

# Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice

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Child custody assessments are among the most complex kinds of psychological evaluations conducted for the courts. There are standards for best practice associated with such evaluations, but relatively little has been written about how such standards apply to custody evaluations involving lesbian and gay parents. This article describes the current legal context surrounding custody determinations involving 1 lesbian or gay parent and 1 heterosexual parent, and those in which a former same-sex couple has sought a custody determination of children they have coparented. In addition to reviewing the relevant law on how sexual orientation can affect custody and how that law has changed over time, the article has briefly summarized key points from the empirical research evidence on major questions and concerns associated with lesbian and gay parents that arise in custody decision-making: parenting ability, impact on children's sexual orientations, social stigma confronting children, and children's general adjustment. The research to date, although limited in some respects, has provided no evidence that lesbian and gay parents differ from heterosexual parents in these areas. Finally, we have highlighted implications for policy and for forensic practice related to custody determinations involving a lesbian or gay parent and forensic psychological evaluations in custody cases. Because there is very little empirical research and few custody cases specifically focused on bisexual parents, this article does not address custody cases involving such parents.

*Keywords:* law, custody, forensic, evaluation, policy

Psychology has provided important scientific and applied contributions to many of the issues involved in parenting and child custody. The substantial growth of the application of behavioral science research and psychological assessment to legal decision-making during the last three decades (Melton, Petrila, Poythress, & Slobogin, 2007) has been reflected in the development of interdisciplinary journals (e.g., *Behavioral Sciences & the Law*, *Law and Human Behavior*) as well as the devotion of mainstream journal pages (e.g., *Assessment*, *Journal of Consulting and Clinical Psychology*, *Professional Psychology: Research and Practice*, *Psychological Assessment*) to forensic assessment with increasing frequency. Practice standards have become clearer as well. The *Ethical Principles of Psychologists and Code of Conduct* (American Psychological Association [APA], 2010a) has acknowledged forensic assessment as an important part of psychological practice; specialized guidelines have been developed to address the more specific aspects of this form of practice (APA, 2010b, 2013).

The evaluation of parents and children in the course of child custody litigation is one of the most complex and challenging professional activities facing psychologists (Otto, Buffington-Vollum, & Edens, 2003). Even as the development of the science and the evolution of specialized child custody practice has coalesced to permit the description of “best practice” in child custody assessment

(see Fuhrman & Zibbell, 2012), there are numerous areas within child custody about which less is known. This article addresses one such area: parenting by lesbian and gay individuals and their partners, and the implications of the current legal landscape and state of scientific knowledge for the practice of child custody evaluations. This article provides an explication of the legal constructs relevant to lesbian and gay parenting, especially those relevant to custody evaluations. We begin with a description of current U.S. law in this area, first reviewing custody decisions involving one lesbian or gay parent and one heterosexual parent and then examining relevant law when a same-sex couple seeks a custody determination on the dissolution of their relationship. In addition to briefly summarizing the relevant empirical literature, we conclude with recommendations for policy and practice relevant to lesbian and gay parents and their children involved in child custody proceedings. Although a thorough review of the empirical literature on lesbian and gay parenting was beyond the scope of this article, a familiarity with this literature is important for those conducting child custody evaluations involving lesbian and gay parents; a number of such reviews are available (see, e.g., Biblarz & Savci, 2010; A. E. Goldberg, 2010; A. E. Goldberg & Allen, 2013; Patterson, 2005). Those interested in further perspectives on legal developments relevant to lesbian and gay parents should consult Shapiro (2013).

## Legal Context

When two parents, natural or adoptive, seek legal determination of custody of their children, the courts in every state in the United States will use the “best interest” standard in allocating both physical and legal custody (Elrod, 2012). The best interest of the

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child is the broad standard that will be applied, regardless of jurisdiction, but what constitutes the child's best interest varies considerably among jurisdictions and among judges (Elrod, 2012). The decision is further complicated when there is a dispute over who may qualify as a natural or adoptive parent (Udell, 2012).

Because of these ambiguities, lesbian and gay parents<sup>1</sup> face uncertainty related to custody of their children both at the conclusion of a heterosexual relationship and at the dissolution of a same-sex relationship. On the dissolution of a heterosexual relationship, a judge may find that the gay or lesbian parent's sexual orientation is relevant to determining the child's best interest, and, as a result, a lesbian or gay parent may not receive custody (Baggett, 1992). On the dissolution of a same-sex relationship, only one parent may be considered the biological or adoptive parent of the children, precluding the other parent from asserting rights to custody or visitation (Bowen, 2008).

### Impact of Sexual Orientation on Custody Decisions

#### Custody With One Lesbian or Gay Parent and One Heterosexual Parent

When considering whether a parent's sexual orientation should be a factor in determination of custody, courts have commonly cited the same list of concerns regarding parenting by lesbian and gay individuals (Patterson, 2005). The available research addressing these issues (specifically, the parenting abilities of lesbian and gay parents and the impact children may experience from having a lesbian or gay parent) has largely suggested that children raised by gay and lesbian parents are similar to children raised by parents who identify as heterosexual (Patterson, 2005; Raley, 2010). However, such research has substantial limitations, most notably its limited scope, small or skewed samples, absence of comparison groups, and potential researcher bias (for discussion, see, e.g., Patterson, 2005; Raley, 2010). Forensic mental health professionals conducting custody evaluations involving one or more parents who identify as lesbian or gay should be aware of the available literature as well as its limitations.

