Assessing the Best Interests of the Child: Missouri Declares That a Homosexual Parent Is Not Ipso Facto Unfit for Custody

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J.A.D. v. F.J.D.¹

I. INTRODUCTION

In formal child custody disputes, the voices of those at the center of the controversy, the children, are rarely heard.² Their parents, who otherwise are presumed to act in their best interests, battle one another in legal proceedings that reward the parent who more persuasively portrays the deficiencies of the other’s parenting skills.³ Because the children, especially the very young, have no adequate basis for making judgments about their long-term well-being, the state acts as parens patriae while their parents are adversaries.⁴ Through its laws and decision makers, the state attempts to ensure that the final custody arrangement is guided by the best interests of the child.

Judges charged with resolving custody disputes are faced with an exceptionally difficult, if not quixotic, task. To implement the best interests standard, they must determine where a particular child’s interests lie—by sorting through conflicting parental and expert testimony, by deducing legislative

¹ 978 S.W.2d 336 (Mo. 1998).
² Many state custody statutes list a child’s wishes as to custody as a factor to consider. See infra note 38. Yet, often for good reason, the child’s wishes are not determinative. See, e.g., Weiss v. Weiss, 954 S.W.2d 456, 460 (Mo. Ct. App. 1997) (holding that the court will follow child’s preference only if other evidence concerning child’s best interests are consistent with that preference).
³ Courts sometimes provide representation for children independent of their parents or custodians by appointing a guardian ad litem. Even in those circumstances, the guardian ad litem is responsible for reporting the facts concerning her ward and not for voicing the child’s preferences. See John E. Coons et al., Puzzling Over Children’s Rights, 1991 BYU L. REV. 307, 333-39.
⁴ "Parens patriae, literally ‘parent of the country,’ refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown.” West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (describing the New York common law approach to parens patriae as requiring the judge to put himself in the position of “a wise, affectionate and careful parent”). See generally George B. Curtis, The Checkered Career of Parens Patriae: The State as Parent or Tyrant, 25 DEPAUL L. REV. 895 (1976) (discussing the development and use of the doctrine from its early English origins to modern American usage).
directives from general statutory standards offering little specific guidance, and by giving due consideration to the parent-child relationship. The burden on the court is tremendous, yet its obligation is equally great. If it fails to fulfill its duty, the court risks long-lasting and serious harms to the child, which may in turn affect society generally.

Given the wide range of familial situations, courts have found that myriad factors bear in differing degrees on the interests and welfare of children. The potential relevance of one such factor, a parent’s involvement in a homosexual relationship, has been hotly debated before the courts, among legal scholars, and by social scientists. The Missouri Supreme Court recently had the opportunity

5. The Supreme Court has characterized the right of parents to raise and care for their children as fundamental. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Parental rights can be terminated only if compelling circumstances, such as parental unfitness, are shown by clear and convincing evidence. See Mark Strasser, Fit to Be Tied: On Custody, Discretion, and Sexual Orientation, 46 AM. U. L. REV. 841, nn.2-4 (1997). As Professor Strasser has noted, however, the constitutional protections for parental rights “are less robust than first might appear” because “states have much discretion in determining the criteria for actual or presumed unfitness” and “because custody and visitation awards often depend on the credibility, temperaments, and personalities of those vying for custody, trial courts are given much discretion when applying the relevant criteria.” Id. at 842.


7. See infra note 157.
to consider the issue in *J.A.D. v. F.J.D.* The court held that it was not error for a court to consider the effect of a parent’s homosexual misconduct on the children, but that homosexual parents are not ipso facto unfit for custody of their children.9

**II. FACTS AND HOLDING**

The custody of three minor children became the focus of contention when J.A.D. sought to dissolve her nine-year marriage to F.J.D.10 J.A.D. petitioned the court to award joint legal custody and to designate her as the children’s principal physical custodian because she was their primary caretaker11 during the marriage.12 F.J.D. sought sole custody and restrictions on J.A.D.’s visitation rights because she had “entered significant, intense, open and blatant lesbian relationships” since their children’s birth and because he could better provide for them.13

Following an eight-day evidentiary hearing, the trial court dissolved the marriage, made custody determinations, and established a visitation schedule.14 It determined that the best interests of the children would be served by granting F.J.D. sole custody and restricting J.A.D.’s visitation rights.15 The court directed

9. Id. at 339.
12. *Delong,* 1998 WL 15536, at *2. J.A.D. had begun a career as a school teacher prior to her marriage to F.J.D. in 1985. After the couple began to have children, J.A.D. primarily stayed at home to care for the children and for F.J.D.’s son from a prior marriage. *Id.* at *1-*2. During the marriage, F.J.D. worked as a full-time attorney, and then later as the CEO of his family’s bridge-steel fabrication business. *Id.*
13. Id. at *2. At the trial, J.A.D. testified to having one nonsexual and three sexual affairs with other women since she concluded her marriage was irreparable in 1991. *Id.* One affair occurred after she and F.J.D. were separated. *Id.* F.J.D. also testified to having a sexual affair with a woman following separation. *Id.*
15. Specifically, the trial court relied on F.J.D.’s greater stability, nearby and close extended family, and his greater likelihood of promoting a good relationship between the children and other parent. *Id.* The court found that J.A.D. displayed a negative attitude toward F.J.D. that adversely impacted the children, and that J.A.D. immaturely sought new love relationships and “enmesh[ed] the children in her lovers’ lives.” *Id.*
J.A.D. to keep "all aspects of the homosexual lifestyle" away from the children and prohibited her from exposing them to any persons known by her to be lesbian (with the exception of one longtime friend) and to any other unrelated females with whom she might be living.\(^\text{16}\) Furthermore, the trial court ordered that the two eldest children, who were unaware of the nature of their mother's relationships, be informed by J.A.D. of her "lesbianism" in a "telling" session monitored by the guardian ad litem.\(^\text{17}\)

J.A.D. appealed the custody and visitation rulings, claiming that the evidence showed she would have made a better custodian.\(^\text{18}\) She argued that the trial court had unconstitutionally based its decision solely on her sexual orientation and that the court-ordered "telling" session and the limitations on her visitation rights were improper.\(^\text{19}\)

In considering J.A.D.'s appeal, the Missouri Court of Appeals for the Western District of Missouri adopted a nexus test,\(^\text{20}\) which requires an evidentiary connection, or nexus, between a parent's sexual conduct and its impact on the child's welfare in order for evidence of the parent's conduct to be relevant to the custody determination.\(^\text{21}\) The court then held that the trial court improperly awarded custody and restricted visitation based on J.A.D.'s homosexual conduct without evidence of its impact on the children.\(^\text{22}\) After the appellate court issued its slip opinion, the Missouri Supreme Court granted transfer, which divested the appellate court's decision of precedential effect.\(^\text{23}\)

Following transfer, F.J.D. moved to strike J.A.D.'s brief.\(^\text{24}\) The motion alleged violations of Rule 84.04(c), which requires a fair and concise statement of the facts, and Rule 84.04(h), which requires page references to the legal file

court also pointed to many findings that were related to J.A.D.'s sexual orientation and conduct but did not include findings connecting J.A.D.'s conduct to its effects on the children. \textit{Id.; Delong v. Delong}, No. WD52726, 1998 WL 15536, at *2 (Mo. Ct. App. Jan. 20, 1998). For example, the trial court noted that J.A.D. engaged in a "promiscuous series of four homosexual affairs," she denied and concealed "her adulterous lesbian activity," and she intended to continue exposing her children to her "lesbian lovers." \textit{Id.}

20. \textit{See infra} notes 44-47 and accompanying text.
23. \textit{See Philmon v. Baum}, 865 S.W.2d 771, 774 (Mo. Ct. App. 1993) ("The decision of the court of appeals in a case subsequently transferred is of no precedential effect."). Although the court of appeal's lengthy slip appellate opinion was mooted by transfer to the Missouri Supreme Court, this Note makes reference to it to help illuminate some issues.
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or transcript for all statements of fact and argument. The supreme court sustained the motion with respect to the statement of facts and granted J.A.D. leave to file a new brief. F.J.D. then moved to strike J.A.D.'s substitute brief, alleging continued violations of Rule 84.04(c) and additional violations of Rule 84.04(d), which requires that the points relied on briefly and concisely state the actions or rulings sought to be reviewed and why they are erroneous. The court took this motion with the case, found that J.A.D.'s points relied on failed to meet the requirements of Rule 84.04(d), and reviewed the trial court's judgment only for plain error.

In a per curiam opinion, the court held that the trial court did not plainly err in making its custody determination because the decision was not based solely on J.A.D.'s homosexual status; that J.A.D.'s challenge to the "telling" session was moot because it had already taken place; and that the limitations on J.A.D.'s visitation rights were overbroad because the restrictions should apply only to persons whose presence might be contrary to the best interests of the children.

### III. Legal Background

When a child's parents divorce or otherwise form separate households, it must be determined whether one or both parents should be responsible for making decisions about her health, education, and welfare, whether she should reside solely with her father or with her mother or should spend significant periods residing with each. If it is decided that she will reside solely with one parent, it must also be determined whether and under what conditions she will spend time with the other parent.

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25. Id.
26. Id.
27. Id.
28. Id. at 338-40.
29. Id. at 339-40.
30. This discussion assumes that both parents wish to maintain contact with their child and that at least one parent is a fit custodian.
31. This question relates to the legal custody of the child. When a court awards "joint legal custody," both parents share the decision making rights, responsibilities, and authority relating to the health, education, and welfare of the child. See, e.g., MO. REV. STAT. § 452.375(1)(2) (Supp. 1998).
32. This question relates to the physical custody of the child. When a court awards one parent "sole physical custody," the child will reside with that parent alone. When a court awards the parents "joint physical custody," the child will spend significant, but not necessarily equal, time residing with or being supervised by each parent. See, e.g., MO. REV. STAT. § 452.375(1)(3) (Supp. 1998).
33. This is usually called visitation. Unlike custody, courts generally recognize a parental right to visitation or presume that it is in the child's best interests. See, e.g., Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993) ("Unlike custody, visitation
A. Principles of Child Custody Adjudication

When parents cannot agree about a child’s custody, they submit their claims to court for adjudication.\(^34\) After considering the parties’ evidence and, if appropriate, the evidence of any individuals appointed by the court to represent the child’s interests, the court resolves the dispute according to the “best interests of the child.”\(^35\) Because there is a strong preference for

between a child and a noncustodial parent is not merely a privilege of the noncustodial parent, but a right of the child.”). In many states, including Missouri, visitation usually can be denied or restricted only if it will be detrimental to or will endanger the child. See, e.g., MO. REV. STAT. § 452.400 (Supp. 1998); 750 ILL. COMP. STAT. ANN. 50/607(c) (West Supp. 1999) (“[T]he court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral or emotional health.”); KAN. STAT. ANN. § 60-1616(a) (1997 & Supp. 1998) (entitling a parent not granted custody to reasonable visitation rights unless the court finds that visitation would seriously endanger the child’s physical, mental, moral, or emotional health); In re Marriage of McKay, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996) (stating that Minnesota utilizes an “endangerment standard” in determining visitation restrictions).

