

Lesbian Mother Child Custody: Legal and Psychiatric Aspects

BARBARA S. HARRIS, B.A., J.D.*

Introduction

No one knows how many lesbian women there are in the United States today. Some experts put the figure at some eight million,¹ while some homosexual-rights groups would estimate many million more. One thing is known, however. Many lesbian women are also mothers, and today they are asking the courts for custody of the children born during their heterosexual marriages.

The purpose of this research is to delve into the psychological and legal facets of custody cases involving lesbian mothers with emphasis on determining whether any conflict exists between how the psychiatric community views the issue and how judges have ruled in specific cases. Part I of the paper examines current child custody law and practices and their application to lesbian mother cases. Any available Maryland law is also included in this section. Part II outlines some of the psychiatric and scientific research which has been conducted in the field of female homosexuality, and, where possible, the views of experts concerning homosexual mothers.

In preparing this paper I encountered two major difficulties. In the first place, few cases are reported where the mother's lesbianism is an issue, and even where reported, the factual bases of the decisions are often omitted or truncated.² Secondly, most scientific books and articles concerning homosexuality are written about the male homosexual. Female homosexuality is still largely an uninvestigated area.

Experts consulted in preparation of this paper included John Money, Ph.D., Professor of Medical Psychology and Associate Professor of Pediatrics, Department of Psychiatry and Behavioral Sciences and Department of Pediatrics, Johns Hopkins University School of Medicine, and the Honorable Robert B. Watts of the Supreme Bench of Baltimore City. Judge Watts has served three years in Domestic Relations Court and is presently Chairman of the Family Court and Domestic Relations Committee of the Supreme Bench. I further acknowledge my reliance upon Marilyn Riley's excellent law review note, "The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge that Can No Longer Be Denied."³

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**PART I:
HOMOSEXUAL MOTHERS' RIGHTS UNDER EXISTING
CHILD CUSTODY LAW**

In order to understand the legal position of women who are both lesbians and mothers, and who wish to retain custody of their children, it is helpful to know something of the current child custody laws. I will briefly outline the rules and standards controlling custody determinations today and then focus on how some courts have applied these standards to cases involving lesbian mothers.

A. The Best Interests Standard

In most states, courts having jurisdiction over divorce proceedings have jurisdiction to determine the issue of child custody as well.⁴ At common law, the father had the superior right to custody of any children born to his marriage.⁵ As a general rule today, both parents have equal right to child custody, at least theoretically.⁶ However, under the so-called "tender years presumption," most judges will award custody to the mother where the child is of young years.⁷ The presumption is rebutted and custody denied if the mother is shown to be "unfit."⁸

In child custody proceedings, all rules and presumptions yield before the paramount consideration of the court: the welfare or "best interests of the child" standard.⁹ The court in each case must determine what custody arrangement is in the "best interests" of the child, but there is no fixed rule or formula for making this decision. A trial judge is endowed with very broad discretion in making the choice between parents,¹⁰ and a custody decree will not be set aside without evidence of clear abuse of discretion.¹¹

The "best interests" standard is inherently subjective. In Maryland, for the purpose of ascertaining what is in the best interests of the child, the court may consider, among other factors, the fitness of the person seeking custody, the age, sex and health of the child, the environment and surroundings in which the child lives, and where appropriate, the child's preference regarding custody.¹² Generally speaking, of the above factors, the relative fitness of the parents influences more than any other single factor how the judge will rule.¹³ Moreover, when assessing the parental fitness factor, the courts have been able to consider the moral character and emotional stability of the parent seeking custody, an area of judgment which includes the parent's sexual conduct.¹⁴

Because a parent's morality and sexual conduct are relevant in determining the "best interests" of the child, and in light of the broad discretion of the trial judge, the question arises whether courts today are subordinating the issue of the child's well-being to consideration of his parent's values, lifestyle, and sexual and other social behavior. It is conceivable that these factors have little or no bearing on a child's happiness and normal development. In other words, are child custody determinations involving lesbian mothers being based upon objective factors or upon the moral biases of the judge? The remainder of this paper will investigate this issue.

B. Results in Specific Lesbian Mother Custody Cases

The factor of parental fitness is crucial in custody decisions involving lesbian mothers. The fitness test establishes that a natural parent, particularly a mother, should be deprived of custody only when "unfit." Although the question of a father's "immorality" is rarely raised, a mother's "immorality" is generally viewed as relevant to a determination of custody.¹⁵ Since lesbianism may be viewed as a matter of morality, consideration of this factor weighs heavily in a judge's decision.