Research findings to date have suggested that being raised by a gay or lesbian parent (or by two gay or lesbian parents) is not detrimental to children (Biblarz & Savci, 2010; Gartrell & Bos, 2010; A. E. Goldberg, 2010; Patterson, 2005). Some courts considering parental sexual orientation in initial custody determinations, visitation decisions, or custody modifications have expressed concern about the broader well-being of children of gay and lesbian parents, but children of lesbian and gay parents appear comparably adjusted relative to children of heterosexual parents (A. E. Goldberg, 2010). Some studies have even suggested that children of lesbian or gay parents are psychologically healthier and better-adjusted than their peers raised by heterosexual parents (Gartrell & Bos, 2010; Golombok et al., 2013). Research has also indicated that adolescents reared by gay or lesbian parents have reported similar quality of life when compared with children raised by heterosexual parents (van Gelderen, Bos, Gartrell, Hermanns, & Perrin, 2012). Parent stress, family conflict, parent-child relationship quality, and family structure are better predictors of child adjustment than is parental sexual orientation (Farr, Forssell, & Patterson, 2010; A. E. Goldberg, 2010). Additional longitudinal research is needed in this area.

Despite the availability of research to this effect for the past two decades or longer, some courts have persisted in making decisions that are disadvantageous to lesbian and gay parents in custody disputes (Lehman, 2010). Considering this, forensic psychologists may play an important role in helping to provide courts with empirical research evidence relevant to the best interests of the child in custody determinations involving one or two lesbian or gay parents.

#### Initial Custody Determinations

In custody disputes involving the dissolution of a heterosexual relationship in which one parent subsequently comes out as gay or lesbian, the sexual orientation of that parent may influence the court's decision regarding custody in multiple ways (Lehman, 2010). Although the social climate in this area has shifted substantially, and changes have also been seen in the legal arena relevant to custody decisions involving gay or lesbian parents, such custody decisions may still consider sexual orientation. In considering how this influence may be present, it is important to begin with the "Nexus Test"—the largely accepted legal framework within which sexual orientation should be viewed in custody determination.

**Nexus Test.** The "nexus" or "adverse impact" test requires that, for sexual orientation to be considered in a custody determination, there must be a nexus between the parent's sexual orientation and a negative impact on the child. That is, some harm to the child must be shown to result from the sexual orientation of the parent (S. Goldberg, 2004). A majority of states rely on a Nexus Test in making custody determinations involving a gay or lesbian parent (Logue, 2002). The burden, under the Nexus Test, is on the heterosexual party to prove that harm has resulted or will result—and therefore the other parent's sexual orientation should be considered (Lehman, 2010). The question in these jurisdictions then becomes what qualifies as harm to the child.

Some of the harms considered by courts using the Nexus Test include social stigma resulting from the parent's sexual orientation (e.g., *S.E.G. v. R.A.G.*, 1987), being exposed to an "immoral" lifestyle (e.g., *In re D.H. v. H.H.*, 2002), harm to the child's sexual identity, under the assumption that being raised by a lesbian or gay parent will result in greater likelihood that the child will "become" gay (e.g., *S. v. S.*, 1980), and child's experience of anxiety as a result of difficulty accepting the parent's sexual orientation (e.g., *Layne v. Layne*, 2001, in which the court found harm to the child because he "was upset by appellant's relationship with another woman"). These "harms"—which presumably would be contrary to the best interest of the child—are derived from a belief that treats heterosexuality as "natural," and nonheterosexuality as unnatural or damaging. In other words, some courts have used

<sup>1</sup> Bisexual and transgender parents also face many barriers to unbiased custody determinations, and this is an area in which additional research is greatly needed. However, custody determinations involving a transgender parent are significantly complicated by the diverse and complex laws governing legal gender and changes to one's legal gender, which vary by jurisdiction. Because of these complexities, custody determinations involving transgender parents are outside the scope of this article. Additionally, to our knowledge, no case law specifically addresses bisexual parents, and very little empirical research answers questions related to parenting by a bisexual individual. Future scholarship should focus on the legal landscape and the empirical background surrounding parenting by transgender and bisexual individuals.

children's sexual orientation and gender identity as a proxy for their well-being. For example, in *S. v. S.* (1980), the Court of Appeals of Kentucky speculated that the child involved in the case "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future" as a result of her mother's lesbian relationship (p. 66). But the empirical evidence discussed earlier in this section does not support the nexus between parental sexual orientation and children's adjustment. Nor does research suggest that lesbian and gay parents are more likely than heterosexual parents to raise children who identify as lesbian or gay (A. E. Goldberg, 2010). Accordingly, courts' custody decisions that have presumed enhanced risk to children who have been raised by lesbian and gay parents have been poorly supported in meeting the adverse impact test.

Although lesbian and gay parents appear no more likely than heterosexual parents to raise children who identify as lesbian or gay (A. E. Goldberg, 2010), two studies have reported somewhat increased likelihood of same-sex attraction among daughters of lesbian mothers (Bos, van Balen, Sandfort, & van den Boom, 2006; Tasker & Golombok, 1997). There has been some suggestion that these results may be due to lesbian mothers creating an environment that is generally more accepting of experimentation (A. E. Goldberg, 2010). Additionally, one study did report somewhat higher rates of gay identity among the sons of gay men when compared to the U.S. population as a whole; however, no comparison group was used, and nearly half of the participants dropped out of the study (Bailey, Bobrow, Wolfe, & Mikach, 1995).