\(^34\) Child custody adjudication is relatively rare because parties often initially agree about who should have custody or they settle their disagreements before going to court. For example, it is estimated that approximately 78 percent of parents agree from the beginning in divorce cases. ELLMAN ET AL., supra note 3, at 621 (citing Robert H. Mnookin & Eleanor E. Maccoby, Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?, in DIVORCE REFORM AT THE CROSSROADS 52 (S. Sugarman & H. Kay, eds., 1990)).

placing a child in the custody of at least one of her parents, the trier usually...

1653.3(A)-(O) (West Supp. 1998) (listing factors); MINN. STAT. ANN. § 518.17 (West Supp. 1999) (best interests standard); MONT. CODE ANN. § 40-4-212 (1999) (listing factors); NEB. REV. STAT. § 42-3642(a)-(d) (1998) (best interests standard); NEV. REV. STAT. § 125.48o (1997) (stating that the "sole consideration of the court is the best interest of the child"); N.H. REV. STAT. ANN. § 458:17 (1992) (directing courts to award custody as shall be most conducive to children’s benefit); N.M. STAT. ANN. § 40-4-9 (Michie 1994) (best interests standard); N.Y. DOM. REL. LAW § 240.1(a) (McKinney Supp. 1999) (directing the court to enter custody orders "as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child"); N.C. GEN. STAT. § 50-13.2(a) (1995) (requiring custody orders to be made "as will best promote the interest and welfare of the child"); N.D. CENT. CODE § 14-09-05.2 (1997) (best interests standard); OHIO REV. CODE ANN. § 3105.21(A) (Anderson Supp. 1997) (directing court orders for children to be made "as in their best interests"); OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1999) (listing preferences for custody arrangements that should be resolved according to the best interests of the child); OR. REV. STAT. § 107.137 (1997) (listing factors); 23 PA. CONS. STAT. ANN. § 5312 (West 1991) (best interests standard); R.L. GEN. LAWS § 15-5-16(d)(2) (1996) (listing factors that should not be considered in determining a child’s best interests); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985) (stating that court may make determinations that, "from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just"); S.D. CODIFIED LAWS § 25-4-45 (Michie 1999) (stating that court shall be guided by "what appears to be for the best interests of the child in respect to the child’s temporal and mental and moral welfare"); TENN. CODE ANN. § 36-6-106 (1996) (best interests standard); TEX. FAM. CODE ANN. § 153.002 (West 1996) (mandating that child’s best interests "shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child"); UTAH CODE ANN. § 30-3-10 (Supp. 1999) (best interests standard); VT. STAT. ANN. tit. 15, § 665 (1989 & Supp. 1999) (same); VA. CODE ANN. § 20-124.2.B (Michie Supp. 1999) (stating that the "court shall give primary consideration to the best interests of the child"); WIS. STAT. ANN. § 767.24(2)(b) (Supp. 1998) (best interests standard); WYO. STAT. ANN. § 20-2-113(p) (Michie 1999) (stating that "[c]ustody shall be crafted to promote the best interests of the child"). See also Boswell v. Boswell, 721 A.2d 662, 670-71 (Md. 1998) (recognizing best interests standard judicially). But see ALA. CODE § 30-3-1 (1989 & Supp. 1996) ("[T]he court may give the custody and education of the children of the marriage to either father or mother, as may seem right and proper, having regard to the moral character and prudence of the parents and the age and sex of the children."); MASS. GEN. LAWS ch. 208, § 28 (West 1998) ("[T]he court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties ...."); MICH. COMP. LAWS ANN. § 552.16(1) (West Supp. 1999) ("[T]he court may enter such orders as it considers just and proper concerning the care, custody, and support of the minor children of the parties."); MISS. CODE ANN. § 93-5-23 (1994 & Supp. 1999) (stating that the court may "in its discretion, having regard to the circumstances of the parties and the nature of the case, [make custody, care, and maintenance determinations] as may seem equitable and just").

36. See Shapiro, supra note 6, at 628 nn.19-24 (identifying the two assumptions underlying the strong and widespread preference for awarding custody to legally
focuses on comparing the relative strengths and weaknesses of the parenting skills of the child's mother and father and the home environments in which they propose to place her.\textsuperscript{37} The child's preferences as to custody, provided she is old enough to form them, may be relevant but rarely are determinative.\textsuperscript{38}

Unlike most other forms of adjudication, child custody determinations under the best interests standard require courts to assess the "attitudes, dispositions, capacities, and shortcomings" of the parties in order to predict how they will act in the future.\textsuperscript{39} Courts are given little statutory guidance in determining what significance should be attached to any particular characteristic or factor.\textsuperscript{40} For the most part, they may consider any matter that seems relevant

recognized parents as (1) the presumption that a child is better off with such parent than with a more distant relative or stranger, and (2) the recognition of a parental right to the custody and companionship of a child).

\textsuperscript{37} See In re Parsons, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995) ("Fitness for custodial responsibilities is \textit{largely a comparative matter.}") (emphasis added).

\textsuperscript{38} Statutes that list the factors a court should consider in assessing the best interests of the child frequently list as a factor the child's preference as to his or her custodian. See, e.g., Mo. REV. STAT. § 452.375(2)(8) (Supp. 1998). Some states, by statute, direct the court to give more weight to the wishes of a child who has reached a certain age. See, e.g., IND. CODE ANN. § 31-17-2-8 (Michie Supp. 1999) (distinguishing children who are 14 years old or older); N.M. STAT. ANN. § 40-4-9 (Michie 1997) (same). Georgia seems alone in giving children who are at least 14 years old the right to select their custodial parent. See GA. CODE ANN. § 19-9-3(a)(4) (1999).


\textsuperscript{40} Even when statutes list factors for courts to consider in assessing the best interests of the child, they provide little guidance or constraint to the trial court. They typically list nonexclusive factors and/or do not attach weight to the factors listed. Often courts are directed to look at all other relevant factors and to use their discretion to evaluate the individual circumstances of each case. Missouri's statute is typical. Section 452.375 provides that:

The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school, and community;

(6) The mental and physical health of all individuals involved, including

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under the circumstances, unless the matter is specifically excluded by statutory or constitutional directive.\footnote{41} Courts also have very broad discretion in formulating an order appropriate to the factual and legal circumstances.\footnote{42}

Once custody has been adjudicated under the best interests standard, the custodial arrangements can be changed only through a petition for modification. In light of a child’s need for stable custodial and emotional ties, the moving party generally must meet a substantial burden of persuasion in showing that a change is necessary or expedient for the child’s welfare.\footnote{43}

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any history of abuse of any individuals involved. . . . Custody and visitation rights shall be ordered in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from harm;

(7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child’s custodian.


\footnote{41} See infra notes 100-01 and accompanying text.

\footnote{42} Whether the child’s best interests are better served by granting trial judges more or less discretion is a question that has been the subject of considerable scholarly analysis and debate. See, e.g., Jon Elster, \textit{Solomonic Judgments: Against the Best Interests of the Child}, 54 U. Chi. L. Rev. 1 (1987) (criticizing the best interests standard as indeterminate and as lacking sufficient guidance in light of inherent limitations in judicial capabilities); Mary Ann Glendon, \textit{Fixed Rules and Discretion in Contemporary Family Law and Succession Law}, 60 Tul. L. Rev. 1165 (1986) (arguing for less discretionary standards than current “best interests” tests); Mnookin, \textit{supra} note 39, at 226 (criticizing highly discretionary standards and articulating difficulties in formulating less discretionary rules); Carl E. Schneider, \textit{Discretion, Rules and Law: Child Custody and the UMDA’s Best Interest Standard}, 89 Mich. L. Rev. 2215 (1991) (supporting value of judicial discretion in child custody cases while proposing some restrictions).

\footnote{43} The exact standards vary from state to state. See, e.g., Mo. Rev. Stat. § 452.410 (1994) (prohibiting modification of custody decrees unless the court finds it is necessary to serve the best interests of the child based on unknown facts or a change in circumstances); Colo. Rev. Stat. Ann. § 14-10-131 (West 1999) (allowing modification of custody orders if new facts show that a change in custody is in the best interests of the child); Del. Code Ann. tit. 13, § 729 (1993 & Supp. 1998) (allowing modification of visitation orders at any time if change will be in the best interests of the child; prohibiting modification of custody orders within two years unless enforcement of prior order will endanger child’s physical or emotional health, and after two years if benefit of modification outweighs harm to child); Idaho Code § 32-1115 (1996) (prohibiting modification of custody decrees within two years unless the present arrangement seriously endangers the child’s physical, mental, moral, or emotional health, and after two years if a permanent material change that warrants modification has occurred); Kan. Stat. Ann. § 60-1610(a)(1) (1997 & Supp. 1998) (allowing modification of custody orders within three years only if a material change in circumstances is shown, but no material change required if modification sought after three years); Wash. Rev. Code Ann. § 26.09.260 (West 1997) (prohibiting modification of custody decrees unless the court finds “upon the basis of facts that have arisen since the prior decree or plan or that
B. Determining the Child’s Best Interests: Basic Approaches to a Parent’s Homosexual Relationship

Courts have approached the relevancy of a parent’s involvement in a homosexual relationship under the best interests standard in three ways: 44 (1) by requiring as a precondition to relevancy a connection, or nexus, between the parent’s conduct and its actual or likely negative impact on the child, (2) by finding proof of homosexual conduct renders a parent unfit for custody as a matter of law, or (3) by presuming that placing a child in the custody of a parent who has been involved in a homosexual relationship will, to some degree, adversely affect the child’s welfare.

Under the more modern approach, the so-called “nexus test,” a parent’s homosexual conduct is relevant only to the extent that it affects or is likely to affect the child’s physical, emotional, or moral well-being. Several jurisdictions have endorsed the nexus test explicitly, 45 but many others have adhered to its general principles, at least in certain contexts. 46 In a similar vein, several

were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child”).

44. As Professor Shapiro points out, many scholars and commentators have identified only two approaches used by courts—nexus tests and per se rules. Shapiro, supra note 6, at 633-35. She suggests that true per se rules are exceedingly rare and posits that many courts actually use what she calls a “permissible determinative inference.” Id. at 634-35. Others have identified this third approach as a rebuttable presumption. See, e.g., Strasser, supra note 5, at 889-90.


