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BIBLIOGRAPHY OF CUSTODY AND VISITATION CASES INVOLVING DIVORCE FROM A DIFFERENT-SEX SPOUSE

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A.

Post-Divorce Custody Cases in which a “Nexus Test” Was Applied and the Fact that the Parent Was Gay, Lesbian, Bisexual or Transgender Was Not Found to Have Adverse Effect on the Children

I. Initial Custody Determination Following Divorce

CALIFORNIA

***In re the Marriage of Birdsall*, 197 Cal.App.3d 1024, 243 Cal.Rptr. 287 (Cal.App. 4 Dist. 1988).**

In dissolution proceedings involving permanent child custody and visitation issues, the trial court granted the gay father visitation, but prohibited him from exercising overnight visitation in the presence of any friend, acquaintance or associate known to be gay. The Court of Appeal vacated that portion of the judgment imposing the visitation restriction, and otherwise affirmed. It held that a parent's sexual orientation alone is not a proper basis for restricting visitation, as a matter of law. Rather, it held, an affirmative showing of harm or likely harm to the child is necessary to restrict parental visitation. It held further that there was no evidence of any indiscretion on the part of the father, nor any evidence supporting the trial court's inference that the father conceded his sexual orientation was detrimental to his child. In the absence of such a showing, it held, the restraining order was unreasonable.

FLORIDA

***Jacoby v. Jacoby*, 763 So. 2d 410 (Fl. Ct. App., 2nd Dist. 2000).**

Appeals Court held that a trial court in a dissolution proceeding could not grant custody of the children to the ex-husband based on unsupported findings that the ex-wife's lesbianism had a negative impact on the children. The court noted that the perceived biases of the community against gays and lesbians was an improper basis for the determination. The court also noted that the evidence did not support the court's comments concerning the negative impact of the ex-wife's sexual orientation, as a psychologist testified only that the children "may" become confused by a possible conflict between religious teachings and homosexuality, there was no evidence as to church doctrine regarding homosexuality, the "obviousness" of the trial court's preference for the ex-husband's home was not apparent from the evidence, and there was no actual evidence that the ex-wife's sexual orientation harmed the children. Thus, the court remanded the case for a new custody decision.

***Maradie v. Maradie*, 680 So.2d 538 (Dist. Ct. of App. of Fla., 1st Dist. 1996).**

Marital dissolution proceeding was brought, and after taking judicial notice that "homosexual environment is not a traditional home environment, and can adversely affect a child," the Circuit Court, Okaloosa County, awarded primary residential custody

of children to former husband. Former wife appealed, and the District Court of Appeal held that: the finding as to effect of “homosexual environment” was not a proper subject of judicial notice; and that the error required reversal and remand for a new custody determination.

GEORGIA

***Fulk v. Fulk*, 2002 WL 31248616 (Miss. Ct. App. Oct. 8, 2002).**

Husband filed for divorce against wife, seeking custody of child. Mother, who is a lesbian, counterclaimed for custody of child. The Chancery Court, Sunflower County, granted divorce and awarded custody of child to husband, and wife appealed. The Court of Appeals held that: (1) the chancellor was required to make findings and address each best interest and welfare of child factor in making determination to award custody to the husband; (2) the chancellor was precluded from placing too much emphasis on wife's lesbian affair as basis for awarding custody to husband; (3) the chancellor should have considered facts that the husband had trapped his pregnant wife in their home and that he had threatened to kill her and her family; and (4) the order restricting the wife's visitation to one hour per week at a public restaurant constituted abuse of discretion.

***Buck v. Buck*, 238 Ga. 540, 233 S.E.2d 792 (Ga. 1977).**

The Superior Court entered a final divorce decree awarding wife (who is a lesbian) custody of 18-month-old child until such time as child reached 30 months, at which time psychological evaluations were to be submitted for determination as to which party would get permanent custody thereafter, and husband took interlocutory appeal. The Supreme Court held that language in decree attempting to retain jurisdiction was simply a nullity and would be ordered stricken, that awarding custody to wife was not abuse of discretion, and that any error caused by entering divorce decree was harmless.

IOWA

***In re the Marriage of Wiarda*, 505 N.W.2d 506 (Iow. Ct. App. 1993).**

Wife appealed from dissolution decree entered in the District Court, Polk County, The Court of Appeals held that: the trial court did not improperly rely upon wife's romantic relationship with a woman in determining that the husband should have physical custody of the children; and that it was not improper for the court to require home study in its effort to determine the best interests of the children. In relation to the romantic relationship of the mother with another woman the Appeals Court held that, “The trial court did not make its decision based upon its view of the homosexual nature of the relationship between Sally and her friend, although the court may well have decided the relationship was disruptive to the continued good relationship between the two children and both parents.”