As noted by Riley, courts presented with custody cases involving avowed lesbian mothers have responded in various ways. Some have decreed the mothers to be *per se* unfit. Others have stated that homosexuality is just one of the relevant factors to be considered. Still others awarded custody to the mother with the stipulation that she neither live with nor visit her lover except under specific circumstances. Only a few have recognized that lesbianism and lesbian relationships have no bearing in themselves on the question of fitness.¹⁶

The earliest case involving a lesbian mother's right to receive custody of her children, and one of the few decisions addressing the issue of a lesbian mother's fitness, is *Nadler v. Superior Court*.¹⁷ *Nadler* was a *mandamus* proceeding to compel the Superior Court of Sacramento County (California) to exercise its discretion in deciding the effect of a lesbian mother's conduct upon the well-being of her five-year-old daughter. The trial court had granted custody to the father after holding "as a matter of law" that the mother's homosexuality rendered her not a fit or proper person to have custody. The trial judge stated that he was not exercising his discretion and was required as a matter of law to award the father custody.

The Court of Appeals, Third District, granted the writ, directing that the awarding of custody be based on all relevant evidence rather than simply on the fact of the mother's homosexuality. The Court of Appeals stated:

We are not saying here that the trial court abused its discretion. Rather, we are saying that the trial court failed in its duty to exercise the very discretion with which it is vested by holding as a matter of law that petitioner was an unfit mother on the basis she is a homosexual.¹⁸

Nevertheless, at the rehearing, the Superior Court judge again granted custody to the father, with visitation rights to the mother every Sunday in the presence of another adult.

Following *Nadler*, it should be concluded that lesbianism is irrelevant to a determination of fitness. The number of decisions denying custody to lesbian mothers, however, indicates that this is not true. Thus in the case known as *In re Tammy F., et al.*,¹⁹ the Sonoma County Juvenile Court removed four children, ages 7 to 11, from the custody of their mother and placed them in a foster home. The removal resulted from evidence at the custody hearing that the mother was a lesbian and carried on a homosexual relationship with another woman in her home. The Court of Appeals (California) sustained this action, concluding that "[t]he continuous existence of a homosexual relationship in the home where the minor is

exposed to it involves the necessary likelihood of serious adjustment problems.”²⁰ One wonders if being raised in a foster home is any less likely to result in adjustment problems.

Another post-Nadler decision, *Townend v. Townend*²¹ also implied that a mother’s lesbian relationship in her home rendered her unfit. The Court of Common Pleas for Portage County, Ohio, granted custody of the three minor children to the paternal grandmother after decreeing the divorce of the parents. On the issue of the mother’s homosexuality, the court stated:

On the question of custody, the court is bound by law to look solely to the welfare of these children. Ordinarily, children of these years would be given to the mother. The question arises ‘should the court do that’, notwithstanding this lesbianism of the defendant. I don’t say that a mother cannot be fit to rear her children even if she is a lesbian, but I wonder if she is fit to rear her children when she brazenly sets up in the home where the kids are to be reared, the lesbian practices which have been current there, clearly to the neglect of supervision of the children.²²

The *Townend* decision appears to rest on findings of neglect regarding the children. But the basis for the findings is not specified in the opinion, and it can be inferred that the judge was injecting his own moral bias when he wrote:

I think that an overwhelming majority of people in this country strongly disapprove of homosexuality, . . . as indicated by various cant applications they give to it, such as ‘queer,’ ‘faggot’ and so forth, so there can be no question in the court’s mind that the conduct revealed here is against the mores of our present-day society, even this society that grows more permissive.²³

*Chaffin v. Frye*²⁴ is another recent case from California. In this case, a lesbian mother was originally awarded custody of her teenaged daughters. Later, the maternal grandparents brought an action for removal of the children from her custody. Although the probation officer conducting the court-ordered investigation found the mother, an acknowledged lesbian, fit, he recommended that custody be transferred to the grandparents. The trial judge, following the recommendations of the probation report, awarded custody to the grandparents without stating reasons for doing so and without stating any findings that it would be detrimental to the children to remain in their mother’s custody or that custody awarded to the grandparents was required to serve the best interests of the children.

On appeal, the Court of Appeals upheld the trial judge’s decision, making its own finding of detriment to the children. The court found that the mother’s personal history and her periodic brushes with the criminal law indicated her unwillingness to face permanent and full adult responsibility.²⁵ Despite the children’s statements that they wished to remain with their mother and that they never saw her engage in homosexual conduct, the court held that the trial court could properly conclude that permanent

residence in a homosexual household would be detrimental to the children. The ironic twist to this case is that the grandparents, into whose home the children were to be brought, had themselves raised two probably homosexual children.²⁶

In only a few cases have courts taken the position that the existence of a lesbian relationship has no significance in determining the fitness of the mother. The first such case is *People v. Brown*,²⁷ in which the Court of Appeals of Michigan found that although sufficient evidence existed that the mothers were engaged in a homosexual relationship, “. . . there was little, if any, material and admissible evidence to support the finding that the appellants’ homosexual relationship rendered their home unfit for their children”²⁸ This was also the first case where acknowledged lesbian mothers were permitted both to retain custody of their children and to live together.