46. See, e.g., In re Marriage of Birdsall, 243 Cal. Rptr. 287, 290 (Ct. App. 1988) (requiring an affirmative showing of harm or likely harm in order to restrict parental custody or visitation); Charpentier v. Charpentier, 536 A.2d 948, 950 (Conn. 1988) (construing trial court’s order to be concerned with the adverse effects of the mother’s homosexual lover and not her sexual orientation); Maradie v. Maradie, 680 So. 2d 538, 542 (Fla. Dist. Ct. App. 1996) (requiring evidentiary basis connecting a parent’s moral fitness and the welfare of the child); Pleasant v. Pleasant, 628 N.E.2d 633, 640 (Ill. App. Ct. 1993) (recognizing the abrogation of a sexual-orientation-neutral presumption of harm flowing from a parent’s cohabitation in custody disputes and extending the principle to visitation); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) (finding that the “proper rule” is that homosexuality standing alone without evidence of any adverse effect upon the child does not render the parent an unfit custodian); Hodson v. Moore, 464 N.W.2d 699, 702 (Iowa Ct. App. 1991) (apparently applying nexus test); Whitehead v. Black, 2 Fam. L. Rep. (BNA) 2593 (Me. June 14, 1976) (same); Bezio v. Patenaude, 410 N.E.2d 1207, 1216 (Mass. 1980) (remanding for new trial when no
jurisdictions have found it improper to take judicial notice of any harmful effects stemming from a parent’s homosexual conduct.47

Jurisdictions that explicitly follow the second approach, a “per se rule,” are rare; Virginia may be the only jurisdiction in which it has continuing vitality.48 Under the per se rule, sufficient proof of a parent’s conduct disqualifies him or her from being granted custody despite evidence showing that the behavior does not affect the child. In Roe v. Roe,49 for example, the Virginia Supreme Court held that an openly homosexual father’s “continuous exposure of the child to his

evidence suggested a correlation between the mother’s homosexuality and her fitness as a parent; In re Marriage of McKay, No. C6-95-1626, 1996 WL 12658, at *5 (Minn. Ct. App. Jan. 16, 1996) (finding trial court abused its discretion by inferring, without evidentiary basis, that any contact by children with lesbians or homosexuals is per se harmful); Hassenstab v. Hassenstab, 570 N.W.2d 368, 372 (Neb. Ct. App. 1997) (requiring showing that children were exposed to a parent’s sexual activity or that the children were adversely affected by it); M.P. v. S.P., 404 A.2d 1256, 1259 (N.J. Super. Ct. App. Div. 1979) (finding trial court erred in changing custody to father when there was no evidence that the mother engaged in sexual misconduct, that she tried to inculcate the girls with her sexual attitudes, or that she was a member of a homosexual organization); Inscoe v. Inscoe, 700 N.E.2d 70, 81 (Ohio Ct. App. 1997) (stating that “a parent’s conduct has no relevance to the allocation of parental rights and responsibilities in the absence of proof that the parent’s conduct has adversely affected the child”); Fox v. Fox, 904 P.2d 66, 69 (Okla. 1995) (finding trial court abused its discretion in changing custody when there was no evidence that the children were adversely affected by the mother’s homosexual behavior); In re Marriage of Ashling, 599 P.2d 475, 476 (Or. Ct. App. 1979) (requiring evidence of harm when parent is engaged in a discreet homosexual relationship); Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (requiring nexus between conduct and harm when restricting partial custody); Stroman v. Williams, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (limiting relevancy of parent’s morality to what can be shown to directly or indirectly affect the welfare of the child); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (requiring evidentiary link for immoral conduct); see also M.S.P. v. P.E.P., 358 S.E.2d 442, 445 (W. Va. 1987) (holding that mother’s association with an allegedly homosexual man was insufficient to rebut primary caretaker presumption when no adverse effects on the children were shown).

47. See, e.g., Maradie, 680 So. 2d at 542 (finding grounds for reversible error when trial court judicially noticed that homosexual environment is not a traditional home environment and can adversely affect a child); Bezio, 410 N.E.2d at 1216 (reversing custody order because it was improper for trial judge to take judicial notice of adverse affects of raising children in lesbian household).

48. Some courts have reinterpreted older cases that arguably applied a per se rule to establish only that a presumption of harm exists. For example, a 1979 Illinois Supreme Court decision seemed to endorse a per se rule when it upheld a trial court’s ruling that a homosexual mother living with her female lover in violation of a fornication statute inevitably endangered her children’s moral development and warranted a change in custody. See Jarrett v. Jarrett, 400 N.E.2d 421, 425 (ill. 1979). However, the court later explicitly declined to interpret Jarrett as establishing a per se rule. See In re Marriage of Thompson, 449 N.E.2d 88, 93 (ill. 1983).

49. 324 S.E.2d 691 (Va. 1985).
immoral and illicit relationship renders him an unfit and improper custodian as a matter of law," 50 even though the trial court found no evidence that the father’s conduct adversely affected the child and had, as a protective measure, conditioned the father’s custody on his "not sharing a bed or bedroom with any male lover or friend while the child was present." 51 The Virginia Supreme Court had

no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large. . . 52

Consistent with the per se rule, the court awarded the mother sole custody without addressing her relative fitness, which may have been compromised by the fact that she had suffered from cancer and had been physically unable to care for the child for at least two years. 53

In jurisdictions that utilize the third approach, such as Missouri, the trier may presume without evidence in the record that placing a child in the custody of a parent who has been involved in a homosexual relationship will adversely affect the child to some degree. 54 S.E.G. v. R.A.G., 55 a 1987 Missouri decision,

50. Id. at 694.
51. Id. at 692.
52. Id. at 694.
53. Id. at 691-92.
54. See J.P. v. P.W., 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (stating that Missouri courts presume detrimental impact to a child from a parent’s homosexual conduct); Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (holding that it is not necessary in Arkansas to prove that illicit sexual conduct by custodial parent is harmful to the children because it is presumed); Constant A. v. Paul C.A., 496 A.2d 1, 10 (Pa. Super. Ct. 1985) (finding that “there are sufficient social, moral and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving detriment to the children”); see also In re J.B.F. v. J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (reinstating trial court’s order changing custody to father based, in part, on presumed harm resulting from mother’s decision to change her relationship with her lover from a discreet affair in the guise of roommates to an openly homosexual home environment); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (opining that when a homosexual parent openly resides with his or her partner, primary custody with the homosexual parent would rarely be held to be in the best interests of the child); Pulliam v. Smith, 501 S.E.2d 898, 905 (N.C. 1998) (upholding the trial court’s conclusion that homosexual father was exposing the children to unfit and improper influences that would likely create emotional difficulties despite the fact that evidence only showed that the father was a practicing homosexual and that no harm was shown to have been inflicted).
55. 735 S.W.2d 164 (Mo. Ct. App. 1987).
is illustrative. A mother appealed from a trial court order awarding primary
custody of the parties' four minor children to their father and restricting her
visitation rights.56 The court originally granted primary custody to the mother,
but it modified the order after receiving evidence that the mother was involved
in a relationship with a woman who resided in another town and drove to the
mother's home several times a week. The two were openly affectionate in front
of the children, and they slept in the same bed when the mother's paramour
stayed overnight.57 The appellate court affirmed the trial court's modified
order.58 The appellate court asserted that these factors presented "an unhealthy
environment for minor children."59 In addition, the court indicated that it
believed affirmance would protect the children from the possible peer pressure,
teasing, and ostracizing they might encounter as a result of their mother's
lifestyle.60

Courts that follow this approach do not find proof of a parent's involvement
in a homosexual relationship renders the parent unfit for custody as a matter of
law, but the trier apparently may presume a significant quantum of harm is likely
to result from placing the child in that parent's custody.61 In some cases, it
seems there may be no practical difference between this approach and a per se
rule. Perhaps the most extreme example can be found in G.A. v. D.A., a 1987
Missouri decision.62 In G.A. v. D.A., the trial court stated that the fact that the
mother was a lesbian "tipped the scales in favor of [the father]," who received
custody.63 A divided appellate court affirmed.64 The majority noted that a
homosexual household is an unhealthy environment, that the mother made no
attempt to conceal the nature of her relationship with her female lover from her
son, and that she had moved seven times between her separation and the custody
trial. The majority did not, however, discuss the relative merits of the home

56. Id. at 165.
57. Id.
58. Id.
59. Id. at 165-66.
60. Id. at 166.
61. The permissible degree of harm a trial judge may presume is a function of the
defense an appellate court is willing to accord to the trial judge's order on appeal. See
infra subpart III(D).
62. 745 S.W.2d 726 (Mo. Ct. App. 1987); see also J.P. v. P.W., 772 S.W.2d 786,
792-93 (Mo. Ct. App. 1989) (requiring homosexual father's visitation be supervised and
noting that Missouri law presumes detrimental impact to a child from a parent's
homosexual conduct and that expert testimony is not necessary basis for determining that
a homosexual influence will adversely affect a child) (citing N.K.M. v. L.E.M., 606
S.W.2d 179, 186 (Mo. Ct. App. 1980); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869 (Mo.
Ct. App. 1982))
63. G.A., 745 S.W.2d at 727.
64. Id. at 728.
environment in which the child actually was placed. Judge Lowenstein’s dissenting opinion examined both of the child’s “limited alternatives.” The mother was not perfect, but

[she] provides the child with his own room in a well kept house, enrolls him in a pre-school, has a steady nursing job, cares about the child, and, despite sleeping with and occasionally hugging a woman, has stated under oath she would discourage her son from emulating her sexual preference. The father has limited education, an income of $6500 and lives in basically a one room cabin containing a toilet surrounded by a curtain; the child sleeps in a foldup cot by a woodstove and plays in an area littered with Busch beer cans, collected by the father’s “slow” sister, who was ordered by the trial court not to care for the boy while alone. The 75 year old paternal grandmother helps care for the little boy.

To say it is in the best interests of this little boy to put him in the sole custody of the father, who was pictured leering at a girly magazine, solely on the basis of the mother’s sexual preference, would be and is a mistake.

C. Factors Influencing the Trier: A Review of the Decisions

Unless courts follow a per se rule, the factual circumstances of a particular case are (or should be) most critical to the trier’s decision. Therefore, a review of the reported decisions is useful to show how triers tend to be influenced by particular factors and when appellate courts have found these factors improper.

65. Id.
66. Id. at 729 (Lowenstein, J., dissenting).
67. Id.
68. The nature of the custody claim may be important depending on the particular statutory scheme. For example, differences may arise if a parent seeks joint or sole custody of the child because some states employ preferences or presumptions with respect to joint custody. See Mo. Rev. Stat. § 452.375(5) (Supp. 1998) (expressing a preference for joint physical and legal custody to both parents); D.C. Code Ann. § 16-911(a)(5) (1981) (creating a rebuttable presumption that joint custody is in the best interests of the child); Idaho Code § 32-717B(4) (1996) (creating presumption that joint custody is in the best interests of a minor child rebuttable by a preponderance of evidence); Iowa Code § 598.41.2b (1999) (same); Louisiana Code Ann. art. 132 (West 1999) (requiring courts to award joint custody unless there is clear and convincing evidence that one parent should be awarded sole custody or unless the parents agree otherwise); Nev. Rev. Stat. § 125.480(3)(a) (1998) (preference for joint custody); N.H. Rev. Stat. Ann. § 458:17(II) (1992) (presumption affecting burden of proof that joint legal custody is in the best interests of minor children); Tenn. Code Ann. § 36-6-101(a)(2) (1996) (requiring clear and convincing evidence to contrary if parents agree to joint custody).