INDIANA

***Teegarden v. Teegarden*, 642 N.E.2d 1007 (Ind. Ct. App, 4th Dist. 1994).**

Mother appealed from order of the Superior Court, Jay County, awarding her custody of her two sons, but imposing conditions upon that award. The Court of Appeals held that the trial court did not have authority to restrict mother's "homosexual behavior" as condition of custody of her two children in custody dispute with stepmother following father's death, absent evidence of behavior having adverse effect upon children.

MARYLAND

Hedberg v. Detthow Unreported. No. 1789 (Md. Ct. of Special App. 2005).

Hedberg and his wife (Detthow) divorced and for the next five years their son lived with Hedberg and his male partner. Detthow sought a modification of the custody agreement after moving to Florida. The Maryland Court of Special Appeals held that a lower court ruled incorrectly when it denied Ulf Hedberg the right to raise concerns as a father over a custody restriction barring him from living with his partner while raising his son.

MASSACHUSETTS

***Doe v. Doe*, 16 Mass.App.Ct. 499, 452 N.E.2d 293 (Mass. App. Ct. 1983).**

Former husband appealed from judgment entered by the Superior Court, Middlesex County, in divorce proceeding. The Appeals Court held that the former wife's lesbian relationship did not preclude granting of joint custody of child to her.

NEW MEXICO

***A.C. v. C.B.*, 113 N.M. 581, 829 P.2d 660 (N.M. App. 1992).**

Woman who had allegedly agreed with child's biological mother to help raise child brought action, after termination of relationship between woman and mother, seeking joint legal custody and time-sharing with regard to child. Action was dismissed upon settlement and woman later moved to reopen judgment alleging that mother had not complied with settlement agreement. The District Court of Bernalillo County rendered summary judgment for mother and woman appealed. The Court of Appeals held that, "Petitioner's sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation. The appellate courts of this state have repeatedly held that evidence of sexual and associational conduct may be relevant to determining the best interests of the child, but is not, by itself, sufficient to make that determination."

***State ex rel. Human Services Department in the Matter of Jacinta M.*, 107 N.M. 769, 764 P.2d 1327 (N.M. App. 1988).**

Department of Human Services requested that child be placed with her brother. The Children's Court of Curry County ordered that child remain in legal and physical custody of Department, and that she not be placed with her brother, and Department appealed. The Court of Appeals held that: (1) children's court had no authority to prohibit Department from placing physical custody of child with brother once legal custody was

granted to Department, and (2) children's court findings that brother could not provide suitable environment for child because of he is gay were not supported by evidence.

NEW YORK

***Paul C. v. Tracy C.*, 209 A.D.2d 955, 622 N.Y.S.2d 159 (NY.A.D. 4 Dept. 1994).**

The Appeals Court held that a custody award to a mother was proper despite the mother's involvement in an alleged romantic relationship with a female co-worker. Upon the dissolution of the marriage in this matter, physical custody was granted to the mother, with liberal visitation for the father. The father appealed the decision, arguing that the mother's relationship with another woman was having a negative impact upon his children. In reviewing the case below, the court held that there was no indication in the record that the relationship that the mother had with her co-worker had a negative impact on the children. In affirming the custody award, the court held that where a parent's sexual preference does not adversely affect the children, such preference is not determinative in a child-custody dispute. Moreover, the court adequately addressed the father's concerns regarding the conduct of the mother and her co-worker during the initial proceedings.

***Anonymous v. Anonymous*, 120 A.D.2d 983, 503 N.Y.S.2d 466 (N.Y.A.D. 4 Dept. 1986).**

Trial court awarded custody of the parties' three-year-old son to plaintiff wife. The husband claimed that the court erred in its award of custody because plaintiff admitted she is bisexual, has a lesbian sexual relationship and is less fit to be the custodial parent. The Appeals Court held that, "In the absence of proof that the child has been adversely affected by plaintiff's life-style, the court correctly determined that plaintiff's sexual preferences do not render her an unfit parent." However, the Appeals Court remanded the issue of conditions imposed on custody to the trial court saying that conditions were necessary "for the child's protection, such as prohibiting the child's presence during, or involvement with, homosexual contact or conduct."

***Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (NY.A.D. 3 Dept. 1984).**

The Husband appealed an order of the Family Court of Broome County awarding the parties joint custody of their three children with primary physical custody to the wife based on allegations of wife's lesbian relationships. Appeals Court held that "the mere fact that a parent is a homosexual does not alone render him or her unfit as a parent.").

