67 (Beverly Greene & Gregory M. Herek, eds., 1994) [hereinafter Baby Boom].

no differences in overall cognitive and behavioral functioning, social competence, school performance, or developmental progress between children raised by a lesbian mother and her same-sex partner and children raised by married heterosexual-parent families.⁷

Several studies have examined the self-esteem and self-concepts of children raised by a lesbian mother and those raised by a heterosexual mother. A study of adolescents found no differences in self-esteem or self-concept between children of divorced mothers living with a same-sex partner and divorced mothers living with an opposite sex partner. The self-esteem and self-concept of both groups were within the normal range.⁸ Moreover, a study of children raised from birth by a lesbian mother in a lesbian household found no difference between those children and children raised by a heterosexual mother on self-concept scales that measure aggression, sociability, or desire to be the center of attention.⁹ This same study found that children raised by a lesbian mother reported greater symptoms of stress but also greater feelings of joy, contentedness, and comfort with themselves than children raised by a heterosexual mother.¹⁰

⁷ David K. Flaks et al., supra note 2, at 16-20, 24.

⁸ Sharon L. Huggins, supra note 2, at 132-35.

⁹ Baby Boom, supra note 6, at 167.

¹⁰ Id. at 168, 169-70.

Finally, the available evidence suggests that there is no difference in the overall level of intellectual development of children raised by a lesbian mother as compared with children raised by a heterosexual mother.¹¹

B. No Differences Between the Social Relationships of Children Raised by Lesbian Mothers or Gay Fathers and Children Raised by Heterosexual Parents Have Been Reported.

The social relationships of children raised by a lesbian or gay parent appear to be of similar quality to those of children raised by a heterosexual parent. Moreover, the fear of the court below that the children were likely to suffer "social difficulties" as a result of their mother's lesbian relationship is not borne out in the research.

1. Relationships with Peers and Adults

Research to date suggests that children raised by a lesbian mother have peer relationships that are substantially equivalent to those of children raised by a heterosexual mother. Studies have shown no significant differences between these two groups of children in terms of self-ratings of popularity, mothers' ratings of their children's popularity and leadership qualities, and overall social adjustment.¹² Similarly, in the area of choice of friends, social science researchers have found little difference between children raised by a lesbian mother and

¹¹ Richard Green et al. (1986), supra note 2, at 167-84.

¹² Id. at 178; Susan Golombok et al., supra note 3, at 565-67.

children raised by a heterosexual mother. Before puberty, most children in both groups have same-sex best friends.¹³

Children of lesbian mothers are also likely to have healthy and positive relationships with adults. One study actually found that children raised by a lesbian visit with their father more often than children raised by a divorced heterosexual mother.¹⁴ Another study found that, although the regularity of visits with fathers did not differ, lesbian mothers were more concerned as a group than heterosexual mothers as a group that their children have positive relationships with men. Accordingly, children of lesbians, especially children of lesbians who were sharing a household with their partner, were reported to be more likely to include male relatives in their activities on a regular basis and to have more men in their lives as family friends.¹⁵ Overall, there are no findings in the research literature to date that would provide any cause for concern about the relationships of children raised by lesbian or gay parents with adults.

2. "Social Difficulties"

The court below asserted that "it is probable that the children will be subject to social difficulties as a result of [Pamela's] lifestyle" Decision Letter, July 21, 1994,

¹³ Richard Green et al. (1986), supra note 2, at 178; Susan Golombok et al., supra note 3, at 564.

¹⁴ Susan Golombok et al., supra note 3, at 557, 561.

¹⁵ Martha Kirkpatrick et al., supra note 3, at 549.

at 4. The social science research does not substantiate the lower court's fears. One study showed that only about five percent of the children studied who had lived with an openly lesbian or gay parent experienced harassment by other children.¹⁶ Another study suggested that if children of a lesbian mother believe that they may face social stigma, they will exercise discretion in revealing the sexual orientation of their parents,¹⁷ presumably resulting in fewer instances of harassment.

In cases where children do experience harassment, the incidents generally are infrequent and consist of relatively minor verbal teasing, such as name-calling.¹⁸ Such experience

¹⁶ Brian Miller, Gay Fathers and Their Children, 28 Fam. Coordinator 544, 548 (1979). See also Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 Am. J. Psychiatry 692, 695-96 (1978) [hereinafter Richard Green (1978)] (limited data showed that in seven lesbian mother families in which issue of teasing was discussed, three children reported being teased and 18 children did not experience teasing; in all three cases, the teasing was minor and transitory).