A similar result was reached in the consolidated cases of *Isaacson v. Isaacson* and *Schuster v. Schuster*.²⁹ In the original divorce proceedings, the trial court awarded custody of the children to their mothers in spite of their admitted homosexual relationship. The decree, however, required the women to live apart. Because the women were actively and publicly engaged in espousing the cause of lesbian mothers, their ex-husbands petitioned for a redetermination of custody, alleging that the mothers flaunted their homosexuality to the detriment and ridicule of the children. Despite these accusations, a Washington Superior Court held that continued custody in the mothers was in the best interests of the children and that the mothers were no longer bound by the earlier ruling that they live separately. Decisions like *Brown* and *Schuster* are in the minority, however. In most cases, a lesbian mother is denied custody of her children. (See *Spence v. Durham*,³⁰ *Bennett v. Clemens*,³¹ *Fleischer v. Fleischer*.³²)

In Maryland, I know of no cases decided on the merits concerning a lesbian mother’s right to receive custody of her children. There is, however, one case pending which bears on the issue.³³ In the case of *A. v. A.*, pursuant to a voluntary separation agreement, custody of three minor children was given to the mother. The father subsequently filed a petition seeking a change of custody to himself. At issue was the mother’s alleged homosexual relationship with a woman with whom she and her children lived. In her deposition, Mrs. A. admitted she had engaged in homosexual conduct, but later at the custody hearing she denied any lesbian relationship with her roommate. Judge Robert B. Watts of the Baltimore Supreme Bench granted temporary custody of the children to the wife, but he made it known that the wife’s lover would be required to move out of the house before permanent custody would be awarded.

At this time, the question of permanent custody remains unresolved. The wife was unable to comply with the judge’s directions and to seek a new residence, due to the fact that her former husband had not kept up his child-support and alimony payments. Additionally, Judge Watts was forced to disqualify himself before ruling on the issue.

In granting the mother temporary custody, however, Judge Watts relied heavily on the report of the Medical Services Division of the Supreme Bench.³⁴ In their report, the examiners had concluded that it would be “in the best interest of the children that they continue to be raised by their

mother.” They also recommended that the children’s best interests would be served by having the mother’s lover move out of the house. The medical team felt that “children of this age [9, 8 and 5 years old] are ill equipped to deal with a situation like that and preferably should not be exposed to it.”³⁵

Decisions awarding custody to lesbian mothers but conditioned on maintenance of separate households are common in this area.³⁶ Judge Watts analogized the situation to that of an adulterous wife.³⁷ In Maryland, where a divorce is the result of adultery on the part of one spouse, custody of the children is awarded to the innocent party, not as a matter of punishment, but because it is assumed that the child will be reared in a more wholesome atmosphere. But where the wife has shown she has mended her ways, her past indiscretions may be overlooked in awarding custody.³⁸ Judge Watts feels that if a lesbian mother shows she has “reformed” and “recognized the error of her ways,” like the adulterous wife, she can retain custody.³⁹ The best way she can demonstrate her reformation is by living separate and apart from her lover. He makes it clear, however, that he would never deny custody based solely on a parent’s sexual preference.

Another member of the Supreme Bench, when asked how he would decide a custody case involving a lesbian mother, concurred with Judge Watts that a mother’s homosexuality does not make her *per se* unfit. He stated that every custody determination depends upon its own facts and circumstances, but where the mother seeking custody is a lesbian, the age of the child would be a controlling factor. In the “impressionable years,” the Judge would show a greater reluctance to award custody of children to the mother if the father were also fit. And were he to grant custody to the mother, he would condition it upon the mother’s living apart from her lover.⁴⁰

As characterized by Riley,⁴¹ one of the most eloquent defenses of a lesbian mother’s right to child custody is the dissenting opinion of Justice Gunter in *Bennett v. Clemens*:

Where neglect, abuse, or mistreatment in some manner is absent, the state has no right to inquire into what a parent teaches his child, or with whom a parent allows his child to associate, or the type of environment a parent permits his child to inhabit. These are fundamental family rights, protected by the Common Law and our Bill of Rights, free from government intrusion. Freedom to think, teach, and express; freedom of association with other persons or classes of persons with varying degrees of morality and philosophy; freedom to inhabit a chosen cultural environment; and freedom to adopt a life-style that may not have the approval of the majority; all of these freedoms exist even more emphatically within the family or the parent-child relationship.