OHIO

***Conkel v. Conkel*, 31 Ohio App.3d 169, 509 N.E.2d 983 (Oh. Ct. App. 4 Dist. 1987).**

Mother appealed from order of the Court of Common Pleas, Pickaway County, granting father overnight visitation with his two sons. The Court of Appeals held that the father, who is gay, could not be denied overnight visitation with his two sons on basis of his sexual orientation, absent evidence that visitation would be harmful to the boys or that the boys would be psychologically or physically harmed.

TENNESSEE

***Berry v. Berry.*, 2005 WL 1277847 (Tenn. Ct. App. May 31, 2005) (slip op.).**

Appeal from the Chancery Court for Knox County, No. 148677-2. This is a post-divorce child custody case. The trial court changed custody to the father based upon the fact that the mother is a lesbian and the effect it would have on the child as he grew older. The Appeals Court held that the evidence preponderates against the trial court's finding that there had been a material change in circumstances to justify a change of custody in the absence of proof that the mother's sexual orientation had affected or would affect the child's well-being in any meaningful way. The trial court's decision was reversed.

***Shea v. Shea*, 2000 WL 62941 (Iowa Ct. App. Jan. 26, 2000).**

Appeals Court Affirmed trial court's refusal to take custody away from mother due to her "lesbian relationship" where trial court found that custody with the mother would be preferable to custody with father, a physically abusive person.

PENNSYLVANIA

***Blew v. Verta*, 420 Pa.Super. 528, 617 A.2d 31 (Pa. Super. 1992).**

In a post-divorce dispute over a child custody arrangement, the Court of Common Pleas, Carbon County, restricted the mother's custody, and the mother appealed. The Superior Court held that the order prohibiting the mother, a lesbian, from visiting her son in presence of her female partner was unsupportable.

VERMONT

***Nickerson v. Nickerson*, 158 Vt. 85, 605 A.2d 1331(Vt. 1992).**

Wife appealed divorce judgment of the Superior Court, Orange County, awarding husband custody of their daughter, claiming that the court improperly based its decision on the fact that she is a lesbian. The Supreme Court held that the trial court did not adequately explain application of primary-care-provider criterion to facts.

***Medeiros v. Medeiros*, 8 Fam.L.Rep. 2372 (Vt. Super. Ct. 1982).**

A Vermont Superior Court awarded custody of a couple's two children to their lesbian mother, finding that she was less rigid and dictatorial than the father. However, the Court expressed concern "with what effect, if any, the existing homosexual relationship of the [mother] may have upon the minor children of the parties...". The Court found that if the father desired, the Court should reexamine the matter to determine if circumstances have changed.

WEST VIRGINIA

***M.S.P. v. P.E.P.*, 178 W.Va. 183, 358 S.E.2d 442 (W.Va. Supreme Ct. of App. 1987).**

The Circuit Court granted husband divorce and awarded joint custody of minor children, with physical custody to husband. Wife appealed. The Supreme Court of Appeals held that wife, who had been primary caretaker of children prior to spousal separation, was

entitled to custody of children, despite being in a relationship with a bisexual man. The Court held that, “Adverse effects upon the children must be demonstrated before a divorcing parent's subsequent associations, standing alone, can be the basis for finding a parent who is the primary caretaker, unfit to have custody of her minor children.”

II. Post-Divorce Modification of Custody Agreement

ALASKA

***S.N.E. v. R.L.B.*, 699 P.2d 875 (Ak.1985).**

Father brought action seeking to change custody of minor child from mother to father, citing mother’s lesbianism. The Superior Court entered order granting father's motion, and mother appealed. The Supreme Court held that it was impermissible to rely on any real or imagined social stigma attaching to mother's status as a lesbian.

ILLINOIS

***In re Marriage of R.S. and S.S.*, 677 N.E.2d 1297 (Ill. App. Ct. 3rd. Dist. 1996).**

Father filed petition to modify child custody arrangement parties had reached at time of their divorce, citing mother’s lesbianism. The Circuit Court for the Tenth Judicial Circuit modified custody, and mother appealed. The Appellate Court held that: mother's relationship with her live-in lesbian partner did not alone justify modification; alleged potential for social condemnation as result of mother's lesbian relationship was not alone sufficient to warrant modification; and that the father failed to carry his burden of establishing that modification was warranted.

INDIANA

***Pryor v. Pryor*, 709 N.E.2d 374 (Ind. Ct. App. 1999).**

Involved a jurisdictional issue in a child custody case remanded to lower court with suggestion that the lower court judge not premise a change of custody based on the mother's actual or perceived sexual orientation. The lower court was instructed to conduct inquiry into the best interest of the child and not to base its decision on the fact that mother is a lesbian in the absence of evidence of conduct adverse to the child's interest.