¹⁷ Karen G. Lewis, Children of Lesbians: Their Point of View, 25 Soc. Work 198, 199 (1980).

¹⁸ See Frederick W. Bozett, Gay Fathers: A Review of the Literature, in Homosexuality and the Family 137, 143, 144, 148 (Frederick W. Bozett, ed., 1989); Brian Miller, supra note 16, at

has not been shown to have had any significant impact on the children involved.¹⁹ On the other hand, the harmful effects suffered by a child when he or she is deprived of opportunities for contact with a parent are well documented.²⁰ Thus, the social science research results strongly suggest that a court does far more harm than good when it insulates the child from his or her gay or lesbian parent to "protect" the child from the possibility of future taunting.

Of course, many children are teased because of some way in which they or their families are different from the norm. Teasing may be based on a child's physical appearance, race, religion, economic status, or any number of other factors. The important issue for children's development is not whether teasing

548.

¹⁹ See, e.g. Richard Green (1978), supra note 16, at 695 (children's reactions to name calling directed at mothers were rather matter-of-fact and ranged from defensiveness to obliviousness); Donna J. Hitchens & Martha J. Kirkpatrick, Lesbian Mothers/Gay Fathers, in Emerging Issues in Child Psychiatry and the Law (Diane H. Schetky & Elissa P. Benedek, eds., 1985); Steve Susoeff, Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, 877-80 (1985).

²⁰ See Michael Rutter, Maternal Deprivation, 1972-1978: New Findings, New Concepts, New Approaches, 50 Child Dev. 283 (1979). See also part III, infra.

occurs, but whether the child has the support of his or her parents in learning to deal with the teasing. See M.P. v. S.P., 404 A.2d 1256, 1262-63 (N.J. Super. Ct. App. Div. 1979).

C. The Research Does Not Suggest That a Parent's Sexual Orientation Influences the Sexual Identity of His or Her Child.

There is no evidence that a parent's sexual orientation influences the sexual identity of a child. Sexual identity is a broad term that encompasses an individual's gender identity, gender role behavior, and sexual orientation. Gender identity concerns an individual's psychological sense of being principally male or female; gender role behavior relates to an individual's adherence to cultural norms for feminine and masculine attitudes and behavior; and sexual orientation relates to an enduring erotic, affectional, or romantic attraction to individuals of a particular gender.²¹ Sexual orientation usually is characterized as either homosexual (a primary or exclusive attraction to individuals of one's own gender), heterosexual (a primary or exclusive attraction to individuals of the other gender), or bisexual (significant attractions to members of both genders).

Research comparing the gender identity of children raised by a lesbian mother with the gender identity of children raised by a heterosexual mother has found that the two groups do

²¹ Gregory M. Herek, Sexual Orientation, in 1 Women's Studies Encyclopedia 344-46 (H. Tierney ed., 1989).

not differ.²² These studies typically attempt to determine whether the child identifies psychologically as a male or female and whether the child is happy with the biological sex to which he or she belongs.²³ The children of a lesbian mother are as likely as the children of a heterosexual mother to identify psychologically as a member of their biological sex and to be content with that status.²⁴

Research has also found that a parent's sexual orientation does not significantly influence a child's gender role behavior. Most boys raised by a lesbian mother show gender role behavior ordinarily regarded as characteristically masculine, and most girls raised by a lesbian mother show gender role behavior ordinarily regarded as feminine.²⁵ Further,

²² Susan Golombok et al., supra note 3, at 568; Julie S. Gottman, supra note 5, at 189; Kirkpatrick et al., supra note 3, at 551; Richard Green, The Best Interests of the Child with a Lesbian Mother, 10 Bull. AAPL 7, 14 (1982) [hereinafter Green (1982)].

²³ Richard Green et al. (1986), supra note 2, at 176.

²⁴ See, e.g., id. at 176 (comparing the children of lesbian mothers and children of heterosexual mothers from rural and urban areas in ten states).