. . . and the state cannot intrude upon or disrupt this relationship by asserting a different moral standard, conceived by judges, that must be adhered to.⁴²

The above survey of case law discloses that most judges hold it to be contrary to the best interests of a child and detrimental to a child’s welfare

for custody to be awarded to a lesbian mother. Lesbian mothers are usually, for one reason or another, found to be "unfit." A lesbian mother, however, might question whether the present "best interests" standard were being applied objectively to her case. Child custody is by its nature an extremely subjective area of the law and one in which judges are given wide discretion. For this reason it is important to inquire about the basis of a custody decision involving a homosexual mother. How does the judge reach his decision? Justice Gunter implied how he would respond to the issue when he wrote, "[a]nd with all due deference to my brothers of the majority, I think they merely substituted their standard of morality for that of the natural parents of the child in affirming the judgement below."⁴³ The answer is not pat, however. Many judges, recognizing the importance of a child's emotional and developmental needs, depend upon expert psychiatric testimony to make their choices.⁴⁴ Because of the increasing use of psychiatrists in custody cases, the second half of this paper analyzes the psychiatric data bearing on our issue.

PART II: FEMALE HOMOSEXUALITY AND PSYCHIATRY

A. Fears, Theories, and Causes

The past twenty years have witnessed a great change in society's attitudes and approaches to human sexuality. Sex has been exhaustively researched and popularized, with the result that many long-held prejudices concerning it have been rejected. Despite all these changes and attention, however, the public has largely maintained a negative attitude towards homosexuality and the homosexual,⁴⁵ and with respect to the lesbian mother, this negative attitude has taken its toll.

Decisions denying custody to lesbian mothers are grounded in several specific fears. When evaluating the best-interests standard, judges appear to be concerned that (1) a child raised by a homosexual parent will be subject to proselytizing and/or sexual molestation, (2) that a child in the custody of a homosexual parent may suffer stigmatization and ridicule on account of the parent's homosexuality, and (3) that a child reared by a homosexual will grow up to be homosexual. In general, these fears are not explicitly outlined in the opinions, but they are raised in pleadings and testimony. And since these are commonly articulated fears, it is necessary to review what experts have written regarding their factual validity.

Beliefs that homosexuals are proselytizers and child molesters have been disproved by competent authorities.⁴⁶ Research has revealed that homosexual solicitation, when it does occur, is usually "discreet, indirect and made only if the other person appears responsive."⁴⁷ Further, there is no proof that a homosexual parent's proselytizing will result in a homosexual child. In the *Schuster* case, the court quotes a psychiatrist as confirming that "although these children will grow up knowing more about homosexuality and human sexuality in general than most children, this knowledge need not predispose them to become homosexual."⁴⁸

The myth about child molestation has also been abandoned by experts.

Saghir and Robins assert that the notion that homosexuals “attack” and “seduce” innocent children is a fallacy. According to these researchers:

Adult homosexuals are rarely interested in individuals who are under the age of 16. Furthermore, there is no evidence to indicate that one is “made” into a homosexual by casual or even repeated “seduction.” In fact, the evidence has indicated that becoming a homosexual is primarily a psychologic (vs. behavioral) state that is determined early in childhood by factors that have little to do with overt or covert sexual seduction by an adult member of the same sex.⁴⁹

A more realistic fear is that the child will be stigmatized and embarrassed by the mother’s homosexuality. In the Maryland case of *A v. A*, psychiatrists specifically brought this concern to the attention of the court. The medical service had concluded that:

The close living arrangement that the two women have raises grave questions as to their real relationship. It . . . exposes all the children to questions that may be raised by neighbors, babysitters, and friends. Children this age [9, 8 and 5] are ill-equipped to deal with a situation like that and preferably should not be exposed to it.⁵⁰

However, psychiatric opinion varies and depends on the facts of each case. Dr. John Money, of the Johns Hopkins University School of Medicine, feels that if children are reared in a stable and happy home they should be able to cope with outside prejudice.⁵¹ Riley points out that similar problems are faced and overcome by children of inter-racial marriages and minority group children living in non-minority neighborhoods.⁵² Saghir and Robins assert that a woman’s index of recognition as a lesbian is low.⁵³ A lesbian woman may have men in her life, and her friendships are not necessarily limited to other homosexuals. Because a mother’s homosexuality may very likely go unsuspected, the question of stigmatization of the children may never arise. Moreover, no child will be stigmatized by all his peers.