Research on gender identity among youth raised by gay or lesbian parents is limited, and much of the early research on this question relied on measurement using projective tests (Patterson, 2005). This has changed in recent years, however, and some newer studies have provided evidence that, at least at young ages, the children of lesbian or gay parents have exhibited similarly gendered behavior relative to children of heterosexual parents (e.g., Fulcher, Sutfin, & Patterson, 2008; Golombok et al., 2013). To the extent that children of gay and lesbian parents exhibit somewhat atypical gendered behavior, it tends to be within the limits of what is regarded as socially acceptable (A. E. Goldberg, 2010). Clearly, additional research is needed in this area (Tasker, 2010).

Not all courts using the Nexus Test have regarded each of these harms as appropriate for consideration. In particular, many courts have rejected the consideration of social stigma in light of *Palmore v. Sidoti* (Lehman, 2010), a U.S. Supreme Court case reversing an order granting the father custody because the mother's interracial marriage would cause the child to face racial stigma. The Court held that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody" (*Palmore v. Sidoti*, 1984, p. 434).

Even prior to the decision in *Palmore*, a small number of courts had found that potential discrimination could not be considered a relevant harm to the child in custody decisions involving a gay or lesbian parent. After *Palmore*, such decisions became much more common, and some courts extended *Palmore* to include discrimination against lesbian and gay parents as a factor in custody decisions (e.g., *Conkel v. Conkel*, 1987). However, other courts have rejected the application of *Palmore* to custody determinations involving a lesbian or gay parent, concluding that teasing or social discomfort constitute sufficient harm under the Nexus Test (*S.E.G.*

*v. R.A.G.*, 1987). Some courts have extended the reasoning in *Palmore* to find that a child's difficulty accepting a parent's sexual orientation is not a sufficient harm for the Nexus Test (e.g., *Inscoe v. Inscoe*, 1997). In particular, there is no sufficient nexus between the harm, which is caused by other people's prejudices and not by the parent, and the parent's sexual orientation (*Blew v. Verta*, 1992). No federal courts have addressed either of these issues.

There is relatively little evidence that children face social stigma because of their parent's sexual orientation (Biblarz & Savci, 2010). Although children of gay or lesbian parents are sometimes teased and may experience discrimination resulting from their parent's sexual orientation, it appears that a parent's sexual orientation does not increase the teasing experienced by a child overall (Biblarz & Savci, 2010; A. E. Goldberg, 2010). Overall, children of gay and lesbian parents seem to report positive peer relations (Golombok et al., 1983; Golombok et al., 1997; Green, 1978; Green, Mandel, Hotvedt, Gray, & Smith, 1986; Patterson, 1994), similar to those of children of heterosexual parents on quality and number of peer relationships (Biblarz & Savci, 2010; Rivers, Poteat, & Noret, 2008; Wainright, Russell, & Patterson, 2004). One study described a greater sense of connection to school peers for children of lesbian or gay parents than for children of heterosexual parents (Wainright & Patterson, 2006).

Peer stigma may depend on a number of factors, including child age, geographical location, school type (public vs. private), and socioeconomic privilege (A. E. Goldberg, 2010). In addition, teasing about atypical family structure is certainly not unique to children with lesbian and gay parents. Thus, there does not appear to be empirical support for the idea that a child is teased more because of a parent's sexual orientation—or that custody arrangements should be adjusted accordingly. However, the research in this area is based primarily on children's self-report, with more limited evidence incorporating parental report (e.g., Gartrell et al., 2005; Kosciw & Diaz, 2008)—meaning that victimized youth must accurately report their experiences. Clearly, more research is needed to better understand whether a child's experience of social stigma is associated with a parent's sexual orientation—and, if so, how this may differ from the experiences of children with heterosexual parents. It is also important to note that such teasing or stigma is not associated with parental shortcomings, but rather is a form of bullying supported by the organizations and institutions that condone it, tacitly or not (A. E. Goldberg, 2010). For an additional perspective on this topic, see van Gelderen, Gartrell, Bos, and Hermanns (2009).

**One of multiple factors.** In some states, courts have found that a parent's sexual orientation may be considered as a relevant factor to a custody determination *without* a showing of harm resulting from the orientation, provided it is not the sole factor considered (Larsen, 2004). Presently, this rule seems to be used in a very limited number of jurisdictions. The only state in which it is clearly the rule is Mississippi, where an appellate court decided that consideration of sexual orientation is acceptable when it is not the sole factor in a denial of custody to a lesbian or gay parent (*S.B. v. L.W.*, 2001). The reasoning in this case was based on a Mississippi Supreme Court case in which the father sought a custody modification because his 14-year-old son witnessed numerous incidents of domestic assault between the mother and stepfather, resulting in 911 calls and an arrest of the stepfather (*Weigand v. Houghton*, 1999). The lower court in which the case was initially

heard denied the modification request and expressed concern about the father's 8-year same-sex partnership, because he "lives with and engages in sexual activities with another and on a day-to-day basis [even though] an open sign of affection between homosexual partners is not proper for the child at this age" (*Weigand v. Houghton*, 1999, p. 586). The Mississippi Supreme Court found no error in the lower court's consideration of the father's sexual orientation (*Weigand v. Houghton*, 1999).