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It is clear that all courts are very concerned when a parent has allowed the child to see the parent engage in sexual activity or embrace his or her same-sex partner in the nude. When it is shown that the child has actually witnessed this behavior, the parent’s custody claim generally will be denied and visitation rights restricted. Similar outcomes follow when a parent has made homosexual advances to other minors or has demonstrated other deviant sexual proclivities.

Courts begin to differ, however, when they consider whether exposing a child to relatively benign displays of affection such as hugging or kissing should be considered harmful or harmless, or whether seeing the parent asleep in bed

69. See Chicoine v. Chicoine, 479 N.W.2d 891, 893-94 (S.D. 1992) (holding that trial court abused its discretion in awarding mother unsupervised overnight visitation when evidence showed that mother, who had numerous emotional and psychological problems, refused to stop a sexual act with another woman when her son walked in and asked why she was lying on top of the woman, and allowed her two boys to sleep with her and lover while she was nude); Dailey v. Dailey, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981) (affirming change of custody when evidence showed that mother and her female lover allowed the 5-year-old child in their bed while they embraced each other in the nude).

70. See Chicoine, 479 N.W.2d at 893-94 (finding that trial court abused its discretion in awarding mother unsupervised overnight visitation without first ordering a home study); Dailey, 635 S.W.2d at 391 (affirming change of custody and, sua sponte, restricting mother’s visitation).

71. See In re Marriage of Williams, 563 N.E.2d 1195 (Ill. App. Ct. 1990) (finding no abuse of discretion in custody award to father when mother exhibited “gross character defects” by abusing her position as nurse in drug treatment center to begin homosexual relationship with an underage drug addict); In re Marriage of Teepe, 271 N.W.2d 740, 744 (Iowa 1978) (affirming trial court’s decision to award mother custody of 3-year-old daughter when father had engaged in homosexual conduct, including sex for money, and had been arrested for exposing himself while wearing a wig and women’s clothing in front of his apartment window); Kallas v. Kallas, 614 P.2d 641, 643 (Utah 1980) (finding error when trial court excluded evidence that would have shown mother made sexual advances to young girl and approached another witness for purpose of trafficking drugs prior to divorce in determining the restrictions placed on mother’s visitation).

72. See Lundin v. Lundin, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (finding joint custody arrangement should have awarded greater custodial time to the father when mother engaged in “indiscreet displays of affection beyond mere friendship” with another woman); T.C.H. v. K.M.H., 784 S.W.2d 281, 284 (Mo. Ct. App. 1989) (drawing negative inference from fact that mother was not able to testify with certainty that she and female lover never kissed or touched affectionately in front of the children); Pulliam v. Smith, 501 S.E.2d 898, 901-02, 904 (N.C. 1998) (noting evidence that father and his partner kissed on cheek and sometimes on mouth in front of the children supported the trial court finding that the father was exposing the children to unfit and improper influences that would likely create emotional difficulties); M.J.P. v. J.G.P., 640 P.2d 966, 967 (Okla. 1982) (finding sufficient change of circumstances for modification of custody decree when mother chose to live in open homosexual relationship which included kissing, touching, and holding hands in child’s presence); Tucker v. Tucker, 910 P.2d 1209, 1218 (Utah 1996) (finding no abuse of discretion when trial court determined that open lesbian
with his or her partner should be considered harmful or harmless. If the child has demonstrated an inappropriate familiarity with details of homosexual sex, the parent will certainly lose a custody claim.

Several courts analyze the significance of a parent’s homosexual relationship in the same way as they analyze heterosexual affairs, but others scrutinize same-sex affairs more closely. For example, a few courts have expressed concern when evidence shows a possibility, however remote, that the child might inadvertently be exposed to some aspect of the parent’s homosexual lovemaking—by wandering into the parent’s bedroom at an inappropriate time or by hearing inappropriate sounds emanating from it.

cohabitation during marriage and in presence of child sets bad moral example).


74. See Ward v. Ward, No. 95-4184, 1996 WL 491692, at *3 (Fla. Dist. Ct. App. Aug. 30, 1996) (finding evidence that child had seen mother and female partner sleeping together supported change of custody to father); Pulliam, 501 S.E.2d at 901 (noting that evidence that one child observed the father and his partner in bed together supported change of custody to mother).

75. See M.A.B. v. R.B., 510 N.Y.S.2d 960, 966 (Sup. Ct. 1986) (finding mother failed to show direct adverse impact of father’s homosexuality on 9-year-old son when she testified that the child had seen father and partner in bed together when evidence did not indicate anything of a sexual nature had occurred, both men were wearing pajamas, and the child thought it funny that father’s partner was bald).

76. See Ward, 1996 WL 491692, at *2 (finding evidence that 11-year-old daughter showed surprising knowledge of sexual activity and vocabulary, played inappropriately with dolls, and told father’s wife about seeing mother and female partner sleeping together supported trial court’s decision changing custody to father); T.C.H., 784 S.W.2d at 283 (noting evidence that 8-year-old son gave demonstration of “how girls masturbate,” and that he indicated he was familiar with the book, The Joy of Gay Sex, when he and father were in a bookstore supported trial court award of primary custody to father and temporary custody and visitation to allegedly homosexual mother). See also Hertzler v. Hertzler, 908 P.2d 946, 949 (Wyo. 1995) (describing children’s “astonishing grasp of anatomical terminology” upon their return from visiting their homosexual mother).


78. See, e.g., Pennington v. Pennington, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992) (describing visitation restrictions on homosexual father as an “attempt to shield a child of tender age ... from the sexual practices of the visiting parent”); Pulliam v. Smith, 501
Although some of the heightened scrutiny may be attributable to general hostility toward homosexuality, more often the difference seems to stem from concern that the child might not be able to develop a proper moral character or a heterosexual gender identity if the child is placed with a parent who is openly involved in a homosexual relationship. These concerns tend to be alleviated, however, when a parent voluntarily conceals the relationship, or when it is conducted discreetly under the guise of roommates.

The reported cases also indicate that virtually all courts tend to be concerned when evidence shows that the child has begun to experience significant difficulties in coping with the parent’s homosexual identity, especially when the child has required on-going counseling or has suffered

S.E.2d 898, 901 (N.C. 1998) (quoting trial court order that made specific finding of fact that father and his male lover’s bedroom was a short distance from the child’s and was left unlocked while the father and partner engaged in oral sex); Dailey v. Dailey, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981) (pointing to evidence that mother and her lover made “audible expressions of pleasure and satisfaction” that could be heard in the area where the child slept).

79. See, e.g., In re J.B.F. v. J.M.F., 730 So. 2d 1190, 1195 ( Ala. 1998) (drawing negative inference from evidence suggesting child believed “girls can marry girls”); L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (expressing concern that after mother explained her lifestyle to her children, one child said she saw nothing wrong with it).

80. See, e.g., S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (finding error when trial court failed to consider significance of evidence that child “may have difficulties in achieving a fulfilling heterosexual identity of her own in the future” when it awarded custody); Lundin v. Lundin, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (finding clear abuse of discretion when trial court awarded sole custody to homosexual mother when the child was of an age where his gender identity was being formed); T.C.H. v. K.M.H., 784 S.W.2d 281, 284 (Mo. Ct. App. 1989) (finding no error in trial court’s award of primary custody to father when expert testified that there was cause for concern when 8-year-old son assumed the role of “Gay Ed” while playing with his cousin after having visited his openly homosexual mother); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (finding no error when trial court changed custody based on appellate court’s belief that allowing the child to remain with homosexual mother could result in sexual disorientation). See also J.L.P. (H.) v. D.J.P., 643 S.W.2d 865, 866 (Mo. Ct. App. 1982) (finding no error when trial court restricted homosexual father’s visitation privileges with his 11-year-old son when there was evidence that father advocated a homosexual lifestyle and thought it would be desirable for son to be homosexual). But see Pleasant v. Pleasant, 628 N.E.2d 633, 639 (ill. App. Ct. 1993) (finding trial court’s order restricting mother’s visitation rights against the weight of the evidence even though lower court found that mother’s relationship with another woman caused child to become confused as to why he had two mothers).

81. See Thippen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) ("[A]ppellant had never engaged in any physical sexual contact in the children’s presence [but] . . . appellant would be sharing the same bedroom [with her lover] while the children were with them."); In re R.E.W., 471 S.E.2d 6, 8 (Ga. Ct. App. 1996) (fact in father’s favor that he and partner had separate bedrooms).
psychological problems. Changes of custody to the heterosexual parent also tend to be upheld when the child has exhibited behavioral or emotional problems after living with the homosexual parent, but such changes tend to be found improper when evidence shows the child happy with the arrangement and otherwise doing well.

82. See In re Marriage of Martins, 645 N.E.2d 567, 569 (Ill. App. Ct. 1995) (reversing trial court’s denial of father’s petition to modify custody when children underwent on-going counseling due to mother’s conduct and perception that mother’s lovers were more important to her than her children); Knotts v. Knotts, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998) (finding no abuse of discretion in awarding custody to father when evidence showed oldest child was “diagnosed with major depression and taking prozac, when symptoms were caused at least in part by her mother’s relationship with another woman”); Johnson v. Schlotman, 502 N.W.2d 831, 833-34 (N.D. 1993) (finding no clear error in trial court’s decision not to change primary physical custody from father to homosexual mother when the children had lived in town where their father lived all their lives, when the children disliked mother’s partner, and when children began having sleeping problems and experienced depression after learning of their mother’s homosexuality notwithstanding the mother’s allegations that children’s problems stemmed from father’s bigotry with regard to homosexuals).

83. See Ward v. Ward, No. 95-4184, 1996 WL 491692, at *2 (Fla. Dist. Ct. App. Aug. 30, 1996) (affirming change of custody to father when evidence showed that daughter was withdrawn, had poor hygiene and table manners, exhibited behavioral problems, and preferred to wear men’s cologne after living with homosexual mother); Martins, 645 N.E.2d at 570 (reversing trial court’s denial of father’s petition to modify custody when evidence showed that children required counseling to deal with mother’s homosexuality and that children’s eating habits and personal hygiene deteriorated).