²⁵ See, e.g., Susan Golombok et al., supra note 3, at 562; Julie S. Gottman, supra note 5, at 181; Beverly Hoefffer, Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families, 51 Am. J. Orthopsychiatry 536, 537 (1981); Baby Boom,

children raised by a lesbian mother show no significant differences in gender role behavior when compared with children raised by a heterosexual mother.²⁶

Finally, the belief that a child raised in a household with a lesbian or gay parent is more likely to become lesbian or gay is without any basis in fact.²⁷ There is no evidence that

supra note 6, at 168-69.

²⁶ Baby Boom, supra note 6, at 168-69; Susan Golombok et al., supra note 3, at 568; Julie S. Gottman, supra note 5, at 189; Martha Kirkpatrick et al., supra note 3, at 551; Beverly Hoeffler, supra note 25, at 542; Richard Green (1982), supra note 22, at 14; Richard Green et al. (1986), supra note 2, at 176, 179-83 (finding that the daughters of lesbians were more likely to prefer less sex-typed activities and to express an interest in becoming a lawyer, doctor, engineer, or astronaut than daughters of heterosexual mothers, but concluding that gender role behavior of the daughters of lesbians fell within normal limits).

Scientists have replicated this finding in numerous studies, using a variety of measures to assess gender role behavior. The measures used include sex-typed play activities, toy preferences, choice of television programs, peer relationship choices, garment preferences, and child, parent, and teacher interviews. Julie S. Gottman, supra note 5, at 180 (summarizing the research).

²⁷ Some courts have denied custody to a lesbian or gay parent based on a fear that a child in that parent's custody

children develop their sexual orientation by emulating their parents. Numerous studies indicate that children who are raised in a lesbian household do not differ in any significant way with respect to their sexual orientation as compared with children who are raised in a heterosexual household.²⁸

would be more likely to become gay or lesbian. See J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 872 (Mo. App. 1982); Jacobson v. Jacobson, 314 N.W.2d 78, 81-82 (N.D. 1981); Dailey v. Dailey, 635 S.W.2d 391, 394-96 (Tenn. Ct. App. 1981). Such a rationale is factually flawed, as shown in the text; in any event, it is irrelevant.

²⁸ Susan Golombok et al., supra note 3, at 564; Julie S. Gottman, supra note 5, at 189; Richard Green (1982), supra note 22, at 13-14. For example, in a study of the adult daughters of lesbian mothers, the research showed that these daughters did not differ significantly in sexual orientation from the daughters of heterosexual mothers. Julie S. Gottman, supra note 5, at 189. The two groups also did not differ significantly in gender identity or gender role behavior. See also J. Michael Bailey et al., Sexual Orientation of Adult Sons of Gay Fathers, at 3 (forthcoming in 31 Dev. Psychol. (Jan. 1995)) (manuscript on file with Covington & Burling) (length of time spent living with homosexual father not related to child's sexual orientation).

II. THE SOCIAL SCIENCE RESEARCH DOES NOT SUGGEST THAT LESBIAN MOTHERS AND GAY FATHERS ARE LIKELY TO BE UNFIT PARENTS.

Wyoming law clearly states that the welfare of the child is to be the determining factor in visitation determinations. At some points, however, the trial court appears to have focused not on the welfare of the children, but rather on a general assumption that, due to the "moral climate" surrounding homosexuality, a lesbian mother is unfit to raise her child or even to have any substantial unsupervised contact with the child. The social science research suggests that such an assumption rests on prejudice and false stereotypes.

The major American professional social science organizations have rejected the view that lesbians and gay men as a group are dysfunctional. The American Psychiatric Association declared in 1973 that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities."²⁹ Amicus the American Psychological

²⁹ Resolution of the American Psychiatric Association, December 15, 1973 ("In the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease"). Scientists recognize that decisions often are flawed when they are based on subjective judgments rather than a thorough review of objective data. When the assumptions underlying the previous classification of homosexuality as an illness--which were based on professional judgment and biased observations--were tested empirically, they

Association adopted a similar position in 1975, following a review of the scientific evidence.³⁰ The American Psychological Association has passed a series of resolutions urging that lesbians and gay men not be discriminated against in child custody matters, as well as employment, housing, licensing, and public accommodation.³¹

were found to be invalid. John C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy 115 (John C. Gonsiorek & James D. Weinrich eds., 1991) [hereinafter Research Implications].

³⁰ American Psychological Association, Minutes of the Council of Representatives, 30 Am. Psychologist 633 (1975).