Are gay and lesbian parents less capable of effective parenting than heterosexual parents, as this rule seems to suggest? Research does not appear to support this view. Some studies have reported no differences between lesbian and heterosexual women in their ability to parent (e.g., Bos, van Balen, & van den Boom, 2004; Brewaeys, Ponjaert, Van Hall, & Golombok, 1997). Others have reported that lesbian parents are more "child oriented" than heterosexual mothers, and do not differ in levels of parenting and family stress, parenting awareness, parenting skill, time spent with children, and maternal warmth (Biblarz & Savci, 2010; A. E. Goldberg, 2010). A similar pattern has been observed when comparing gay and heterosexual men and their parenting (e.g., Bigner & Jacobsen, 1989). Research on gay fathers has shown that they do not differ from heterosexual parents in parenting and family stress, level of involvement with children, or level of intimacy and warmth with children—and may be more responsive to their children's needs than heterosexual fathers (A. E. Goldberg, 2010; Golombok et al., 2013). Gay and lesbian parents may also be more likely to equally share parenting tasks and responsibilities (Farr & Patterson, 2013). Some research has suggested that lesbian mothers and gay fathers may have enhanced parenting abilities when compared with heterosexual mothers or fathers (e.g., Flaks, Fischer, Masterpasqua, & Joseph, 1995; Johnson & O'Connor, 2002). Whether gay and lesbian parents are reported to have better parent-child relationships than heterosexual parents seems to depend on who is doing the reporting; when children describe the quality of relationships, there appears to be no difference between heterosexual and gay or lesbian parents (Tasker, 2010). But we could not identify any research indicating that gay or lesbian parents are generally *less* effective in parenting.

**Restrictions on custody and visitation.** Once a custody decision is reached, lesbian or gay parents may face additional restrictions as conditions of their right to custody or visitation with their children, although the likelihood and nature of such restrictions have decreased substantially in the past decade. Historically, courts have revoked custody from lesbian and gay parents because the parents did not hide their sexual orientation from their children (e.g., *Larson v. Larson*, 1995), and some courts have made visitation for such parents contingent on hiding their sexual orientation (e.g., *Hertzler v. Hertzler*, 1995). Other restrictions imposed on lesbian and gay parents in the past have included requiring visitation to be supervised (e.g., *In the Interest of R.E.W.*, 1996), preventing overnight visitation (e.g., *Marlow v. Marlow*, 1998), and prohibiting bringing the child to gay or lesbian events (e.g., *J.L.P.[H.] v. D.J.P.*, 1982) or into the presence of any "known homosexual" (Strasser, 1996).

However, since around 2000, appellate courts have less commonly recognized these broad restrictions. Instead, courts have largely restricted their consideration to the parent's present relationship, including having a same-sex partner present during visitation or living with their same-sex partner (Maxwell & Donner,

2006). Such restrictions are related to the more common restriction that each parent refrain from having a (nonspousal) romantic partner spend the night while the children are present, traditionally imposed on heterosexual parents (Tye, 2003), but have a disparate impact on lesbian and gay parents in states where they cannot legally marry their same-sex partner. Increasingly, however, such restrictions have only been upheld when there has been some evidence that harm to the child will occur *without* the restriction, and some courts have advocated using the Nexus Test to determine whether a restriction is appropriate (e.g., *Boswell v. Boswell*, 1998).

Historically, some courts have expressed particular concern that lesbian and gay parents may be more likely to sexually abuse the children in their care. Such concerns are implicit in visitation restrictions preventing children from staying overnight with a lesbian or gay parent, or prohibiting the presence of gay or lesbian individuals around the children (e.g., *In re J.S. & C.*, 1974). However, research evidence has suggested that lesbian and gay individuals are no more likely to abuse children than are heterosexual individuals (Cromer & Goldsmith, 2010). One study concluded that children of lesbian parents may be *less* likely to experience sexual abuse—but this study had a number of limitations, including an abuse history based on parental report (Gartrell, Deck, Rodas, Peyser, & Banks, 2005). One investigator even concluded that "a child's risk of being molested by his or her relative's heterosexual partner is over 100 times greater than by someone who might be identifiable as being homosexual, lesbian, or bisexual" (Jenny, Roesler, & Poyer, 1994, p. 44)—although this does not take into account the prevalence of heterosexuality compared with homosexuality, and the results might be explained by noting that the percentage of sexually abused children who have been abused by a lesbian, gay, or bisexual individual is consistent with the prevalence of homosexuality in the community. Although additional research is needed in this area, there is apparently no research evidence suggesting *higher* rates of sexual abuse by gay and lesbian adults. Concerns about sexual abuse of children thus do not appear justified solely on the basis of a parent's or partner's sexual orientation.

## Modifications

Once custody, visitation, and visitation restrictions have been established, modifications to the order can generally only be made if the party requesting modification can show that a "substantial or material" change of circumstances has occurred, necessitating a modification to serve the child's best interest (Logue, 2002). Courts have heard numerous cases arguing that the custodial parent coming out as gay or lesbian constituted a "changed circumstance" for purposes of a modification, and courts have historically accepted this claim (e.g., *Dailey v. Dailey*, 1981). More recently, however, courts have tended to reject such arguments without accompanying evidence that harm had occurred to the child as a result of the parent's coming out (e.g., *Berry v. Berry*, 2005). Despite this change, courts may still hold that "openly" being in a same-sex relationship constitutes a changed circumstance sufficient for a modification order (Parrott, 1996), especially if such relationship violates a previous custody restriction placed by the court (*Cook v. Cook*, 2007).

## Custody With Two Same-Sex Parents

When same-sex partners decide to start a family, they may decide that one or both of them will have biological children (using either artificial insemination or egg donation and surrogacy), or they may adopt. Not all states (or foreign countries, when parents opt for an international adoption) allow for joint adoption by both parties in a same-sex couple (see, e.g., Miss. Code Ann. § 93–17–3[5], 2007), and not all states provide a mechanism for a same-sex partner of a biological parent to establish parentage of a child created using reproductive assistance technologies (Udell, 2012). Therefore, the question of who qualifies as a legal parent, and how a legally recognized parental relationship can be established, becomes very important in custody disputes, because only legal parents can seek custody in most states when there is no showing of substantial harm to the child that would result from the legal parent(s) receiving custody (Udell, 2012).