The most commonly voiced fear, however,⁵⁴ is that lesbians are likely to rear homosexual children. Among the authorities who have denounced this theory are Dr. John Money,⁵⁵ Dr. Judd Marmor, Dr. Benjamin Spock and Dr. Wardell Pomeroy.⁵⁶ Dr. Money’s thoughts are particularly instructive:

In human psychosexual development, the differentiation of gender identity as heterosexual, homosexual or bisexual takes place in the years between infancy and middle childhood Thus a boy or girl at puberty may find himself or herself heterosexual, homosexual or bisexual in erotic dreams, fantasies, masturbation fantasies and/or sexual activity.

It is not possible to change a heterosexual boy or girl into a homosexual by reason of exposure to homosexual practices. Likewise, it is not possible to change a homosexual boy or girl into a heterosexual by exposure to heterosexual people or even exposure to heterosexual

practice. So far as homosexual parents are concerned, their homosexuality is not the criterion by which their fitness as parent or mentor should be judged *They do not turn their children into homosexuals any more than grandparents who raise children turn them into adults who can fall in love only with older people. Homosexuality is not contagious.*⁵⁷

Little follow-up data is presently available, however, as to the sexual orientation of children raised by lesbian mothers; certainly such information is needed.

Although exploration of the etiology of homosexuality is beyond this paper's scope, an outline of some of the more commonly posited causation theories may be of benefit. Concepts related to fears and other causal factors have been noted by Wilbur (1965),⁵⁸ Romm (1965),⁵⁹ and Martin and Lyon (1972).⁶⁰ These include fear of growing up and assuming adult responsibilities; fear of dominance and destruction; fear of rejection; fear of the opposite sex; fear of castration and the penis; fear of pregnancy; father fixation; mother fixation; seduction in childhood by an individual of the same sex; prolonged absence of the mother; tomboy behavior in early childhood; problems of identification; masturbation, with resulting clitoral fixation; social factors (such as heterosexual taboos and the existence of unisexual, all-female groups); and physical factors (genetic, constitutional and endocrine abnormalities).

On the issue of whether homosexual behavior is a product of conditioning, *i.e.*, influenced by environmental factors, or a result of inborn, chromosomal makeup, the work of Dr. John Money and colleagues at Johns Hopkins University Medical School has shed some light. Money's early studies of hermaphrodites led him to the conclusion that sexual behavior is learned, an effect of child-rearing. Hermaphrodites tended to take on either masculine or feminine behavior according to whether they were raised as boys or girls by their parents. As a consequence of later research, however, Money somewhat altered his "nurture" theory. One of his more famous studies established that if female fetuses, while in the womb, are accidentally the recipients of large quantities of male hormones, they will be born with enlarged clitorises and subsequently manifest aggressive behavior. In sum, Money feels that sexual behavior is influenced by both cultural and prenatal hormonal distribution factors. Rather than labeling behavior masculine or feminine *per se*, he feels that behavior is simply one degree or another of what is culturally considered normal femininity or normal masculinity.⁶¹

Unfortunately, one of the most highly regarded books on homosexuality,⁶² edited by Marmor, deals primarily with male homosexuality, and devotes only two chapters to lesbianism. Marmor, however, recognizing that scientists have not agreed on any one cause of homosexuality, stresses a multifactorial etiology. He summarizes:

Although innumerable explanations can be found in psychiatric and psychoanalytic literature for the origins of specific cases of homosexuality, there is as yet no single constellation of factors that can adequately explain all homosexual deviations. The simple fact is that

dominating and seductive mothers; weak, hostile, or detached fathers; and the multiple variations on these themes that are so often suggested as being etiologically significant in homosexuality, abound in the histories of countless heterosexual individuals also. . . . We are probably dealing with a condition that is not only multiply determined by psychodynamic, socio-cultural, biological and situational factors but also reflects the significance of subtle temporal qualitative and quantitative variables.⁶³

Any attempt to describe the so-called "lesbian personality" is also fraught with difficulty. The assumption that all women who are lesbian can be considered, described and characterized as one is as absurd as the corresponding assumption that all heterosexual women are alike. Contrary to popular belief, women who are lesbian form an extremely heterogeneous group in our society⁶⁴ and their personalities also vary. They are passive and aggressive; they are introverted and extroverted; they are sexually inhibited and sexually promiscuous; they are irresponsible sociopaths and responsible law-abiding citizens.⁶⁵

Judges and others also seem to have the misconception that lesbianism is primarily a sexual activity. According to lesbian women themselves, however, it is a "way of life, encompassing the structure of [a lesbian's] whole personality . . . [I]t is the expression of a way of feeling, of loving, of responding to other people."⁶⁶ The final Report of the National Institute of Mental Health Task Force on Homosexuality supports this position. It declares: "Homosexuality is not a unitary phenomenon, but rather represents a variety of phenomena which take in a wide spectrum of overt behaviors and psychological experiences . . ."⁶⁷