84. See Hassenstab v. Hassenstab, 570 N.W.2d 368, 373 (Neb. Ct. App. 1997) (affirming trial court’s denial of father’s petition to modify custody because “although there was evidence that Carol and her partner would engage in sexual activity at times when Jacqueline was in Carol’s residence and that Jacqueline was generally aware of her mother’s homosexual relationship, there was no showing that the daughter was directly exposed to the sexual activity or that she was in any way harmed by the homosexual relationship between Carol and her partner” when evidence, including testimony by father, showed that Jacqueline was a happy, self-assured, and joyful child who was well-kempt and doing well in school); Fox v. Fox, 904 P.2d 66, 69 (Okla. 1995) (finding trial court abused discretion in ordering a change of custody from lesbian mother to father when children were “well-adjusted and happy,” mother had a “loving and nurturing relationship” with them, and there were no signs that the children’s school performances, behavior patterns, or relationships with family or peers had been adversely affected by the mother’s behavior); Stroman v. Williams, 353 S.E.2d 704, 706 (S.C. Ct. App. 1987) (finding no abuse of discretion in denying father’s petition for change of custody when evidence showed child was a good student, “‘well-behaved,’ and ‘mannerly’”). But see N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980) (dismissing mother’s evidence that child was normal and well adjusted and relying on presumed detrimental impact of social stigma in affirming trial court’s decision granting change of custody from homosexual mother to father). See also Newsome v. Newsome, 256 S.E.2d 849, 855 (N.C. Ct. App. 1979) (affirming change of custody from homosexual mother to father
A parent involved in a homosexual relationship tends to be disfavored when the parent has included the child in a commitment ceremony or has taken the child to functions such as gay pride parades. This type of conduct is especially damaging to the parent’s claim if there is evidence that it caused the child to experience emotional distress. In Marlow v. Marlow, for example, the father’s claim failed when it was shown the children experienced bed wetting, difficulty sleeping, and nightmares after the father took them to gay religious services and social events and discussed in detail his homosexuality with them.

Courts generally do not favor a parent whose priority is the homosexual relationship and not the children or a parent who has been involved in several fleeting relationships. Courts disagree, however, whether a parent’s open and speculating that “it may well be that the judge struggled to spare the child as much future embarrassment as possible”).


86. See J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 866 (Mo. Ct. App. 1982) (upholding restrictions that prohibited father from taking children to gay activist social gatherings and to a church with a largely gay and lesbian congregation); Hertzler v. Hertzler, 908 P.2d 946, 951 (Wyo. 1995) (gay and lesbian rights parade). But see Pleasant v. Pleasant, 628 N.E.2d 633, 636, 642 (Ill. App. Ct. 1993) (finding error in restriction of mother’s visitation rights when, inter alia, there was no evidence that the parties’ 5-year-old son was upset by the gay and lesbian pride parade and when evidence suggested that he actually enjoyed it, that he did not know what type of parade it was, and that he remembered only that the people wore colorful shirts).


88. Id. at 736-37.

89. See, e.g., Bark v. Bark, 479 So. 2d 42, 43 (Ala. Civ. App. 1985) (finding no abuse of discretion in awarding custody of two minor children to father when mother began to devote more and more time to female lover, such that burden of child-rearing shifted to father); Charpentier v. Charpentier, 536 A.2d 948, 950 (Conn. 1988) (affirming custody award to father when children felt mother preferred to spend time with her female lover); In re Marriage of Martins, 645 N.E.2d 567, 569 (Ill. App. Ct. 1995) (reversing trial court’s denial of father’s petition to modify custody when children believed that mother’s female lovers were more important to mother than children); Hall v. Hall, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980) (affirming custody award to father based on evidence that, given a conflict, mother would unquestionably choose homosexual relationship over children); Chicoine v. Chicoine, 479 N.W.2d 891, 893-94 (S.D. 1992) (finding abuse of discretion when evidence showed mother did not stop sexual act with another woman to comfort son who was upset after seeing mother lying on top of her lover).

90. See, e.g., Martins, 645 N.E.2d at 569 (string of roommates and frequent lesbian
commitment to one partner is a positive or negative factor. Some courts have found commitment to be evidence of a stable home environment, but other courts perceive it to be particularly repugnant. For example, in In re J.B.F. v. J.M.F., the Alabama Supreme Court reinstated a trial court judgment granting the father's petition to modify custody because there was evidence that the mother had established a two-parent home environment and had presented it to the daughter as the social and moral equivalent of a heterosexual marriage. With evidence that the child believed "girls can marry girls," the court held that the trial court did not abuse its discretion by transferring the girl to her father's custody.

The clearest split of authority pertains to the role other persons' reactions should play in custody determinations. In several jurisdictions, including Missouri, courts have placed great emphasis on the possibility that a child may be ostracized or teased about the parent's homosexual lifestyle and have found


91. See, e.g., Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (citing as positive factor that mother and partner lived together in stable relationship for 6 years when facts indicated that mother, in the presence of partner, was a positive influence in son's life and that child was genuinely fond of mother's partner).

92. 730 So. 2d 1190 (Ala. 1998).

93. Id. at 1195 n.3 (basing decision in part on recently approved law that forbids the issuance of a marriage license in Alabama to parties of the same sex). But see Schuster v. Schuster, 585 P.2d 130, 131-32, 134-35 (Wash. 1978) (denying father's petition to modify custody under similar circumstances even though dissent argued that mothers were using the children to proselytize the homosexual lifestyle when they "publicly espoused on radio, television and in lectures the superiority of the homosexual lifestyle and advertised in a brochure entitled "The Gay Family: A Valid Lifestyle?" in which they offered interested persons a booklet, "Love is for All," and information about a film entitled "Sandy and Madeleine's Family").

94. J.B.F., 730 So. 2d at 1196.

95. See, e.g., S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (affirming award of custody to father based in large part on a desire "to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen"); Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) (finding error when trial court awarded custody to mother because living in the same house with mother and her female lover may cause the children to "suffer from the slings and arrows of a disapproving society" to a much greater extent than would if the children were placed in the custody of their father). See also L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (affirming denial of mother's
the potential for social stigmatization a sufficient basis for denying custody, for requiring a reversal of an award granting custody, or for restricting a parent's visitation privileges severely. That a child may experience or has experienced embarrassment also is a significant factor.

Many jurisdictions find these considerations impermissible, but for various reasons. A few have cited Palmore v. Sidoti, which held that the Constitution prohibits private racial biases from being considered in determining whether to remove a child from a natural parent's custody, as authority for prohibiting consideration of societal prejudices and biases against homosexuals. Other courts have found arguments based on the potential for social condemnation to be otherwise legally improper or legally insufficient, but some courts have

petition to change custody based in part on evidence that children had been teased about their mother's lifestyle; Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("[W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.").

96. See S.E.G., 735 S.W.2d at 166.
98. See Roe, 324 S.E.2d at 694 (ordering a "cessation of any visitations in the father's home or in the presence of his homosexual lover").
99. See Charpentier v. Charpentier, 536 A.2d 948, 950 (Conn. 1988) (evidence that children had concerns regarding the open display of affection between the two women in the home and hoped their friends would not be exposed to similar displays); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (evidence that child felt uncomfortable when kids at school asked why two different women picked him up from after-school care, and noting that open lesbian relationship far more likely to cause embarrassment to young children than heterosexual relationship); Weigand v. Houghton, 730 So. 2d 581, 584 (Miss. 1999) (evidence that child had been embarrassed when he appeared in public with his father and partner while they were "here in the South," and definitely would be embarrassed if their displays of affection occurred in the presence of his friends).

101. See, e.g., M.A.B. v. R.B., 510 N.Y.S.2d 960, 964 (Sup. Ct. 1986); Inscoe v. Inscoe, 700 N.E.2d 70, 82 (Ohio Ct. App. 1997). But see Marlow v. Marlow, 702 N.E.2d 733, 737 (Ind. Ct. App. 1998) (rejecting father's argument based on Palmore when it was evident that trial court's decision was not based on private biases but on potential harm from father's intent to orient the children to the gay lifestyle); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (rejecting mother's argument that Palmore should apply and reasoning that homosexuality is not afforded the same constitutional protection given to race, national origin, and alienage).

found these arguments simply lack merit.\textsuperscript{104} In \textit{M.P. v. S.P.},\textsuperscript{105} for example, the New Jersey Superior Court reversed a trial court order granting the father’s petition for a change of custody of his eleven and fifteen year old daughters, who had been living with their mother for approximately seven years.\textsuperscript{106} In addressing the father’s argument that he should have custody because the children might be embarrassed about their mother’s unconventional lifestyle, the court reasoned as follows:

\begin{quote}
 Plaintiff’s argument overlooks . . . the fact that the children’s exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her. Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant’s sexual nature will be abated by a change of custody. Hard facts must be faced. These are matters which courts cannot control, and there is little to gain by creating an artificial world where the children may dream that life is different than it is.

Furthermore, the law governing grants of custody does not yield to such narrow considerations. Of overriding importance is that within the context of a loving and supportive relationship there is no reason to think that the girls will be unable to manage
\end{quote}

court stated:

\begin{quote}
 Courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parents unless it can be shown that some detrimental impact will flow from the specific behavior of the parent. The process of children’s maturation requires that they view and evaluate their parents in the bright light of reality. Children who learn their parents’ weaknesses and strengths may be able better to shape lifelong relationships with them. . . . [I]t is preferable for parent-child relationships to be defined by and developed according to the personalities and character of the child and parents, unh hampered, to the extent possible, by restrictions imposed by the court.
\end{quote}

\textit{Id.}  

\textsuperscript{104} See, e.g., Boswell v. Boswell, 721 A.2d 662 (Md. 1998); \textit{M.P.}, 404 A.2d at 1262-63; \textit{M.A.B.}, 510 N.Y.S.2d at 963-64.  


\textsuperscript{106} \textit{Id.} at 1257, 1263. The court described the mother as a dutiful, warm, and loving parent who provided for her children within her means. \textit{Id.} at 1258-59. In contrast, the father had exhibited little interest in the children, was $5,000 in arrears on child support, had carried out “appalling” “sexual onslaughts” on the mother during their marriage, and the father’s new wife had questionable judgment concerning proper subjects of conversation with the parties’ 11-year-old daughter. \textit{Id.} at 1260, 1262-63.
whatever anxieties may flow from the community’s disapproval of their mother.\textsuperscript{107}

The court also questioned the validity of the father’s argument that he should have custody because the children’s moral welfare would be jeopardized if they remained with the mother:

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

Taking the children from defendant can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expediency. Lastly, it diminishes their regard for the role of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.\textsuperscript{108}

\textit{D. The Limited Role of Appellate Review}

Because child-custody adjudication is discretionary and depends so heavily on the assessment of such subtleties as a party’s character and potential parenting ability, appellate courts are extremely deferential in their review.\textsuperscript{109} An order

\addcontentsline{toc}{section}{References}

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 1262.
\item \textsuperscript{108} \textit{Id.} at 1263.
\item \textsuperscript{109} See Newsome v. Newsome, 256 S.E.2d 849, 855 (N.C. Ct. App. 1979) (noting that the trial judge “can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges”); Hertzler v. Hertzler, 908 P.2d 946, 949-50 (Wyo. 1995) (“The atmosphere in such cases is generally so charged, the decision so daunting, and accurate assessment of the character of the contestants so pivotal that we defer to the superior evidentiary perspective of the district court in custody and visitation decisions absent a clear abuse of discretion.”); see also Leone v. Leone, 917 S.W.2d 608,
will be disturbed on appeal only if the trial court abused its discretion or if no substantial evidence in the record supports the order. Even if it is relatively clear that a trial court allowed its bias against homosexuality to determine the outcome, most appellate courts affirm the decision.