³¹ Id.; American Psychological Association, Minutes of the Council of Representatives, 32 Am. Psychologist 532 (1977); American Psychological Association, Minutes of the Council of Representatives, 36 Am. Psychologist 581 (1981); American Psychological Association, Policy Statements on Lesbian and Gay Issues (1987). See also American Medical Association, Resolution 12, Annual Meeting of the House of Delegates 322 (1989).

The National Association of Social Workers has issued similar policy statements, as has the American Psychiatric Association. See National Association of Social Workers, Delegate Assembly, Policy Statement on Lesbian and Gay Issues (August 1993) ("NASW affirms its commitment to work toward full social and legal acceptance and recognition of lesbian and gay

Although lesbians and gay men historically have been discriminated against in custody and visitation matters,³² there is no evidence to support the conclusion that as a group they do not make good parents. The belief held by some that lesbians and gay men are unfit parents is grounded not in facts, but in false stereotypes. Social science researchers have found that anti-gay prejudice manifests the same social psychological dynamics as racial and other ethnic prejudice.³³ People holding negative attitudes are less likely to have had personal contact with lesbians or gay men and, hence, are basing their attitudes on popular beliefs and misconceptions, not on accurate information or personal experience.³⁴

people."); American Psychiatric Association, Position Statement on Homosexuality (April 1993).

³² See Editors of the Harvard Law Review, Sexual Orientation and the Law, 102 Harv. L. Rev. 1584, 1629-42 (1989).

³³ See, e.g., Gregory M. Herek, Stigma, Prejudice and Violence Against Lesbians and Gay Men [hereinafter Stigma], in Research Implications, supra note 29, at 60-80; Margaret M. Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 J. Applied Soc. Psychol. 189, 189-99 (1985); Gregory M. Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 Personality and Soc. Psychol. Bull. 34 (1987).

³⁴ Gregory M. Herek and Eric K. Glunt, Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results

The social science research does not indicate that lesbians and gay men are likely to have traits that would diminish their effectiveness as parents. Research over three decades has established conclusively that homosexual orientation is not related to psychological adjustment or maladjustment.³⁵ In general, lesbians and gay men are as highly diverse a group as are heterosexuals and are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives.³⁶ Lesbians and gay men are employed productively in all occupations

From a National Survey, 30 J. Sex Res. 239-244 (1993) ("Heterosexual men and women who report knowing someone who is gay express generally more positive attitudes toward lesbians and gay men than do heterosexuals who lack contact experiences."); Gregory M. Herek, Stigma, supra note 33 (summarizing the research).

³⁵ See John C. Gonsiorek, Research Implications, supra note 29, at 115-36; John C. Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behav. Scientist 385, 394 (1982); Bernard F. Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296 (Judd Marmor ed., 1980); Maureen Hart et al., Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978).

³⁶ Alan P. Bell and Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 229-31 (1978).

and professions³⁷ and have an overall potential to contribute to society similar to that of heterosexuals.³⁸

Indeed, the research suggests that lesbian mothers have parenting skills that are equivalent to or better than those of heterosexual parents.³⁹ This research demonstrates a "remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of" lesbian mothers and heterosexual mothers.⁴⁰ One study found lesbian and heterosexual mothers to be similar in maternal interest, current lifestyles, and child rearing practices.⁴¹ Another concluded

³⁷ Id.

³⁸ See, e.g., id. at 141-48 ("for the majority of our homosexual respondents, male and female, the fact that they happened to be homosexual had little to do with their experiences at work or the satisfaction they derived from them").

³⁹ Flaks et al. have found that lesbian mothers score significantly higher than heterosexual parents on the Parent Awareness Skills Survey ("PASS"), which measures the sensitivity and effectiveness with which a parent responds to typical child-care situations. David K. Flaks et al., supra note 2, at 14-15, 20-21.

⁴⁰ Beverly Hoefffer, supra note 25, at 537; Martha Kirkpatrick et al., supra note 3.

⁴¹ Martha Kirkpatrick et al., supra note 3, at 546. See also id. at 549 ("the lesbian mothers tended to be more concerned with providing male figures for their children than were the

that the majority of the lesbian mothers studied saw themselves as intimately involved in parenting and that the lesbian mothers as a group appeared more concerned for their children's long-range development than the heterosexual mothers as a group.⁴²

In a proceeding involving visitation rights, where the focus is on the best interests of the child, it is clearly inappropriate for a court to rely on stereotypes about a group that are outdated and flatly contradicted by the available evidence. Rather, the court must examine the parenting abilities and moral values of the particular individuals involved in the proceeding. Only by doing so can the court satisfy its obligations under Wyoming law.

comparison mothers").