Finally, although a composite "lesbian personality" cannot be drawn, certain facts are known about the personal adjustment and psychological well-being of the homosexual woman. Researchers assure us that in comparison to heterosexual women of the same age and education, many homosexual women are more self-confident, independent, composed, resilient and self-sufficient.⁶⁸ Additionally, the study by Thompson, McCandles and Strickland disclosed that lesbians do not differ in important ways from heterosexuals in terms of defensiveness, personal adjustment and self-evaluation.⁶⁹

B. Illness vs. Way of Life

When assessing what may be the best interests of the child, jurists come face to face with the controversy surrounding the question: is homosexuality an "illness" or merely a different "way of life"? For over fifty years the mental health profession has asserted that homosexuality is a sickness requiring therapeutic treatment.⁷⁰ In the past few years, however, this view has been challenged. On December 15, 1973, the Trustees of the American Psychiatric Association ruled that "homosexuality" would no longer be listed as a "mental disorder" in its official nomenclature of psychiatric disorders. The Trustees also urged that homosexuals be given all protections now guaranteed to other citizens.⁷¹ And in 1969, the National Institute of

Mental Health published its report urging that all private sexual acts between consenting adults be legalized.⁷²

No doubt some psychiatrists and other mental health professionals still adhere to the “sickness” theory in spite of the APA resolution. But on the other hand, many researchers now support a “non-sickness” view. As Saghir and Robins have observed:

Homosexuals are not *a priori* sick. Many of them present little or no psychopathology and those who do are rarely disabled by their disorder Thus, it is quite inappropriate and scientifically untenable to label an individual psychiatrically ill because [she] happens to be a homosexual, for to do so would only tend to perpetuate the social and legal discriminatory practices against men and women who are primarily different in their sexual preferences but who otherwise show little other differences from their fellow non-homosexual men and women.⁷³

Moreover, numerous studies geared specifically to testing the “lesbian” psyche have found lesbians to have the same or a lower incidence of psychiatric disorder than matched heterosexual controls.

Armon (1960)⁷⁴ has conducted an especially significant inquiry. In her investigation, two groups – one heterosexual and one homosexual – were given a series of projective tests (Rorschach and Figure Drawing). Then psychologists were asked to determine, on the basis of the results only, which responses belonged to the lesbian group and which to the control group. The psychologists were unable to identify the responses correctly, whereupon it was concluded that the majority of lesbians cannot be distinguished from heterosexuals on the basis of projective test performance.

Freedman (1968), who gave a battery of psychological tests to a sample of lesbians and to a heterosexual control group, also found no differences in psychological adjustment. He stated that “the members of the [lesbian] group were no more neurotic than the members of the control group” and that homosexuality is not necessarily related to psychological disturbance.⁷⁵

In a recent study (1972), Siegelman investigated 84 homosexual women and matched the results of their psychological tests with those of the heterosexual control group. “Siegelman found the lesbians to have higher scores on tendermindedness and lower scores on depression, submission, and anxiety.”⁷⁶ His failure to find lesbians more neurotic than female heterosexuals concurs with the reported findings of Armon, Freedman, and Thompson, McCandles and Strickland.

The results of the above studies support the theory that the majority of lesbians are mentally healthy, harboring no demonstrable pathology which would differentiate them in any way from a group of normal heterosexuals. While it is understandably true that judges seeking the best possible custody arrangement are reluctant to award custody to an emotionally unstable parent, it is also true that a mother’s homosexuality does not render her *a priori* sick.

C. Detriment to Children

Returning to this paper’s central query – whether Lesbian mothers are

capable of rearing well-adjusted children – Martin and Lyon posit that love and security in the home overshadow almost all other factors in determining the emotional stability of the child.⁷⁷ They quote experts as stating that if a child knows love and knows he or she is wanted, chances are, the child will turn out to be normal and well adjusted.⁷⁸ That lesbian mothers are capable of giving love to their children seems clear from the reported cases awarding custody to the mothers and from a review of Martin and Lyon’s book. Dr. John Money offers supportive comments:

In the worst cases of the battered-child syndrome I have encountered, the criminal assault and injury of the child has been perpetrated by a heterosexual mother and/or father. By contrast, some of the most tender devotion and care of sick and ailing children I have seen has been performed by a mother or father with an active homosexual history.⁷⁹

Dr. Judd Marmor also believes that lesbian mothers are capable of raising well-adjusted children. He is quoted as saying “. . . without hesitation that a child brought up by a loving lesbian mother in a tranquil home is far better off than the thousands of children who are constantly growing up in ‘straight’ households marked by constant domestic turmoil and lack of affection.”⁸⁰ These experts and others believe that the suitability of a parent to have custodial rights is something that needs to be judged independently of a parent’s homosexual history.