MAINE

***Whitehead v. Black*, 2 BNA Family Law Rptr 2593 (Me. Super. Ct. 1976).**

Superior Court held that, notwithstanding the mother's lesbian lifestyle, her children would still be better off in her custody than with her ex-husband, who had demonstrated behavior that was not in the best interests of the children. The court found that the mother had actively sought to minimize or eliminate any impact of her “lesbian lifestyle” upon her children, while the father had demonstrated a lack of concern for their welfare and had committed several acts of violence. The court held that absent more convincing

evidence that the father was able to provide an environment better than that provided by the mother, the court would not change custody of the children, which had been in the mother ever since the divorce.

MASSACHUSETTS

***Fort v. Fort*, 12 Mass. App. Ct. 411, 425 N.E.2d 754 (Mass. App. Ct. 1981).**

In a heterosexual case, a court found that a father who had had an extramarital affair and lived with the other woman while married did not deprive him of custody rights where there was no evidence of harm to his children.

***Bezio v. Patenaude*, 381 Mass. 563, 410 N.E.2d 1207 (Mass. 1980).**

Mother appealed lower court decision that, although stated that the mother's sexual preference is "per se irrelevant", concluded that, "environment in which the Mother proposes to raise the children, namely, a Lesbian household, creates an element of instability that would adversely (a)ffect the welfare of the children." On appeal, the Court held that there is no evidence suggesting the sexual preference of a parent has detrimental effects on the welfare of their children.

MISSOURI

***Delong v. Delong*, 1998 WL 15536 (Mo.App. W.D., Jan. 20, 1998).**

Mother appealed from the judgment of dissolution entered by the trial court dissolving her marriage, awarding custody and visitation of the parties' three minor children, and distributing property. She claims the trial court erred in (1) awarding sole custody of the parties' children to the father, (2) restricting her visitation with the children and ordering her to inform them that "she is homosexual," and (3) enforcing the antenuptial agreement. She contends that the trial court's custody decision was improperly based solely on her "sexual orientation." The judgment of the trial court was reversed, and the cause was remanded to the trial court. The Court rejected Missouri's previous "per se" standard regarding homosexuality and custody of children and adopted a nexus standard.

NEBRASKA

***Hassenstab v. Hassenstab*, 570 N.W.2d 368 (Neb. Ct. App. 1997).**

Former husband sought to modify custody. The District Court, Douglas County denied modification, and former husband appealed. The Court of Appeals held that former husband failed to demonstrate requisite change of circumstances, affirming decision to leave 11-year old in custody of her mother who has engaged in a romantic relationship with a woman ("Because the evidence in the case at bar simply does not establish any harmful effect on [the child] because of [mother's] homosexual relationship, there has been no showing of a material change of circumstances.").

NEW JERSEY

***M.P. v. S.P.*, 169 N.J.Super. 425, 404 A.2d 1256, (N.J.Super.A.D. 1979).**

Former husband sued former wife for a change in custody of the parties' two daughters. The Superior Court, Chancery Division, awarded custody to the former husband and former wife appealed. The Superior Court, Appellate Division, held that the fact that the former wife is a lesbian or any embarrassment that her variant sexual orientation might cause to the children in the eyes of their peers were not grounds for change of custody.

NORTH DAKOTA

***Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003).**

Supreme Court held that a custodial parent's "homosexual household" is not grounds for modifying custody within two years of a prior custody order in the absence of evidence that such environment actually or potentially endangers the children's physical or emotional health or impairs their emotional development.

***Insoe v. Insoe*, 121 Ohio App.3d 396, 700 N.E.2d 70 (Oh. App. 4th Dist. 1997).**

Former wife moved for modification of parental rights and responsibilities concerning child of marriage, custody of whom had been awarded to husband. The Court of Common Pleas, Meigs County, granted motion and awarded custody to wife. Husband appealed, and the Court of Appeals held that a parent's sexual orientation may be considered in connection with determination of parental rights and responsibilities only if that sexual orientation has direct adverse impact on child and that evidence was insufficient to support determination that sexual orientation of husband, who was living in openly homosexual relationship, had directly and adversely affected child.

***Large v. Large*, 1993 WL 498127 (Ohio App. 10 Dist. Dec. 2, 1993).**

As part of the divorce decree, the parties entered into a joint custody plan which provided that the children were to have their primary residence with their mother. Because of confusion over the joint custody plan, the mother filed a motion to modify the parties' joint custody plan. Both parties then filed motions requesting to be designated as the sole residential parent. The Trial court determined that it was in the best interest of the children to designate the mother as the sole residential parent of the parties' minor children. The Appeals Court upheld this decision, finding that "there is no evidence indicating that [mother's] sexual orientation has had any negative affect on the children."