_Weigand v. Houghton_ presents an example of how this rule can operate to deny parents who have been involved in homosexual relationships the opportunity to have their claims adjudicated by an unbiased trier. In _Weigand_, the Mississippi Supreme Court considered an appeal of a trial court decision that denied the father's petition for custody modification. The facts indicated that

613 (Mo. Ct. App. 1996) (noting that appellate courts afford greater deference to trial court decisions in child custody determinations than in other cases and that trial courts are presumed to have considered all evidence and awarded custody in the best interests of the child).

An appellate court's willingness to defer to a trial court's ruling sometimes evaporates when it reviews lower court decisions that favor a homosexual parent. _See, e.g., In re Marriage of Martins_, 645 N.E.2d 567, 573 (Ill. App. Ct. 1995) (reversing trial court's denial of change of custody from homosexual mother to father because "the trial court failed to evaluate fully the impact of the petitioner's lesbianism on the children"); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (reversing trial court's denial of change of custody from homosexual mother to father because the trial court failed to consider sufficiently expert testimony regarding potential social stigma that would bring "additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts" and the possibility that child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future").

Some appellate courts are more successful in restraining their desire to overturn trial court rulings that favor a homosexual parent. _See, e.g.,_ Stroman v. Williams, 353 S.E.2d 704, 707 (S.C. Ct. App. 1987) (affirming denial of change of custody from homosexual mother to father partly because, in the words of one judge, "we are not in the business of gratuitously judging the private lives of other people") (Sanders, C.J., concurring); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (affirming award of primary physical custody to homosexual mother partly because "[p]ersonal conceptions of morality held by the members of this Court have no place in the resolution of this controversy").

110. _See_ Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc); McDowell v. McDowell, 670 S.W.2d 518, 521 (Mo. Ct. App. 1984).

111. _See, e.g.,_ D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) (finding that "even if the trial court was wrong in its opinion on the issue of the effect of the wife's homosexuality as it affected the custody question, such error was not reversible error"); _Hertzler_, 908 P.2d at 950-52 ("Absent evidentiary underpinnings or persuasive precedent, we conclude that the district court indulged an essentially personal viewpoint in derogation of Pamela's lifestyle," but "i[t was reasonable for the district court to conclude that limiting Pamela's visitation with the children would limit the damage done by mutual parental insistence upon use of the children as weapons in an acrimonious contest between lifestyles."). _See also supra_ notes 62-67 (discussing G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987)).

112. 730 So. 2d 581 (Miss. 1999).

113. _Id._ at 582, 588.
the father and mother had shared joint custody of their son for ten years pursuant to a Kansas divorce decree.\textsuperscript{114} The mother had primary physical custody, but the child spent most of his summer vacations with his father, who lived in California with his life partner of eight years.\textsuperscript{115} The father sought full custody when the son expressed an interest in moving in with him after witnessing several incidents of domestic violence by his stepfather against his mother.\textsuperscript{116} The son was greatly disturbed by the stepfather’s behavior and had placed a 911 emergency call on one occasion.\textsuperscript{117} The mother admitted that her marriage to her current husband strained her relationship with the child and that her time with her son was limited since she took a second job to support the family and pay the stepfather’s excessive medical bills after he was seriously injured in an automobile accident and was unable to work.\textsuperscript{118} Despite these problems at home, however, the son was an “A” student with no behavioral problems.\textsuperscript{119}

After hearing the evidence, the chancellor denied the father’s petition and, sua sponte, ordered that all visitation between the father and son occur outside the presence of the father’s life partner.\textsuperscript{120} The chancellor very clearly was biased against the father because the father was openly gay.\textsuperscript{121} Nonetheless, the

\begin{itemize}
\item \textsuperscript{114} Id. at 583.
\item \textsuperscript{115} Id. at 583-84.
\item \textsuperscript{116} Id. at 584.
\item \textsuperscript{117} Id. at 585.
\item \textsuperscript{118} Id. at 584.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id. at 587.
\item \textsuperscript{121} One of the two dissenting opinions that were filed included portions of the Chancery Court’s order. This excerpt illustrates that order’s basic tenor:
\end{itemize}

(12) Moral fitness of the parents: It is this factor above all others which causes the greatest concern with the Court. The natural father is an admitted homosexual who lives with and engages in sexual activities with another man on a day-to-day basis.

\textbf{...} \textbf{...} [T]he fact that the Plaintiff and his “life partner” engage in sexual activity which includes both oral or anal intercourse is repugnant to this Court as constituting a felony act under the laws of this state.

\textbf{...} \textbf{...}

Under Mississippi law, oral intercourse or fellatio violates the statute. Further, anal intercourse or sodomy falls within the purview of that statute. The conscious [sic] of this Court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a regular basis and expect the Court to find such conduct acceptable, particularly with regards to the custody of a minor child. The parties are not in Kansas anymore, nor are they in California. Such conduct is only not [sic] condoned by the Mississippi legislature but is prohibited and punishable as a serious crime. Further, other statutes within this state make it clear that the legislative intent for the enforcement of the law prohibiting unnatural intercourse among other reasons, is for the protection
majority affirmed denial of the father's petition instead of remanding for a new trial as advocated by the three dissenters. According to the majority, the chancellor's decision could not be overturned because evidence in the record showed that some of Mississippi's statutory best-interests factors (school and community, religious training, and moral fitness) favored the mother and some (stability of the home and employment) favored the father. Thus, the chancellor was not "manifestly wrong" in denying the father's petition. The majority did, however, overturn the visitation restrictions.

At least two courts have refused to affirm when presented with a situation similar to that presented in Weigand. For example, the Washington Supreme Court reversed a trial court order denying the father's request for extended visitation with his child in his California home because, although "the findings and conclusions of law suggest the homosexuality of the father was not the determining factor the unfortunate and unnecessary references by the trial court to homosexuality generally indicated the contrary." Similarly, an Illinois appellate court reversed a trial court decision that ordered that the mother's

of children. Section 43-15-6 of the Mississippi Code Annotated (1972 as amended), prescribes that:

"No person convicted of a crime affecting children or any other crime as set forth in . . . Section 97-29-59, Mississippi Code of 1972, relating to unnatural intercourse; . . . or any other offense committed in another jurisdiction which, if committed in this state, would be deemed to be such a crime without regard to its designation elsewhere, shall be licensed as a foster parent or a foster home by the Mississippi Department of Public Welfare . . . ."

Surely it cannot be argued that conviction for such which would prohibit the Plaintiff from serving as a foster parent should not likewise prohibit him from serving as a custodial parent of a child.

. . . .

Likewise, this Court recognizes the legislative intent of such a statute to be for the protection of children. . . . This Court refuses to condone, endorse, sanction or tolerate homosexual activity in any fashion, mode or manner. To do so would be to turn a blind judicial eye in the statute promulgated and enacted by the legislature which was obviously passed with the intent to protect children. The element of morality must be resolved against the Plaintiff because of his homosexual activity which, if committed within this state would constitute felonious conduct, same as it would be resolved had he openly admitted and confessed to the ongoing sale or distribution of illegal drugs. This state and particularly this Court is unwilling to accept such conduct at any time.

Id. at 590-91 (McRae, J., dissenting) (citations omitted).

122. Id. at 585-87.
123. Id. at 586.
124. Id. at 587.
visitation rights be restricted when it was "disturbed" by the judge's numerous homophobic comments which showed he "improperly relied on his personal belief that homosexuality creates serious endangerment."126

As these cases also indicate, appellate courts typically examine visitation restrictions more carefully than they examine denials of custody.127 Even under the more stringent review, appellate courts invariably uphold or require severe restrictions designed to protect children from very unstable persons who also happen to be homosexual. For example, a parent who suffers from significant psychological and emotional problems or who has displayed gross deficiencies in judgment will likely be denied overnight or unsupervised visitation.128 Similarly, a parent will almost certainly be prohibited from visitation in the presence of a same-sex partner who poses a significant threat to the child's well-being.129 Appellate courts also commonly uphold restrictions prohibiting a...
parent from involving the child in gay and lesbian events, especially when the child has experienced distress after attending similar functions.\(^\text{130}\)

When restrictions appear aimed at limiting a child’s contact with a parent or other person because he or she is open about a same-sex relationship, the decisions reach different results depending on how much harm to the child an appellate court is willing to presume flows from contact with persons involved in such relationships. It is not uncommon for appellate courts to overturn these restrictions when they are insufficiently supported by the evidence,\(^\text{131}\) are more restrictive than necessary to shield the child from harm,\(^\text{132}\) or when other remedies such as counseling are possible.\(^\text{133}\)

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\(^{130}\) See, e.g., Marlow v. Marlow, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998) (affirming restrictions prohibiting homosexual father from having any other non-blood related person in the house overnight when the children are present and from including children in any social, religious, or educational functions that promote the homosexual lifestyle when children had experienced emotional distress after having attended prior activities); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 866 (Mo. Ct. App. 1982) (affirming visitation restrictions prohibiting overnight visitation and taking son to “gay activist social gatherings” and a homosexual church when father advocated homosexual lifestyle and son experienced increased bed wetting after having attended prior functions). See also Gottlieb v. Gottlieb, 488 N.Y.S.2d 180, 181 (App. Div. 1985) (affirming restriction that father not involve the daughter in any homosexual activities or publicity when father had advertised for homosexual lover in the “Village Voice”).

\(^{131}\) See, e.g., In re Marriage of Birdsall, 243 Cal. Rptr. 287, 291 (Ct. App. 1988) (removing restrictions because the “unconventional lifestyle of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent’s beliefs by the other parent’s religion, which may result in confusion for the child, do not provide an adequate basis for restricting visitation rights”); Pleasant v. Pleasant, 628 N.E.2d 633, 639-42 (Ill. App. Ct. 1993) (finding that trial judge “improperly relied on his personal belief that homosexuality creates serious endangerment” and that trial judge’s findings were against the manifest weight of the evidence); Boswell v. Boswell, 721 A.2d 662, 678 (Md. 1998) (discussing the need for factual finding of harm which “requires that the court focus on evidence-based factors and not on stereotypical presumptions” in imposing restrictions); In re Marriage of Ashling, 599 P.2d 475, 476 (Or. Ct. App. 1979) (finding nothing in the record to justify provision that restricted lesbian mother’s visitation rights by prohibiting her visitation to be conducted in the presence of any lesbians).