Although parents may agree during their relationship that they will coparent and each will have equal rights, such agreements may not withstand the ending of the relationship. Unfortunately, agreements made by couples regarding coparenting are not legally binding, because they violate public policy by preventing the court from considering the child's best interests (see, e.g., *Zahl v. Zahl*, 2007). Further, the child's best interest will be considered in the context of the legally recognized parent's right to control the upbringing of his or her child, which means that parent's wishes will be heavily weighed in the court's analysis—and the legal parent's partner may not even have standing to sue for visitation (Osborne, 2004).

This legal landscape creates potential risks for both parents in a same-sex relationship—the biological or adoptive “legal” parent, and the “nonlegal” parent. The nonlegal parent may lose all access to the child on dissolution of the relationship, and may be denied both custody and visitation by his or her former partner and by the courts (Bowen, 2008). The legal parent, on the other hand, may face both a former partner who refuses to support the child they intentionally created or adopted together with the intention that they share equal responsibility, and a court that will not order child support payments because the partner's parentage is not legally recognized (e.g., *State ex rel. D.R.M. v. Wood*, 2001). Even when one state recognizes both parents as legal parents and provides for joint custody or visitation for the second parent, such orders may not be recognized or enforced by another state under the theory that the Defense of Marriage Act (DOMA, 2006) supersedes the Parental Kidnapping Prevention Act's (PKPA, 2000) requirement that states to give full faith and credit to other states' custody and visitation determinations (Lindevaldsen, 2009).

The legal landscape in this area was not affected by the U.S. Supreme Court's decision in *U.S. v. Windsor* (2013). Although *Windsor* concerned DOMA (2006), the ruling invalidated only a small portion of DOMA. In *Windsor*, the Court ruled on the constitutionality of Section 3 of DOMA, which defines “marriage” and “spouse” only as they relate to federal statutes. It did not affect Section 2 of DOMA, which protects states from being forced to recognize same-sex unions from other jurisdictions “or a right or claim arising from such relationship.” Because custody and parenting are entirely state issues, the *Windsor* ruling does not change the legal landscape regarding custody involving lesbian or gay parents.

Different arguments have been advanced for protecting the status of both members of a same-sex partnership as the parents of any children raised together, including second-parent adoption, de facto parenthood, and presumptions of legitimacy. Each has received mixed support in various jurisdictions, and the case law as well as both model and adopted legislation in this area are still evolving.

**Second-parent adoption.** Traditionally, in order for a child to be adopted, he or she must not have any legal parent. However, in the past couple of decades, states have begun to allow “second-parent” adoption, in which a child with only one legal parent can be adopted by a second parent without the first parent surrendering or losing his or her rights (Palmer, 2003). Courts first allowed this approach through stepparent adoption, in which an individual legally married to a child's sole parent could adopt the child with the parent's consent (Palmer, 2003). However, such adoption traditionally cannot occur unless the child does not have a legal parent of the same gender as the stepparent, or unless that parent permanently relinquishes his or her rights in order for the stepparent to assume the legal parental role (Polikoff, 1990). Additionally, in states that do not allow same-sex marriage, a same-sex partner cannot take advantage of stepparent adoption statutes (Wooster, 2011).

Twenty-one states and the District of Columbia currently allow same-sex couples either to make use of stepparent adoption statutes, where same-sex marriage or domestic partnership is permitted in the state, or to undertake a second-parent adoption without the termination of the first parent's rights (National Center for Lesbian Rights, 2013). Additionally, lower courts in at least six additional states<sup>2</sup> have permitted second-parent adoptions, at least in certain situations (National Center for Lesbian Rights, 2013). Finally, California recently enacted a statute that modifies the California Family Code to allow courts to recognize more than two legal parents of a child, which will likely be particularly relevant to many lesbian and gay parents (2013 Cal. Stat. 564).

When second-parent adoption is permitted, it gives the second parent the full legal rights and responsibilities of parenthood so that, in a custody determination, each parent would have a comparable basis for requesting custody or visitation (Moulding, 2012). However, second-parent adoption is generally more time-consuming and costly than stepparent adoption (Moulding, 2012). Additionally, appellate courts in at least six states (Alabama, Kansas, Nebraska, North Carolina, Ohio, and Wisconsin) have held that second-parent adoption is not permissible in the state (National Center for Lesbian Rights, 2013). Indeed, same-sex couples living in a jurisdiction that does not permit second-parent adoption who plan to have children have been known to move to a different state for the purpose of obtaining a second-parent adoption, or to drive across a state border to a second-parent adoption state in order to take advantage of a state statute establishing jurisdiction over adoptions for children born in the state (Palmer, 2003). Research has highlighted the potentially favorable impact of second-parent adoption for gay and lesbian families, as well as the family instability that can result when second-parent adoption is not available (A. E. Goldberg, Moyer, Weber, & Shapiro, 2013).

<sup>2</sup> These states include Alaska, Georgia, Louisiana, New Mexico, Texas, and West Virginia.