OKLAHOMA

***Fox v. Fox*, 904 P.2d 66, 1995 OK 87 (Okla. 1995).**

Father filed motion seeking post decree modification of permanent child custody order, citing mother's lesbianism. The District Court, Cleveland County, found mother to be unfit and ordered custody of parties' children changed to father. Mother appealed, and the Court of Appeals affirmed. The Supreme Court held that the finding that mother was unfit was wholly without evidentiary support and clearly erroneous that the father failed

to establish material change in circumstances which adversely affected best interest of children.

OREGON

***Collins v. Collins*, 51 P.3d 691 (Or. Ct. App. 2002).**

The Appeals Court reversed a lower court's modification of a custody agreement and held that children's exposure to seeing their mother in bed kissing another woman did not constitute a change in circumstances sufficient to trigger a reconsideration of custody status.

SOUTH CAROLINA

***Stroman v. Williams*, 291 S.C. 376, 353 S.E.2d 704 (S.C. App. 1987).**

Father brought action for change of custody of daughter from mother to father, citing mother's lesbianism. The Family Court, Orangeburg County, denied change of custody. Father appealed. The Court of Appeals held that the fact that the mother is a lesbian was not adversely affecting the child and did not mandate change in custody.

WEST VIRGINIA

***Rowsey v. Rowsey*, 174 W.Va. 692, 329 S.E.2d 57 (W.Va. Supreme Ct. of App. 1985).**

Mother appealed from final order of the Circuit Court, which modified final divorce decree by removing two infant children from her custody and placing them in custody of father. The Supreme Court of Appeals held that: the fact that custodial parent and her children were in presence of a woman who was reputed to be a lesbian was not a ground for changing custody to noncustodial parent; and that substantive actions of mother, in associating with reputed lesbian and removing children from the state for a few days, standing alone, were not grounds for changing custody.

WISCONSIN

***Dinges v. Montgomery*, Unpublished opinion. 179 Wis.2d 849, 514 N.W.2d 723 (Wis.App. 1993).**

Robert G. Montgomery appeals from a judgment modifying a judgment of divorce, in which his visitation with his son was reduced to one weekend a month. Montgomery claims that the trial court erred in concluding that his motion to change custody was frivolous and dismissing his claims that the fact that the mother is a lesbian had an adverse effect on their son. The Appeals Court rejected Montgomery's arguments and affirmed the lower court decision.

B.

Illustrative Post-Divorce Custody and Custody Modification Cases in which the Fact that Parent Was Gay, Lesbian, Bisexual, or Transgender Was Considered to Have an Adverse Effect on Child

I. Initial Custody Determination Following Divorce

ALABAMA

***J.B.F. v. J.M.F.*, 730 So.2d 1190 (Ala. 1998).**

Former husband filed post-divorce petition for custody modification. The Supreme Court held that the trial court acted within its discretion in changing custody from former wife to former husband, based on change of circumstances consisting of former husband's new marriage and change in former wife's lesbian relationship from a discreet affair to the creation of an openly "homosexual home environment."

INDIANA

***Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998).**

In action for divorce and ancillary relief, the Madison Superior Court, entered order dissolving marriage and restricting gay husband's visitation with couple's children. Husband appealed. The Court of Appeals affirmed the lower court decision and held that: (1) evidence provided rational basis for custody order precluding husband's overnight visitation with children if non-blood-related persons were also in house overnight; (2) trial court's foremost consideration in determining appropriate custody and visitation was best interests of children, rather than private bias against father's sexual orientation; and (3) the restriction prohibiting the husband from taking children to activities promoting "homosexual lifestyle" was not unconstitutionally vague, overbroad, or prior restriction on husband's speech.

MISSISSIPPI

***Morris v. Morris*, 783 So.2d 681 (Miss. 2001).**

Court rejected appeal by lesbian mother of order awarding custody of children to ex-husband and refusing to allow visitation unless agreed third party was present; decision influenced in part by lesbian mother's "homosexual lifestyle."

OHIO

***Layne v. Layne*, 2001 WL 1359784 (Oh. Ct. App. 12th Dist. Nov. 5, 2001) (not officially published).**

Appeals Court held that minor son's discomfort with the fact that his mother was a lesbian is suitable factor to consider in awarding custody to father.