\(^{132}\) See, e.g., Anonymous v. Anonymous, 503 N.Y.S.2d 466, 467 (App. Div. 1986) (finding court abused its discretion in imposing conditions on the custody award that restricted mother’s right to maintain lifestyle well beyond that which was necessary to protect child from reasonably predictable effects of her lesbian relationship). See also Gottlieb, 488 N.Y.S.2d at 182 (excising visitation restriction that conditioned father’s visitation privileges on the exclusion of his male lover because it could only be interpreted as punitive measure against the father when 7-year-old daughter knew that father had male live-in lover because she lived in same apartment building).

\(^{133}\) See, e.g., Boswell v. Boswell, 721 A.2d 662, 673 (Md. 1998) (finding that evidence that children were confused by father’s new relationship was an insufficient basis to restrict his visitation when counseling could alleviate the problem); In re
On the other hand, there are extreme examples of appellate courts upholding severe restrictions despite weak evidentiary bases. In *J.P. v. P.W.*, for example, a Missouri appellate court upheld an order restricting a father’s visitation to supervised-only, even without evidence indicating that the father’s homosexual conduct caused or would likely cause physical or emotional harm to the child. In *Pascarella v. Pascarella*, a Pennsylvania superior court upheld restrictions limiting a father’s visitation from occurring outside the children’s paternal grandparent’s residence or in the presence of his male partner because the children were unaware of their father’s sexual preference and because it was “inconceivable that they could go into that environment, be exposed to this relationship and not suffer some emotional disturbance, perhaps severe.” Without discussion, a number of reviewing courts have deleted restrictions they deemed too severe, usually when it appeared the trial court was biased.

IV. Instant Decision

Before reaching the merits, the Missouri Supreme Court considered the Rule 84.04(d) violations alleged in *F.J.D.*’s motion to strike. The court held

Marriage of Wicklund, 932 P.2d 652, 656 (Wash. Ct. App. 1997) (overturning visitation restrictions because the children’s problems stemmed from difficulties adjusting to father’s homosexuality and the trial court did not fully consider whether to order counseling before entering improper restrictions).

134. See, e.g., Pennington v. Pennington, 596 N.E.2d 305, 306-07 (Ind. Ct. App. 1992) (affirming, over one dissent, restrictions on homosexual father’s visitation prohibiting him from exercising overnight visitation in presence of his male roommate even though the restrictions were based on trial court’s belief that the father’s roommate, who did not testify at trial, would be harmful to the child and even though the mother testified that she had never observed any improprieties between the father and his roommate); J.L.P. v. D.J.P., 643 S.W.2d 865, 866 (Mo. Ct. App. 1982) (affirming restrictions denying overnight visitation privileges and limiting father’s visitation rights by prohibiting him from taking the child to gay activist social gatherings based on fact that father lived with homosexual lover despite uncontradicted expert testimony that less restrictive visitation would not harm the child). See also *Dailey v. Dailey*, 635 S.W.2d 391, 396 (Tenn. Ct. App. 1981) (raising issue of mother’s unrestricted visitation at its own discretion and prohibiting mother’s visitation from being made in the home where she was living with female partner and/or in the presence of any female lover).


137. See *In re Marriage of Wiarda*, 505 N.W.2d 506, 508-09 (Iowa Ct. App. 1993) (finding, without discussion, that the trial court’s visitation restrictions were too severe and modifying them by giving mother the right to four weeks visitation in her home during the summer); *Weigand v. Houghton*, 730 So. 2d 581, 587 (Miss. 1999) (similar).

138. 978 S.W.2d 336, 338 (Mo. 1998). As a reference point for this discussion, the court indicated that the need for rule-conforming briefs relates to an appellate court’s
that both of J.A.D.’s points alleging errors in the trial court’s custody determination were so deficient that they could be reviewed only for plain error.\(^{139}\) The supreme court concluded that the trial court did not plainly err in applying Missouri’s best interests standard to the evidence at trial. The supreme court also found that the trial court did not determine custody solely based on J.A.D.’s homosexual status because the trial court decision indicated several other reasons for placing the children with their father.\(^{140}\)

While emphasizing that the best interest of the child is the guiding principle in custody adjudication and that a homosexual parent is not ipso facto unfit, the

function as a court of review: an opportunity to examine asserted error in the trial court. \textit{Id.} According to the court, a party failing to adequately advise the reviewing court of an asserted error places the court on the horns of a dilemma: If the court decides the merits based on inadequate advocacy, it risks establishing ill-considered precedent; if the court performs additional research to make up for the deficiency, it impermissibly advocates for the party. \textit{Id.} Due to a policy of deciding cases on the merits, however, the court stated that a defective point is considered unless it is so deficient that it fails to give notice to the court or other parties of the issue presented on appeal. If so, the court may disregard the point, review it for plain error, or dismiss the appeal. \textit{Id.} As a final preliminary matter regarding the sufficiency of a point, the court stated that it must meet three requirements: “(1) it must state the trial court’s action or ruling about which the appellant complains; (2) it must state why the ruling was erroneous; and (3) it must state what was before the trial court that supports the ruling appellant contends should have been made.” \textit{Id.} (citing Murphy v. Aetna Cas. & Sur. Co., 955 S.W.2d 949 (Mo. Ct. App. 1997)).

\(^{139}\) \textit{Id.} at 339 (citing Mo. R. Civ. P. Rule 84.13(c), which allows plain errors affecting substantial rights to be considered when there is manifest injustice or a miscarriage of justice).

With respect to the first point, which alleged that the trial court erred in awarding the father sole custody because the evidence showed the mother was the better choice, the court found it was inadequate because it failed to state what was before the trial court that would have supported J.A.D.’s contention, and the related argument portion of the brief failed to supply the deficiency. \textit{Id.}

For two reasons, the court found facially defective J.A.D.’s second point, which alleged unspecified constitutional violations stemming from the custody determination, the court-ordered “telling” session, and visitation restrictions. \textit{Id.} The point failed to state what evidence before the trial court would have supported J.A.D.’s contention, and it failed to specify which constitutional provisions were claimed to have been violated. \textit{Id.}

\(^{140}\) \textit{Id.} The court pointed to paragraph 19 of the custody order which read: 19. The best interests of the minor children will be met by their custody being placed with [F.J.D.] because of: (a) [F.J.D.’s] greater stability; (b) [J.A.D.’s] negativism toward [F.J.D.] and it’s [sic] negative impact on the children; (c) [J.A.D.’s] immaturity in seeking after repeated new love relationships and enmeshing her children’s lives in her lover’s lives; (d) [F.J.D.’s] nearby close extended family; and (e) [F.J.D.’s] greater likelihood of promoting a good relationship between the children and the other parent.

\textit{Id.} at 337.
court also stated that it "is not error to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination."\textsuperscript{141} Because substantial evidence supported the custody determination, the court also affirmed this part of the order.\textsuperscript{142}

The court then turned to the "telling" session and visitation restriction issues. The court held that the former was moot because the session had already taken place, but that the latter had merit because the restrictions were too broad.\textsuperscript{143} Because restrictions prohibiting the children from being in the presence of any known lesbians (with the exception of one long-time friend of the children) or any unrelated female with whom J.A.D. might be living would apply to persons who might not be harmful to the children, the court reversed and directed the trial court on remand to limit the conditions to persons whose presence might be contrary to the best interests of the children.\textsuperscript{144}

V. COMMENT

Because of the procedural context of \textit{J.A.D. v. F.J.D.},\textsuperscript{145} it may be tempting to read into the opinion both a tacit rejection of a nexus test and an implicit approval of prior Missouri decisions.\textsuperscript{146} Such a reading, however, would be a mistake. Clearly, the Missouri Supreme Court felt constrained by technical errors in J.A.D.'s brief, and its plain error review makes it difficult to glean anything definitive on these issues.\textsuperscript{147} What is indisputable is that the court declared that homosexual parents are not ipso facto unfit custodians of their children. Further, the opinion emphasizes that the child's best interest is the

\textsuperscript{141} \textit{Id.} at 339.
\textsuperscript{142} \textit{Id.} at 340.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{See supra} notes 21-23 and accompanying text.
\textsuperscript{146} The court decided without a single reference to any of the seven custody decisions involving the parental homosexuality issue decided since 1980, which may indicate that the court did not consider any of them controlling. The only authority cited with respect to homosexual parents and custody determinations was a decision that addressed the relationship of the common law marital communications privilege and the admissibility of evidence in a custody hearing. \textit{See J.A.D. v. F.J.D.}, 978 S.W.2d 336, 340 (Mo. 1998) (citing \textit{T.C.H. v. K.M.H.}, 693 S.W.2d 802, 804-05 (Mo. 1985) (en banc)). The underlying facts in \textit{T.C.H. v. K.M.H.} did pertain to a custody dispute involving a homosexual parent, but a final determination had not been reached. When the final determination was reached, it was appealed in \textit{T.C.H. v. K.M.H.}, 784 S.W.2d 281 (Mo. Ct. App. 1989).
\textsuperscript{147} \textit{See Lisa Brunner, Circumventing the "Best Interests of the Child" Standard: Child Custody Law in Missouri as Applied to Homosexual Parents, 55 J. Mo. B. 200 (1999)} (suggesting that the court seemed to advocate a nexus test when it analyzed the limitations on J.A.D.'s visitation but that it otherwise appeared to recognize a presumption-of-harm approach in custody determinations).
fundamental concern in custody adjudication. This seems to be meant as a signal to judges who in practice may have viewed parents who had been involved in same-sex relationships as unfit even if the judges did not explicitly follow a per se rule.  

Whether the Missouri Supreme Court will take the next logical step and adopt a nexus test that requires an evidentiary connection between the parent’s conduct and its actual or likely negative impact on the child remains unanswered. Thus, it seems fruitful to explore the reasons for and against adopting the test. Section 452.375 of the Missouri Revised Statutes is the natural starting point for analysis because it articulates the public policy considerations underlying custody determinations and gives content to Missouri’s best interests standard. In part, it provides:

The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children . . .

Stated another way, unless a child requires protection, Missouri’s public policy minimizes state interference with parent-child relationships beyond what is necessary to accommodate the fact that the child’s parents have established separate households. For courts considering whether to make a custody award that limits parent-child contact more than minimally necessary, this statute appears to call for evidence particular to the child’s circumstances that shows less restricted parent-child contact does or is likely to affect the child’s welfare

148. See Delong v. Delong, No. WD52726, 1998 WL 15536, at *6-*11 (Mo. Ct. App. Jan. 20, 1998) (reviewing the Missouri decisions since 1980 and concluding that Missouri courts appeared to have applied a per se rule against homosexual parents when awarding custody); Cox, supra note 6, at 792 (reaching same conclusion).