**De facto parenthood.** In cases in which the same-sex couple is not able to or does not acquire a second-parent adoption, an alternative approach has been taken by some courts to protect the parent-child relationship for both parents on dissolution of the partnership. Under legal theories granting rights stemming from reliance on another person's representations, the nonlegal parent may be given legal rights as a "de facto" or "psychological" parent (Graham, 2008). In states in which a nonparent has standing to sue for visitation or custody, an individual who has acted *in loco parentis* may be recognized legally as a parent figure for the child, given "a relationship . . . such that the child recognizes the person . . . as a parent from whom they receive daily guidance and nurturance" (*In re E.L.M.C.*, 2004, p. 559).

Some courts have relied on a four-factor test to determine who may be considered a de facto parent: (a) the legal parent fostered a parent-like relationship between the third party and the child, (b) the third party and the child lived together in the same home, (c) the third party assumed the responsibilities of parenthood, and (d) the third party has actually created with the child a parent-like bond (*In re E.L.M.C.*, 2004). This approach is based on the notion that a legal parent, having encouraged a parent-child relationship between his or her child and a third party, is precluded from later disrupting that relationship (*In re E.L.M.C.*, 2004). Additionally, courts have recognized that being separated from a de facto or psychological parent is unlikely to be in the best interest of the bonded child (*In re E.L.M.C.*, 2004). In most cases, courts allow a de facto parent to seek custody (or, in two states, only visitation) under the best interests standard, but do not grant the de facto parent the legal status of parent (Joslin & Minter, 2012). In a handful of states (e.g., Delaware and Washington), de facto parents are made legal parents, and have parental rights equal to those of the biological or adoptive parent (Joslin & Minter, 2012).

The doctrine of de facto parentage may provide protection (either through full legal status as parent or through standing to seek custody and visitation) for the nonbiological or nonadoptive parent of a child reared in a same-sex relationship (Anderson, 2006). This may be particularly true when the parents planned together for the conception or adoption of the child and when the child was given the nonlegal parent's last name (*Mason v. Dwinell*, 2008). However, not all courts have given the nonlegal parent standing to request custody or visitation in the first place, which would be necessary in order for a determination of de facto parenthood to be made (Graham, 2008).

**Presumption of legitimacy.** In light of the policy concerns relevant to providing children with two legal parents and recognizing parent-like relationships once they are created, a limited number of jurisdictions have extended a presumption of parenthood traditionally only available to men in heterosexual marriages (Udell, 2012). That is, under the Uniform Parentage Act (2002) in the 21 states that have adopted it, and under the common law in states that have not, a woman's husband is legally presumed to be the biological father of any children she has during their marriage (Bowen, 2008). This is true even if the husband clearly is not the biological father, such as in cases of artificial insemination using sperm donation (Williams, 2005). Under the Uniform Parentage Act, this presumption exists even when the couple does not marry until after the birth of the child, provided the husband claims the child as his own (Bowen, 2008).

California grants this presumption to lesbian couples at the time of the child's birth, even if they are not married, provided that the partner "caused the child to be conceived" by "actively assist[ing]" the biological parent in becoming pregnant and raised the children as her own (*Elisa B. v. Superior Court*, 2005, p. 124). In addition, states allowing or recognizing same-sex marriage (or those providing for civil unions and statutorily establishing the same definitions of parentage for those in civil unions as for married couples) extend the presumption of legitimacy to those same-sex couples in legal marriages or unions (Beekman, 2012). However, a presumption of legitimacy may not automatically lead to a right to have the names of both (same-sex) parents on the birth certificate (Shotwell, 2012).

Although the extension of the presumption of legitimacy represents an important method for same-sex couples to establish parentage, it is not available in states without same-sex marriage, domestic partnership, or civil unions (Bowen, 2008). Additionally, there are clear limits in how it may be exercised by same-sex couples (Anderson, 2006). The presumption functions only to establish paternity in heterosexual marriages, and cannot be used to establish maternity; if a married man is the biological father of a child, his wife is not presumed to be the mother (Anderson, 2006). The presumption works in reverse in same-sex marriages. Because it applies only to the spouse of a woman who gives birth to a child, lesbians will be able to assert the presumption of legitimacy, while gay men will not (Anderson, 2006). Because gay men must use a surrogate in order to have a biological child, the woman who gives birth to the child will likely be assumed to be a parent; the presumption of legitimacy may provide the surrogate's husband with legal rights to the child (Anderson, 2006). Because the legal landscape related to surrogacy is still in its infancy, it is unclear how the law may evolve to deal with this unequal application (Dana, 2011).

### Rights Across Borders: Full Faith and Credit

The Full Faith and Credit Clause of the U.S. Constitution provides that each state must give full faith and credit to the public records and judicial proceedings of every other state (U.S. Const. Art. IV, § 1). This applies to adoption orders issued by other states, likely including adoption by same-sex couples and second parent adoption (*Finstuen v. Crutcher*, 2011). However, as long as *recognition* is given to the adoption decree of another state in terms of parents' legal rights, states do not have to *facilitate* such decrees—and therefore can choose not to issue birth certificates with the names of both legal (same-sex) parents (*Adar v. Smith*, 2011).<sup>3</sup>

The PKPA (2000) requires every state to enforce "any custody determination or visitation determination made consistently with

<sup>3</sup> There is an exception to the Full Faith and Credit Clause established by case law that "if the public policy of one state is strongly against the public policy of another state, a sister state does not have to recognize the acts of the first state" (Goldhaber, 2007). The exception was codified through the Defense of Marriage Act (DOMA, 2006), which allows states to refuse to recognize same-sex marriages or civil unions performed in another state. Although it seems that the public policy exception to the Full Faith and Credit Clause, in general, and DOMA, in particular, will not apply to adoptions, so that states must recognize adoptions from another state even if they would not be permitted in the current state, this issue has not been definitively settled (Joslin, 2009).