TENNESSEE

***Hogue v. Hogue*, 2004 WL 578593 (Tenn. Ct. App. Sept. 13, 2004).**

Court of Appeals reversed a trial court ruling that Joseph Hogue may not "expose" his son to his "gay lifestyle" pending final resolution of divorce proceedings in which custody and visitation are at stake.

VIRGINIA

***Piatt v. Piatt*, 499 S.E.2d 567 (Va. Ct. App. 1998).**

Appeals court ruled against woman in lesbian relationship in her effort to obtain primary physical custody of her child.

II. Post-Divorce Modification of Custody Agreement

ALABAMA

***H.H., Ex parte*, 2002 WL 227956 (Ala. Feb. 15, 2002).**

Supreme Court ultimately held that lesbian mother's allegations that father engaged in child abuse failed to meet requirement for material change of circumstances to justify change of custody for minor children; concurring opinion by Chief Justice Moore asserts that gays are presumptively unfit to custody because "homosexuality is an evil disfavored under the law."

ARKANSAS

***Larson v. Larson*, 902 S.W.2d 254 (Ct. of App. Ark. Div. 1 1995).**

Father filed petition to obtain custody of children. The Chancery Court, Benton County, entered order changing primary custody of both children to father. Mother appealed. The Court of Appeals held that: (1) change of custody was in best interest of children; (2) change in circumstances warranted change of custody; and (3) evidence supported finding that mother and lesbian lover had engaged in "deviant sexual activity."

FLORIDA

***Sinclair v. Sinclair*, 804 So.2d 589 (Fla. Ct. App. 2nd Dist. 2002).**

Appeals Court rejected lesbian mother's petition for change of custody upon imprisonment of her ex-husband; found best interest of children served in remaining with their grandmother, who had raised them and formed psychological bond with them, rather than with mother and her same-sex partner.

IDAHO

***McGriff v. McGriff*, 140 Idaho 642, 99 P.3d 111 (Id. 2004).**

Mother filed petition for modification of custody and father filed counterpetition. The

District Court granted mother's petition. Father appealed. The Supreme Court held that the magistrate did not abuse his discretion by ordering that father have visitation with children provided that father was not residing in the same house with his male partner during such visitation.

ILLINOIS

***In re Marriage of Martins*, 645 N.E.2d 567 (Ill. App. 2 Dist. 1995).**

Former husband petitioned for modification of custody, seeking sole custody of minor children. The Circuit Court, Kane County, denied petition, and husband appealed. The Appellate Court held that a change in residential custody arrangement from weeks with former wife and weekends with husband to sole residential custody with husband was warranted, in light of children's expressed preference to reside with father during week, adverse impact of wife's lesbianism on children, lack of stability in wife's home caused by wife's numerous roommates, fact that children required counseling to deal with wife's lesbianism, and recommendation of guardian ad litem that husband have residential custody.

LOUISIANA

***Rowan v. Scott*, 665 So.2d 760 (La. App. 1 Cir. 1995).**

Father moved for change of custody entered pursuant to custody agreement. The Twentieth Judicial District Court, Parish of West Feliciana, granted motion and granted final divorce between the parties, and mother appealed. The Court of Appeal held that change of custody was warranted by mother's cohabitation with another woman in openly gay relationship.

MISSISSIPPI

***Davidson v. Coit* 899 So.2d 904 (Miss. Ct. App. 2005).**

Ex-husband moved to modify custody. The Chancery Court, Rankin County, modified custody and granted ex-husband permanent custody of the children, and ex-wife appealed. The Court of Appeals held that fact that ex-wife, who was a lesbian and exposed children to sexual nature of her relationships with other women constituted substantial change in circumstances warranting modification of custody.

***Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999).**

Court affirmed chancery court decision to deny the application of a gay father for modification of a custody and visitation order in effect with regard to his son, despite evidence of troubled household in which son was living with mother and abusive stepfather.

NORTH CAROLINA

***Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (N.C. 1998).**

Former wife filed action seeking modification of a judgment granting primary physical custody of the parties' two minor children to the former husband. The District Court granted exclusive custody to the former wife. Former husband appealed. The Court of Appeals reversed. The Supreme Court held that evidence supported the trial court's decision to modify the out-of-state child custody judgment and award exclusive custody to the former wife as a result of the former husband's gay relationship and activities.

WYOMING

***Hertzler v. Hertzler*, 908 P.2d 946 (Wy. 1995).**

Father petitioned for modification of terms of divorce decree granting liberal unsupervised visitation rights to mother. The District Court of Goshen County granted petition, and mother appealed. The Supreme Court held that: (1) district court's indulgence of essentially personal viewpoint in derogation of mother's "homosexual lifestyle" did not indicate malice or prejudice sufficient to cast doubt upon its capacity to remain open to conviction evidence might produce, and (2) limitation of minor children's visitation with mother was reasonable and benefited from substantial support in record.