149. Mo. Rev. Stat. § 452.375(4) (Supp. 1998) (emphasis added). Missouri’s public policy is consistent with cases recognizing the fundamental liberty interest of parents in maintaining relationships with their children. See supra note 5.
adversely. Any lesser evidence seems inadequate to justify the additional state interference.

A nexus test seems eminently suited to effectuate the policy behind the best interests standard. The question therefore arises whether the approach taken by Missouri courts prior to *J.A.D. v. F.J.D.* can be reconciled with this policy. If not, the nexus test would appear to provide a sounder approach. As discussed in subparts III(B) and III(C) of this Note, prior to *J.A.D. v. F.J.D.*, Missouri courts invariably seemed to presume that placing a child in the custody of a parent who had been involved in a homosexual relationship would not be in the child’s best interests. Specifically they presumed that placing the child in the parent’s custody would impair development of the child’s moral character or heterosexual gender identity or that it would subject the child to social ostracism. Unless these inferences are corroborated by some statutory provision or are otherwise well supported by evidence, the best interests of the child may not be served by allowing courts to indulge them.

With respect to the first issue, nothing in the statutory chapter governing divorce and custody suggests that the Missouri legislature has considered this social policy question and resolved it against a parent who has been involved in a same-sex relationship. Indeed, the statutory best-interests factors do not even list parental sexual behavior as a factor to be considered apart from its relationship to the child’s welfare. Nor does anything in other chapters sustain the approach taken in the earlier decisions. No provision arguably relevant to the child custody question singles out persons who have engaged in homosexual behavior simply because the behavior is homosexual.

150. See Section 452.375(5), which lists in order of preference the potential custody arrangements that should be considered by the court. At the top of the list is an award of joint physical and legal custody, which is followed by awards of joint physical custody with one party granted sole legal custody, joint legal custody with one party granted sole physical custody, and sole custody to one parent respectively. MO. REV. STAT. § 452.375(5) (Supp. 1998). Considered in conjunction with the portion of Section 452.375 quoted above, this paragraph suggests that stronger and stronger evidence of actual or potential harm emanating from a parent’s contact with the child must be shown in order to justify less and less favored custody arrangements.


152. See *supra* note 79 and accompanying text.

153. See *supra* note 80 and accompanying text.

154. See *supra* notes 95-96 and accompanying text.

155. How courts approach the parental homosexuality issue under the best interests standard primarily “involves a fundamental policy question concerning the foundational relations of society,” which generally is a matter reserved to legislative branch. Wardle, *supra* note 6, at 896. In most instances, the constitutional rights of parents will not play a primary role. See *supra* note 5.

156. As Judge Ulrich has pointed out, Missouri recognizes the marital relationship
Second, the premise that a child inevitably will be harmed by being placed in the custody of a parent involved in a homosexual relationship is dubious at best. Recent social science studies have concluded unanimously that the psychosocial development of a child will not be compromised if the child is raised by a parent who, regardless of his or her sexual preference, can provide a nurturing home environment and has demonstrated good parenting skills.157

between a man and a woman only, and a reasonable inference of this expression of public policy is that the “desired environment for propagating and rearing children is within the sanctioned relationship of marriage between both natural parents.” Delong, 1998 WL 15536, at n.4 (citing Mo. REV. STAT. § 451.022 (1994)) (emphasis added). Some may argue, however, that this provision simply indicates a preference for raising children in a heterosexual household, and thus the parent who will likely reestablish such a household after divorce should be given custody in favor of other parent. This argument does not validate the assumptions made by the courts prior to J.A.D. v. F.J.D. Whatever weak preference for a heterosexual household Section 451.022 may indicate, it is superseded by the policies expressed in Section 452.375, which demand that the courts make custody awards that foster a child’s relationship with both parents.

These scientific conclusions are consistent with other Missouri case law, which also indicates that a good environment and stable home are the most important considerations in custody matters.\(^{158}\) Even if some scientists have overstated the significance of their results, as Professor Lynn Wardle has argued,\(^ {159}\) courts that made assumptions unsupported by scientific literature or by legislative policy declarations were treading on shaky ground.

Third, although it may be laudable for judges to be concerned about a child’s exposure to peer or community condemnation, their efforts in this area may have been misguided, for several reasons. As \textit{M.P. v. S.P.} eloquently explained, the assumption that teasing will always jeopardize a child’s moral welfare is questionable, as is the assumption that denying custody to a parent who has been involved in a homosexual relationship will always protect the child from being teased, particularly when both parents decide to remain in the same community after divorce.\(^ {160}\) Furthermore, remedies like court-ordered counseling can better ameliorate these sorts of problems and help ensure that parent-child relationships survive and flourish over the long term.

In short, prior to \textit{J.A.D. v. F.J.D.}, Missouri courts appear to have made assumptions about the relevancy of a parent’s involvement in a homosexual relationship that were not supported by legislative directives, by the weight of social science data, or by universally applicable postulates. If the decisions in these cases were without other competent evidentiary basis, the resultant custody awards may have interfered impermissibly with parent-child relationships. To prevent such consequences in future custody determinations, the Missouri Supreme Court should consider adopting a nexus test if it is presented with an opportunity to do so.

If the court adopts a nexus test, the test would alleviate a number of other problems that arise when courts presume harm from homosexual behavior. For example, adoption of a nexus test would facilitate appellate review and offer children greater protection from biased or misguided triers. Because trial courts were not required to articulate how a parent’s sexual conduct affected the child’s welfare, attempts to obtain meaningful appellate review were easily frustrated prior to \textit{J.A.D. v. F.J.D.} The trial court had only to say that evidence of the parent’s behavior “tipped the scales” in its custody determination, and the appellate court was required to draw all favorable inferences from the record.\(^ {161}\)

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\(^{159}\) See Wardle, \textit{supra} note 6.

\(^{160}\) See \textit{supra} notes 105-08 and accompanying text.

As a practical matter, this gave trial judges free rein to limit a child’s contact with a parent for legally insubstantial reasons. When a trial court decides under a nexus test, however, the appellate court can review the trial court’s particularized reasons based on evidence and can determine whether they withstand scrutiny. Adopting the test will provide moderate restraint on trial court discretion\(^\text{62}\) that will not interfere with the trial court’s ability to formulate an order suited to the child’s unique circumstances, and it will give the parties a better chance at framing the issues on appeal other than as “generalized pleas” for the appellate court to decide the dispute differently than the trial court.

Another shortcoming a nexus test might remedy pertains to the appearance of injustice. If a court issues a custody determination that disfavors a parent who has been involved in a homosexual relationship and the court’s reasons are not linked to the evidence, the court risks appearing biased even if its ultimate award is, in an objective sense, consistent with the best interests of the child. When a court is bound by a nexus test, it will articulate the reasons for its decision more clearly. A nexus test could therefore help promote confidence in the judicial system by better satisfying the litigants and the public that the case was decided according to a rule of law, and not a rule of men.\(^\text{63}\)

Finally, a nexus test may actually promote better trial court decision making. As Judge Patricia Wald of the D.C. Circuit has pointed out in another context, reasoned decisions “impose a discipline on judges” and ensure more thoughtful determinations.\(^\text{64}\) When courts may simply presume harm, they are not forced to critically assess how the parent’s actions relate to the child’s welfare. Encouraging courts to engage in critical analysis seems particularly important in these custody battles where one parent may be preoccupied with what usually is newly discovered sexual behavior and where testimony about this behavior frequently comprises a disproportionate amount of the evidence. Perhaps because the parties are preoccupied, judges who may presume harm tend to focus on evidence about the parent’s homosexual conduct and fail to adequately consider evidence about the other parent.\(^\text{65}\) The nexus test may also

\[\text{62-67 and accompanying text.}\]
\[\text{62. But see Shapiro, supra note 6, at 641-646 (arguing that nexus tests fail to accomplish their purposes in many jurisdictions because courts engage in or permit speculation about potential future harm rather than confining the inquiry to harm that is proven or reasonably likely to occur and because what constitutes “harm” is often undefined, leaving trial judges “free to identify wide-ranging and ill-defined harms, including stigma and moral injury, without engaging in any careful analysis”).}\]
\[\text{63. See Christopher L. Kutz, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 YALE L.J. 997, 1022 (1994) (arguing that the rule of law requires that all grounds for a decision be displayed in the judicial opinion, so that the justificatory argument can be subject to public disagreement, dissent, and correction”).}\]
\[\text{64. See Patricia M. Wald, The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?, 42 MD. L. REV. 766, 768 (1983).}\]
mitigate this problem because it limits the admissibility of some testimony: Evidence about a parent’s homosexual behavior is relevant only to the extent that it could be shown to affect or to be likely to affect the child’s physical, emotional, or moral well-being. With less distraction by irrelevant evidence or, worse still, by unfounded prejudice, judges may be more inclined to thoughtfully consider the relative merits of both parents and less inclined to restrict the child’s contact with either parent.

VI. CONCLUSION

When the Missouri Supreme Court held that homosexual parents are not ipso facto unfit for custody of their children, it appeared to be sending a signal to judges who may in practice have viewed these parents as per se unfit. Whether the court will formally adopt the more modern nexus test remains to be seen. Until the court has the opportunity to consider the issue directly, Missouri courts should adhere to the policy behind the best interests standard by thoughtfully weighing the relative merits of both parents’ skills and characteristics and by considering a parent’s involvement in a homosexual relationship only when evidence suggests it has affected or is likely to affect the child adversely. Only then will the courts succeed in fulfilling their obligations to determine custody arrangements in the best interests of the children.

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Jan. 20 1998 (noting that in prior cases, Missouri courts “frequently” upheld custody awards disfavoring the homosexual parent “without substantial evidence of the environment presented for the child by the heterosexual parent”). The Pennsylvania Superior Court has also witnessed this phenomenon. See Barron v. Barron, 594 A.2d 682 (Pa. Super. Ct. 1991). Prior cases placed the burden on a homosexual parent to disprove detriment to children as a prerequisite for custody. In Barron, the trial court awarded joint legal custody of 6-year-old daughter and primary physical custody to father. Id. at 682. The mother appealed, claiming a remand was necessary because the trial court’s credibility determination relative to father’s drinking problem was unsupported. Id. at 686. The appellate court agreed. Id. at 688. According to the appellate opinion, the trial court was greatly concerned about the psychological effects the mother’s homosexuality might have on the daughter, but it failed to consider certain more relevant characteristics of the father: “We are also deeply troubled by the trial court’s utter failure to address the effect of father’s drinking on his ability to provide adequate care for Christine.” Id. at 686. “In addition to mother’s testimony, father’s own friends testified that father was prone to drink intoxicating beverages to the point of getting verbally abusive or falling asleep . . . . We do not understand why the trial court did not perceive this as a significant factor . . . . [T]here was uncontradicted testimony that the excessive drinking went on in the child’s presence and on at least two occasions father had passed out when he was the sole caretaker of Christine.” Id. at 686-87.