the provisions of this section by a court of another State.” This legislation ensures that only one state at a time will have the power to issue custody and visitation decisions for a particular child, in order to avoid competing orders as a result of “forum shopping” by dissatisfied parents. This is necessary because the Full Faith and Credit Clause applies only to final judgments, and custody and visitation orders are, by definition, subject to modification and therefore never “final.” However, some courts have suggested that DOMA creates an exception to the PKPA when the custody or visitation decision at issue regards a former same-sex couple (Sanders, 2011), especially when the judgment was somehow based on the legal relationship between the same-sex parents (Joslin & Minter, 2012). To date, no higher court has upheld this claim. Because “it is well settled that the PKPA preempts any conflicting state law,” absent a finding that DOMA supersedes the PKPA, full faith and credit should be extended to custody decisions involving same-sex parents (*Miller-Jenkins v. Miller-Jenkins*, 2006, p. 96). Ultimately, a federal decision on this issue is unlikely because of the domestic relations exception to diversity jurisdiction (Ullman, 1983), and so state courts may continue to have discretion to construe this potential conflict in whatever way they choose so long as the relevant section of DOMA is not ruled unconstitutional.

### Discussion

In our review of the legal landscape and relevant research in this area, we have considered the legal questions of custody, visitation, custody of two same-sex parents, de factor parenthood, the presumption of legitimacy, and rights across borders. We have also identified concerns often considered by courts in making decisions in these areas. In particular, courts (particularly those in jurisdictions using the Nexus Test, under which there must be a nexus between sexual orientation and harm to the child) have considered whether (a) lesbian or gay parents are less fit or effective as parents, (b) lesbian or gay parents or their partners are more likely to sexually abuse children, (c) children raised by lesbian or gay parents are themselves more likely to be gay or lesbian, (d) children of lesbian or gay parents will be more likely to be teased and discriminated against due to their parent’s sexual orientation, and (e) children of lesbian or gay parents will be more likely to be poorly adjusted and report a poorer quality of life. In the course of reviewing the relevant research on these questions, we have identified information that should be considered by policymakers, judges, and psychologists conducting custody evaluations for parents and children under these circumstances.

There are certainly limitations to this empirical literature (Amato, 2012; Biblarz & Savci, 2010; Marks, 2012; Patterson, 2005). These limitations suggest significant caution when interpreting the results described in the previous section. The research has focused very heavily on lesbian mothers, with less attention on the parenting of gay men and almost none on bisexual men or women (Biblarz & Savci, 2010). Although research on parenting by gay men is becoming more common, it is still somewhat difficult to draw conclusions about lesbian and gay parents broadly. Research is needed on bisexual individuals, in particular in the context of parenting and custody, because there is currently a dearth of such research. The research literature is still developing, but has been sufficient for a number of professional organi-

zations to draw public policy conclusions based in part on the available empirical evidence (see, e.g., American Academy of Child & Adolescent Psychiatry, 2009; American Bar Association, 1995, 1999; American Psychiatric Association, 2002; American Psychological Association, 2004; Child Welfare League of America, n.d.).

The research to date also has numerous methodological limitations related to sampling: Many studies have used small samples of convenience, due to the rarity of lesbian and gay parents in the population generally (Amato, 2012; Marks, 2012). Accordingly, such studies are often significantly underpowered, which may result in the failure to detect differences between children of gay and lesbian parents and children of heterosexual parents even when such differences exist (Amato, 2012). A number of studies also failed to include a heterosexual parent comparison group, making it impossible to draw conclusions regarding the differences between children raised by lesbian or gay and heterosexual parents (Marks, 2012). Despite such limitations related to sampling, significant improvements in sampling and study design have been observed in recent years (A. E. Goldberg, 2010). These improvements allow conclusions to be drawn from the research literature.

It is also important to note that very little of the existing research has been conducted on families who have been involved in custody disputes, so conclusions about child well-being may not be generalizable to families involved in custody litigation (Raley, 2010). Existing research has not addressed many of the questions relevant to the contemporary routes to parenthood and child custody for same-sex couples.

Researcher bias is a significant concern with research on any sensitive topic, especially one so important to our valued notions of fairness and equal protection—and having such potential to affect public policy (Raley, 2010). The potential for bias should be considered when evaluating research in this area, given that there has been some apparent association between investigators and advocacy groups (see Raley, 2010, for a discussion of this issue). For example, one study (Regnerus, 2012a) has come under criticism for its sampling, analysis, and conclusions, and the peer review process by which it was considered for publication (Gates et al., 2012; Perrin, Cohen, & Caren, 2013; Sherkat, 2012; although cf. Regnerus, 2012b). Investigator affiliation with or funding by organizations with strong advocacy views introduces the possibility that research design, sample selection, data interpretation, and conclusions will be influenced by such views. It is also important to consider whether criticism of such research is itself ideologically driven; research bias may exist on both sides of the debate (see Redding, 2013, for further discussion). It is important, therefore, to remain aware of the potential impact of bias by rigorously evaluating the design, results, and interpretation of research in such a sensitive area.

Research methodology in this area has been consistently improving, and limitations are becoming less significant. Despite some remaining limitations, it appears that the current research evidence does provide important information for policymakers, courts, and psychologists conducting custody evaluations. To the extent that relevant science is foundational for psychological evaluations for the courts, it is particularly important that custody evaluators be familiar with this research and prepared to describe it (along with its limitations) for decision-makers.