⁴² Judith A. Miller et al., supra note 2. Also, there is no social science evidence that even suggests that lesbian or gay parents are more likely to sexually abuse their children, or to allow them to be molested by others. A. Nicholas Groth, Patterns of Sexual Assault Against Children and Adolescents, in Sexual Assault of Children and Adolescents 4-5 (Ann Wolbert Burgess et al. eds., 1978) ("[T]he belief that homosexuals are particularly attracted to children is completely unsupported by our data."); see also Gregory M. Herek, Myths, supra note 2, at 156 (reviewing the literature relating to adult sexual orientation and molestation of children and concluding that gay men are not more likely than heterosexual men to molest children).

**III. VISITATION CASES SHOULD BE DECIDED WITHOUT REGARD FOR A
PARENT'S OPENLY LESBIAN OR GAY RELATIONSHIP.**

- A. An Assumption That a Child Should Not Have Significant Contact with a Parent in an Openly Lesbian or Gay Relationship Undermines Wyoming's Statutory Mandate that Visitation Determinations Be Based on the Welfare of the Child.**

The holding of the court below that Pamela Hertzler's open homosexuality provided a basis for severely restricting her visitation appears to have been based largely on an assumption that significant contact with a parent in an openly lesbian or gay relationship is inappropriate and contrary to a child's best interests. Because such an assumption is wholly unsupported by social science research, it undermines the statutory mandate that visitation determinations be based on the welfare of the child.

As shown above, the relevant social science research provides no support for any assumption that a parent in an openly gay or lesbian relationship is an unfit custodian. To the contrary, the research suggests that there is no significant difference in overall psychological health of children raised by lesbian or gay parents and children raised by heterosexual parents. Moreover, the research fails to support the lower court's speculation about potential "social difficulties" resulting from a child's contact with a lesbian or gay parent. In sum, the available social science research does not support the conclusion that a parent's sexual orientation has a necessary relationship to his or her fitness or to a child's welfare.

Application of an assumption that has no basis in fact precludes consideration of a parent's abilities and relationship

with the child. Such an assumption prevents a full evaluation of a child's best interests by automatically calling into question visitation by a lesbian or gay parent even if the child's best interests would be served by liberal contacts with that parent. Thus, the assumption flies in the face of Wyoming law, which requires that visitation determinations be based on the welfare of the children.⁴³

There can be little doubt that on a number of occasions application of the lower court's assumption will result in a visitation determination that is against a child's best interests. Most natural parents develop a close bond with their child beginning early in the child's life. Parent-child bonding is crucial to a child's development and well being, particularly in infancy and early childhood.⁴⁴ In many cases, this will be the most important psychological bond in the child's life. Separation from a parent to whom a child has developed an attachment can have a significant negative effect on the child's

⁴³ Compare Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993) (a rule of law that would prevent an adoption by a lesbian co-parent of her partner's natural child would be "inconsistent with the children's best interests and therefore with the public policy of [Vermont], as expressed in [Vermont's] statutes affecting children").

⁴⁴ See John Bowlby, A Secure Base 119-36 (1988).

psychological adjustment and emotional well-being.⁴⁵ Restriction of this important attachment relationship is justified only when there are clear and compelling reasons, such as concern for the physical or mental health of the child.

Under the lower court's reasoning, courts could deprive a child of any significant contact with the person with whom the child has shared the most important bond in his or her life, with significant negative psychological effects on the child. Because the social science research discussed above indicates that a parent's same-sex relationship does not adversely affect a child's psychological well-being, the existence of such a relationship clearly does not present a

⁴⁵ See Paul R. Amato and Bruce Keith, Parental Divorce and the Well-Being of Children: A Meta-Analysis, 110 *Psychology Bull.* 26, 37 (1991) (children who lose a parent through death or divorce exhibit a lower level of well-being); Judith S. Wallerstein and Joan B. Kelly, Surviving the Breakup 132-46, 170-72, 217-20 (1980); John Bowlby, Separation xi (1973) ("[M]any forms of psychoneurosis and character disorder are to be attributed either to deprivation of maternal care or to discontinuities in a child's relationship with his mother figure."); Eileen M. Hetherington et al., The Aftermath of Divorce, in Mother/child, Father/child Relationships (Joseph H. Stevens and Marilyn Mathews eds., 1978); Lawrence A. Kurdek and B. Berg, Correlates of Children's Adjustments to Their Parents' Divorce, in Children and Divorce (Lawrence A. Kurdek ed., 1983).

compelling justification for disrupting a parent-child attachment. Any rule that deprived children of visitation solely because the parent has a same-sex partner would be flatly contrary to the welfare of children in Wyoming.