C.
***Cases Addressing Whether the Non-marital Sexual Conduct or
Relationship of the Non-custodial Parent Affects that Parent’s
Visitation Rights***

**I. Cases in which Visitation Was Restricted Because Exposure to a
LGBT Parent Was Presumed to Be Harmful to the Child.**

ALABAMA

***Ex parte D.W.W.*, 717 So. 2d 793 (Ala. 1998).**

The Alabama Supreme Court declared that, even without evidence that children have been adversely affected by their parent's romantic relationship with a member of the same sex, a trial court is justified in restricting the parent's visitation to limit the children's exposure to their parent's "homosexual lifestyle." When a noncustodial parent is involved in a continuing romantic relationship with someone of the same sex, the court said, restrictions on that parent's visitation rights have been widely held to be proper. Such restrictions, the court commented, are common tools used to shield a child from the harmful effects of a parent's illicit sexual relationships--heterosexual or homosexual.

***T.K.T. v. F.P.T.*, 716 So. 2d 1235 (Ala. Civ. App., 1998).**

In divorce case, the Jefferson Circuit Court entered judgment divorcing parties, dividing their marital assets, and providing that wife would have custody of children. Husband appealed. The Court of Civil Appeals held that the trial court acted within its discretion in awarding custody of children to wife and that the trial court acted within its discretion in imposing restrictions on the gay husband's visitation rights.

INDIANA

***Marlow v. Marlow*, 702 N.E.2d 733 (Ind.Ct.App. 1998).**

In action for divorce and ancillary relief, the Madison Superior Court, entered order dissolving marriage and restricting husband's visitation with couple's children. Husband appealed. The Court of Appeals held that: (1) evidence provided rational basis for custody order precluding husband's overnight visitation with children if non-blood-related persons were also in house overnight; (2) trial court's foremost consideration in determining appropriate custody and visitation was best interests of children, rather than private bias against the fact that the father is gay; and (3) restriction prohibiting husband from taking children to activities promoting "homosexual lifestyle" was not unconstitutionally vague, overbroad, or prior restriction on husband's speech. Lower court decision was affirmed.

MISSISSIPPI

***Lacey v. Lacey*, 822 So.2d 1132 (Miss. Ct. App. 2002).**

Mother filed a petition requesting physical custody of her children, or alternatively, that she be awarded more definite visitation. The father filed a cross-petition requesting modification of visitation and child support. The Attala County Chancery Court restricted mother's visitation and ordered her to pay \$310 per month in child support. The mother appealed. The Court of Appeals held that substantial evidence supported chancellor's restriction of mother's supervised visitation (mother's girlfriend could not be present during visitation.)

MISSOURI

***J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. E.D. 1997).**

Case involving a father who had undergone sex-reassignment surgery shortly before trial and was living as a woman. The court did not require a showing of harm in affirming a trial court order requiring the father to not "sleep with another female" during child visitation. It was unclear whether the appellate court, which used male pronouns to refer to the father, viewed the case as involving homosexual or transsexual conduct.

II. Cases in Which Visitation by LGBT Parent Could Only Be Restricted Upon Showing of Actual Harm to the Child from Exposure to Parent's Sexual Orientation.

ALABAMA

***K.T.W.P. v. D.R.W.*, 721 So. 2d 699 (Ala. Civ. App. 1998).**

Affirming a judgment in a custody modification proceeding insofar as the judgment failed to further restrict the father's visitation rights with the parties' daughter, the court in held that there was no showing that any further restriction on the visitation rights of the father, who was gay, was in the daughter's best interests. Observing that the father's visitation was already restricted, in that he was not allowed to engage in sexual activities in the daughter's presence, the court said that the testimony at trial supported the trial court's apparent conclusion that the father acted responsibly toward his daughter by sleeping apart from his partner while the child was in their home. According to the father, the court recounted, the partner slept in his own bedroom, and the father slept on the couch, when the daughter visited. The father also testified that the daughter's privacy was safeguarded and that he, not the partner, cared for the daughter's personal needs, such as the supervision of bathing, while she was visiting. The court acknowledged that the trial court could have restricted the father's visitation and that, if it had done so, the court very likely would have affirmed such a restriction.

CALIFORNIA

***In Interest of R.E.W.*, 220 Ga. App. 861, 471 S.E.2d 6 (Ga. Ct. App. 1996).**

Gay father filed complaint seeking to expand his visitation privileges to include unsupervised visitation. The Bibb Juvenile Court refused to allow unsupervised visitation, and father appealed. The Court of Appeals held that unsupervised visitation, as opposed to continued restricted visitation, was in best interests of the child.