We have seen that the frequently given reason for denying a lesbian mother custody is a finding of detriment to the children. When asked flatly whether he felt it to be detrimental to a child for it to be raised by its homosexual mother, Dr. Money had this to say:

Society’s apprehensions notwithstanding, it is not inevitably psychically dangerous for children, boys and girls, to live with a divorced parent who sets up a new household with a partner of the same sex. Children are rather readily able to equate such a situation with that of living with a widowed mother and her sister, or a father and grandfather, for example. It is not the sameness or difference of the sex of the adults that counts, but the quality of the relationship between them, and the quality of the relationship they establish with the child.

Above all, . . . it is the caliber of the parent and parenthood that counts, not the sex or eroticism of the parent’s friend or partner. Parents may be of the highest caliber, or, by the same token, of the lowest caliber in their relationship with their children quite independently of and apart from their heterosexuality, bisexuality, or homosexuality. Their fitness for visitation and custody should be judged on the criterion of parental caliber, not the criterion of the partner’s sex.⁸¹

It is clear that Dr. Money has summed up the approach that must be taken in cases involving lesbian mothers. It is also clear that if the “best interests of the child” are to be served, judges would be wise to follow his recommendations.

CONCLUSIONS

Although judges have largely ruled to the contrary, the awarding of custody to lesbian mothers does not denigrate the "best interests of the child" standard. The scientific literature and the views of experts such as Dr. John Money disclose that women who are homosexuals are also capable of being good mothers.

A combination of lack of facts and inherent prejudice on the part of judges has resulted in a body of decisions denying custody where the mother's unfitness has been presumed from the single fact of her sexual orientation. Under these decisions, a practicing lesbian is precluded from having custody regardless of her moral character, her emotional stability, her financial status or her children's wishes. The judicial establishment and the public at large must be made aware of the findings of the scientific community concerning homosexuality. Lesbianism is not a biological condition, nor is it a mental disease. The majority of lesbians are indistinguishable from normal heterosexual women in their psychological make-up. Moreover, fears that a lesbian mother will molest or proselytize a child or that the child will be homosexual as a result of its rearing have been shown by experts to be irrational.

When making child custody awards, courts should separately assess each woman's fitness apart from her sexual preference. In some cases, psychiatric opinion will clearly indicate custody in the lesbian mother to be against the best interests of the child, and in such cases judges are justified in denying a custody petition. But where the psychiatric evidence is neutral, or where it favors the lesbian mother, judges have a legal and moral responsibility to make their determination based upon objective considerations, not on personal biases. It is the quality of the parent-child relationship which must be focused upon, not whether the parent is heterosexual or homosexual.

References

- 1 Rosen D: *Lesbianism: A Study of Homosexuality*, 1974, p. 63
- 2 E.g., see *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973)
- 3 Riley: The avowed lesbian mother and her right to child custody: A constitutional challenge that can no longer be denied, 12 San Diego L. Rev. 799 (1975) (hereinafter cited as Riley)
- 4 E.g. Annotated Code of Maryland Article 16 § 25 (1957)
- 5 Derdeyn: Child custody contests in historical perspective. *American Journal of Psychiatry* 133:12 (December, 1976) at 1370
- 6 *Ibid.* at 1373. E.g., *Scanlon v. Scanlon*, 29 N.J. Super. 317, 102 A2d 656 (1954)
- 7 E.g., *Parker v. Parker*, 222 Md. 69, 158 A2d 607 (1960); *Wallis v. Wallis*, 235 Md. 33, 200 A2d 164 (1964); *Neuwiller v. Neuwiller*, 257 Md. 285, 262 A2d 736 (1970)
- 8 E.g., *Parker, supra*; *Antony v. Antony*, 160 So. 2d 765 (La. Ct. App. 1964)
- 9 E.g., *Kirstukas v. Kirstukas*, 14 Md. App. 190, 286 A. 2d 535 (1972); *Goldschmiedt v. Goldschmiedt*, 258 Md. 22, 265 A2d 264 (1970); *Krebs v. Krebs*, 255 Md. 264, 257, A2d 428 (1969)
- 10 E.g., *Raible v. Raible*, 242 Md. 586, 219 A2d 777 (1966)
- 11 E.g., *Raible, supra*; *Bookstein v. Bookstein*, 7 Cal. App. 3rd 219, 86 Cal. Rptr. 495 (1970)
- 12 *Hild v. Hild*, 221 Md. 349, 157 A2d 442 (1960)
- 13 Foster and Freed: *Child custody*. 39 N.Y.U. L. Rev. 423, 615 (1965)
- 14 *Ibid.* at 435
- 15 E.g., *Molloy v. Molloy*, 460 S.W. 2d 15 (Ky. 1970); *Anonymous v. Id.*, 436 P.2d 157 (Ariz. Ct. App. 1968)
- 16 Riley at 816
- 17 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967)