B. The Trial Court's Reference to a State Interest in Supporting "Conventional Marriages and Families" Does Not Provide an Appropriate Basis for Restricting a Parent's Visitation Rights.

As one of the bases for its decision to restrict Pamela Hertzler's visitation with her children, the trial court referred to an alleged state "interest in supporting conventional marriages and families." Decision Letter, July 21, 1994, at 5. The trial court provided no citation for its statement. In fact, relevant authority indicates that it is only the best interests of the child, not any independent state interest in "conventional marriages and families," that is relevant to decisions regarding visitation.⁴⁶

This Court recently stated that "Wyoming has adopted as its public policy a paramount concern for the best interests of the child in connection with child support, custody and visitation." Cosner v. Ridinger, 882 P.2d at 1247 (emphasis added). Any state interest other than the well-being of children is therefore of secondary importance, at most. Furthermore, this

⁴⁶ Moreover, in determining the best interests of the children, the trial court must focus on the families the children have, not on the trial court's conception of what an ideal family should be.

Court often has recognized that parents enjoy a "fundamental liberty of familial association" and that infringement by the State of this fundamental liberty must be measured under a strict scrutiny standard. E.g., In re Adoption of JLP, 774 P.2d 624, 627 (Wyo. 1989); LP v. Natrona County Dep't of Pub. Assistance & Social Servs., 679 P.2d 976, 1005 (Wyo. 1984). The United States Supreme Court has declared that any state interest in a particular family structure does not overcome the fundamental liberty of family members to structure their familial relationships as they see fit. See Palmore v. Sidoti, 466 U.S. 429 (1984); Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) ("the [United States] Constitution prevents East Cleveland from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns").

Moreover, in view of the wide variety of family situations that exist in our society, it is unclear what sorts of families should be characterized as "conventional." See Moore, 431 U.S. at 504 n. 14, 508-10 (citing studies concerning functional, non-nuclear families). Amici doubt that there is good reason for discrimination against individuals simply because they are part of an "unconventional" family.

In view of the fact that Wyoming law requires that visitation determinations be based on the well-being of the child and not on other interests (even those that are well-recognized), generalizations (or stereotypes) about whether a type of family situation is conventional or whether certain kinds of individuals

are likely to be able parents cannot replace an examination of the specific individuals before the trial court. The examination must focus on whether there are "positive, nurturing parent-child relationships," in which case state action should preserve, not hinder, these relationships. See Santosky v. Kramer, 455 U.S. 745, 766 (1982).

Wyoming courts have long engaged in such individualized examinations in child custody and related matters. For instance, this Court has held that a parent's status as an incarcerated felon is insufficient to justify the termination of parental rights absent a further showing that the parent is unfit. See In re Adoption of JLP, 774 P.2d at 629. The showing of unfitness must rest on more than a mere demonstration of incarceration; it is necessary to examine the particular parent before the court. See id. at 629 (evidence of father's multiple acts of rape and assault combined with his refusal to participate in prison program for sex-offenders demonstrated unfitness).

If an incarcerated felon is not per se an unfit parent, it is surely improper to make a blanket judgment that the "moral climate" surrounding homosexuality and the State's interest in conventional families justify a severe restriction of parental rights. A court should consider only how contact with the actual individuals involved in a particular case will affect the well-being of the children. Only by focusing on the facts of the case before it, and how the children in question are actually

affected, can a court be faithful to the requirements of Wyoming law.

CONCLUSION

Any assumption that a child should have only restricted contact with a parent who is in an openly gay or lesbian relationship has no basis in fact. Reduction of visitation on the basis of such an assumption precludes a full evaluation of the welfare of a child and is therefore inconsistent with Wyoming

law. This case should be decided without reference to any such assumption.

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