COLORADO

***In re Marriage of Dorworth*, 33 P.3d 1260 (Colo. Ct. App. 2001).**

Bisexual father's overnight visitors and church visits during parenting time could not be restricted by the court without statutorily required finding that father's conduct endangered the child or physically or impaired her emotional development.

INDIANA

***Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002).**

Ex-wife appealed portion of child custody order of the Superior Court, prohibiting her from cohabiting with same-sex partner while living with her children. The Court of Appeals held that there was no rational basis for order prohibiting ex-wife from cohabiting with same-sex partner while living with her children.

MARYLAND

***Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (Md. Ct. App. 1998).**

Articulating a standard it said applies to both homosexual and heterosexual relationships by a parent, the Appeals Court held that the correct standard to be applied is the best interests of the child, with visitation being restricted only upon a showing of actual or potential harm to the child resulting from contact with the parent's nonmarital partner.

MINNESOTA

***In re Marriage of McKay v. McKay*, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996).**

A child support modification proceeding, in which the court, reversed a lower court order insofar as it restricted the visitation of the mother, who lived in Texas with her lesbian partner, to the Minnesota county of the father's residence. The Court held that no evidence supported the father's claim that the children's exposure to gay rights events by the mother was somehow harmful.

MISSISSIPPI

***Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999).**

Former husband sought modification of custody so that his child could live with him. The Chancery Court denied petition and prohibited visitation in the presence of the former husband's male partner. Former husband appealed. The Supreme Court held that

the former husband was not entitled to modification of custody, and that banning visitation in the presence of former husband's life partner was improper.

MISSOURI

***J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. 1998).**

Supreme Court remanded a dissolution judgment for a reconsideration of the mother's visitation rights. The Court held that a provision prohibiting the children from being in the presence of "any person known by [the mother] to be lesbian or known by [the mother] to be one who engages in lesbian sexual activity . . ." except for a person named in the order who was described as a "long time friend of the children," was too broad. The court directed the trial court to limit the condition to apply only to those individuals whose presence and conduct might be contrary to the best interests of the children. The court also held that a second provision, prohibiting the children from being in the presence of "any other female, unrelated by blood or marriage, with whom [the mother] may be living," was also too broad.

OHIO

***Davis v. Davis*, 2004 WL 2806433 (Oh. App., 7 Dist. Nov. 29, 2004) (Slip op.).**

Following divorce, wife filed motion to hold husband in contempt for interfering with visitation as well as motion for change of custody. Husband filed competing motion for contempt alleging that wife continually violated restriction that her "female paramour" not be present during visitation. Following a hearing before a magistrate, the parties came to a mutually agreeable custody schedule and an agreed entry was filed. Wife subsequently filed motion to vacate the agreed entry. The Court of Common Pleas journalized the agreed entry and denied wife's motion to vacate. She appealed. The Court of Appeals held that the former wife, who never informed trial court that her motion to vacate agreed entry on cross-motions for contempt in custody enforcement proceeding was based on restriction prohibiting her "female paramour" from being present during visitation with children, failed to set forth sufficient operative facts to establish a meritorious claim or defense.

WASHINGTON

***In re Marriage of Wicklund*, 84 Wash. App. 763, 932 P.2d 652 (Wash. App. Div. 1 1996).**

The Appeals Court reversed a judgment in a marital dissolution action restricting the father's visitation with the parties' children by providing that "[the father] shall not practice homosexuality in the sense of exhibiting, or participating in displays of affection (hand-holding, kissing, etc.) with a partner, 'guest,' or significant other," the court held that the confusion experienced by the children due to the conflict between the father's romantic relationship with another man and the mother's Jehovah's Witness faith did not justify the restriction.

In the matter of the Marriage of Cabalquinto, 43 Wash. App. 518, 718 P.2d 7 (Wash. App. 1986).

The Superior Court, King County, denied divorced father's request for an order allowing visitation with his son in California, and father appealed. The Supreme Court remanded due to its inability to determine basis for trial court's ruling. On remand, the Superior Court, King County, authorized minor son to visit his divorced father in California provided that father limit association with his male companion. The Court of Appeals held that limitation of father's visitation decree was improper.

WYOMING

Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995).

Supreme Court held that it could not reverse a discretionary decision that was reasonable and benefited from substantial support in the record. While the court emphasized that it could not condone the trial court's indulgence of a personal viewpoint against homosexuality, the court found the visitation restrictions justified as an effort to limit the damage done by mutual parental insistence upon use of the children as weapons in an acrimonious contest between lifestyles.

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