- 18 *Ibid.* at 525
- 19 No. 1 Civil 32648 (Cal. 1st App. Dist., Div 2, Aug. 1973) petition for hearing denied, Cal. Sup. Ct. (Nov. 7, 1973), as reported in Riley at 816
- 20 Quoted in Riley at 816
- 21 1 Family L. Rptr. 2830, March 14, 1975
- 22 *Ibid.* at 2831
- 23 *Ibid.* at 2831
- 24 45 Cal. App. 3rd 39, 119 Cal Rptr. 22 (1975)
- 25 *Ibid.* at 25
- 26 *Ibid.* at 23, 26
- 27 49 Mich App. 358, 212 N.W. 2d 55 (1973)
- 28 *Ibid.* at 59
- 29 1 Family Law Rptr. 2004, Sept. 3, 1974
- 30 283 N.C. 671, 198 S.E. 2d 537 (1973)
- 31 230 Ga. 317, 196 S.E. 2d 842 (1973)
- 32 2 Family Law Rptr. 1013, Nov. 25, 1975
- 33 In order to protect the privacy of the parties involved, this case will be referred to as *A. v. A.* File No. 82B/859 124397-B
- 34 Interview with Judge Robert B. Watts, Nov. 8, 1976
- 35 Medical Service Summary & Recommendation Report, Jan. 17, 1975
- 36 *E.g.*, *Mitchell v. Mitchell* as reported in Riley at 816
- 37 Interview with Judge Robert B. Watts, Nov. 8, 1976
- 38 *Cornwell v. Cornwell*, 244 Md. 674, 224 A2d 870 (1966)
- 39 Interview with Judge Robert B. Watts, Nov. 8, 1976
- 40 The Judge interviewed wishes to remain anonymous.
- 41 Riley at 819
- 42 *Bennett v. Clemans*, *supra* at 844
- 43 *Ibid.* at 845
- 44 *E.g.*, Judge Watts in *A. v. A.*, *supra*; *Fleischer v. Fleischer*, *supra*; *Schuster v. Schuster*, *supra*
- 45 Saghir and Robins: Male and Female Homosexuality, 1973, p. 319
- 46 *E.g.*, see Riley at 853, 862; Martin D, Lyon P: Lesbian Woman, 1972, pp. 10-11
- 47 Riley at 853
- 48 *Schuster v. Schuster*, *supra* at 2004
- 49 Saghir and Robins, *op. cit.*, n. 45, p. 319
- 50 Summary & Recommendation Report, Jan. 17, 1975
- 51 Interview with John Money, Ph. D., Professor of Medical Psychology and Pediatrics, Department of Psychiatry and Behavioral Sciences and Department of Pediatrics, Johns Hopkins University, School of Medicine, Oct. 26, 1976
- 52 Riley at 862
- 53 Saghir and Robins, *op. cit.*, n. 45, p. 310
- 54 Interview with Judge Robert B. Watts, November 8, 1976
- 55 Interview with John Money, Ph.D., October 26, 1976
- 56 Riley at 860
- 57 Interview with John Money, Ph.D., Oct. 26, 1976, and from his letter file
- 58 Wilbur: Clinical aspects of female homosexuality. In Marmor, ed., *Sexual Inversion, The Multiple Roots of Homosexuality*, 1965, pp. 268-281
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- 62 Marmor, *op. cit.*, n. 58
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- 64 National Institute of Mental Health Task Force on Homosexuality (hereinafter NIMH Report) at 2 (1972); Martin and Lyon, *op. cit.*, n. 46, pp. 7-9
- 65 Marmor, *op. cit.*, n. 58, p. 19
- 66 Martin and Lyon, *op. cit.*, n. 45, p. 10
- 67 NIMH Report at 2
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- 69 Thompson, McCandles & Strickland, *supra*
- 70 Rosen D: *Lesbianism: A Study of Homosexuality*, 1974, p. 65
- 71 Press Release of the American Psychiatric Association, Dec. 15, 1973
- 72 NIMH Report at 6
- 73 Saghir and Robins, *op. cit.*, n. 45, p. 317
- 74 Armon: Some personality variables in overt female homosexuality. *J Projective Techniques*, 24:292-309 (1960)

- 75 Rosen, *op. cit.*, n. 1, p. 12, quoting Freedman: Homosexuality among women & psychological adjustment. *Ladder*, 12:2-3 (1968)
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- 79 Interview with John Money, Ph.D., Oct. 26, 1976 and from his letter file
- 80 Riley at 860, quoting J. Marmor
- 81 Interview with John Money, Ph.D., Oct. 26, 1976 and from his letter file