First, the research evidence does not suggest that lesbian and gay parents are less fit or effective in parenting relative to heterosexual parents (Bigner & Jacobsen, 1989; Bos et al., 2004; Brewaeys et al., 1997; A. E. Goldberg, 2010). Whether lesbian mothers and gay fathers have enhanced parenting abilities when compared with heterosexual mothers or fathers remains an open question, but there is some evidence to suggest this (Flaks et al., 1995; Johnson & O'Connor, 2002).

Second, gay and lesbian individuals do not appear to be at greater risk for sexually abusing children, according to the available evidence (Gartrell et al., 2005). One study suggests that they may be at lower risk, although this conclusion is dependent on the prevalence estimates of homosexuality that are applied (Jenny et al., 1994).

Third, some research has suggested that gay and lesbian parents are no more likely than heterosexual parents to raise children who identify as lesbian or gay (Golombok & Tasker, 1996; Huggins, 1989). Two other studies have reported increased likelihood of same-sex attraction among daughters of lesbian mothers (Bos et al., 2006; Tasker & Golombok, 1997). For young children of gay and lesbian parents, there is some evidence for showing behavior that is comparable to children of heterosexual parents (Fulcher et al., 2008; Golombok et al., 2013).

Fourth, children of lesbian and gay parents are sometimes teased about and face discrimination resulting from their parent's sexual orientation (Bos & van Balen, 2008; Gartrell et al., 2000; Vanfraussen, Ponjaert-Kristoffersen, & Brewaeys, 2002), but having a gay or lesbian parent apparently does not increase the overall amount of teasing experienced by a child (Rivers et al., 2008; Wainright & Patterson, 2006).

Finally, the evidence has suggested that children of gay and lesbian parents are generally as well-adjusted as children of heterosexual parents (Biblarz & Savci, 2010; Patterson, 2005; Raley, 2010). They report positive peer relationships (Golombok et al., 1983; Golombok et al., 1997; Green, 1978; Green et al., 1986; Patterson, 1994), and may even experience a greater sense of connection to school peers than do children of heterosexual parents (Wainright & Patterson, 2006).

Accordingly, there appears to be very little empirical research support for the major concerns that have been raised by policy-makers and courts in making laws and decisions concerning custody and visitation for children with at least one lesbian or gay parent. When there is evidence about group differences between heterosexual and lesbian and gay parents, it is more likely to favor the lesbian and gay parents. But it would seem problematic on equal protection grounds to use the evidence to discriminate against those in one of these groups based on such evidence. For psychologists conducting custody evaluations, moreover, it is crucial to provide detailed *individualized* information about the particular parents and children involved in a custody case. It may be in some cases that a parent who is gay or lesbian is the less preferable parent for custody or visitation—but this should be gauged using considerations that are routinely incorporated into the best practice of custody evaluations (see, e.g., Fuhrman & Zibbell, 2012) rather than unfounded concerns about the parenting of gay and lesbian individuals.

There are a number of implications for forensic practice in custody cases involving one or two lesbian or gay parents. Given the particularly complex circumstances that may be involved in

custody determinations involving a gay or lesbian parent, forensic evaluators conducting child custody evaluations should exercise particular caution in adhering to best practice guidelines for child custody evaluations—and considering how these guidelines may apply to the individual case.

Forensic psychologists practicing in this area should know the law relevant in their jurisdiction in addition to relevant federal law, including the relevance of DOMA to a family's particular situation. Evaluations should be individualized so that no assumptions are made in an individual case that sexual orientation is unfavorable or favorable to parenting effectiveness; rather, conclusions should be based on an assessment of that family. Finally, forensic psychologists should strive to be culturally competent in assessment approaches and interpretation of results. Additionally, it is critical for forensic psychologists to know the major research findings cited here, as well as the limitations of that research.

For example, although custody evaluations should always use the empirical literature as a foundation, referencing it when appropriate, this may be particularly important in custody determinations with a lesbian or gay parent if a judge has preconceptions regarding parenting by gay or lesbian individuals. Although forensic evaluations should consistently focus on providing information relevant to the legal question, this is especially applicable in custody determinations involving gay or lesbian parents because of the greater number and complexity of questions arising in these evaluations. Psychologists conducting such evaluations should provide the court with sufficient information to consider the totality of the circumstances relevant to the child's best interest, and address any misconceptions held by the judge (e.g., quality of relationships between child and each parent; sources of family conflict; child's physical, educational, social, and emotional needs; child's relationships with siblings and with extended family; each parent's capacity for meeting child's needs; each parent's willingness to foster a relationship between child and other parent; the child's preference). Finally, custody cases involving two same-sex parents may be the only kind of custody evaluation in which it is important to routinely consider the impact of separation from or loss of a caretaking relationship with a person who may not be a legal parent of the child—at least in jurisdictions where the prospect that same-sex parents will receive comparable treatment from the courts is significantly limited.

The legal landscape reviewed here may also be impacted by policy changes through legislation in various jurisdictions. Legislators and other policymakers should take into account the research summarized here, and this research should be used to help guide policy. State legislators might develop legislation to limit judicial consideration of sexual orientation in custody decisions; the research in this area strongly suggests that parental sexual orientation is not relevant to the best interest of a child, and legislation could help ensure that custody decisions reflect these findings. Additionally, policy changes could address the difficulty that gay and lesbian couples have in some jurisdictions in creating legal parental relationships with their children. Such policy changes would have the potential to assist judges in the complex decisions they are asked to make regarding custody and parental rights—and could help ensure that such legal decisions genuinely reflect the best interest of the child.



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