Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should Be Considering a Parent's Sexual Orientation in Contested Custody Cases

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I. INTRODUCTION

My grandmother taught me how to bake bread, how to prune trees, and how to keep snails from the garden. She made jam, always, at the first hint of fall. At the end of each summer I went home with a box full of jam marked with masking tape labels. In her death, I remember those jars and the captured smell of summer that she sent home with me. Such memories may be uncommon in a law review article. However, these memories are relevant not only to me, but to Montana law as well for the question my grandmother’s life presented.

My grandmother was a lesbian. When she fell in love with another woman, my grandfather would not allow a divorce. He wanted no one to know that his wife was a lesbian. Further, he wanted no such mother for his children. He said that he would fight for custody if she ever left him. In anticipation, he had affidavits signed and kept in his safe. These were his bargaining chips to keep her in the marriage. With these, he told her, he could prove her lesbianism. Because of these, he claimed, a court would find her unfit to care for her children. If she left, he told her, he would call upon a court to find the same.1

In 1952, my grandmother’s life presented a question: how should courts consider a parent’s sexual orientation in contested custody cases? Today, in 1996, this question is still definitively unanswered. In some jurisdictions, a parent’s sexual orientation is viewed as a detriment to the child;2 in others, a parent’s sexu-
al orientation is irrelevant unless it is proven to adversely affect the child. Depending upon the jurisdiction, the answer changes.

Courts generally decide custody cases by considering what their state legislatures determine to be in the “best interest of the child.” This standard requires that judges compare parents’ respective abilities to care and provide for their children by considering a list of enumerated factors. Many observers criticize this standard. As a result, some jurisdictions have moved to, or

3. See infra note 54 and accompanying text.

now consider, a primary caretaker preference that restricts a court's broad authority to compare the contesting parents. Instead, this preference authorizes courts to compare parents only to determine which parent bore the primary day-to-day responsibility for the child.

However, both the "best interest of the child" standard and the primary caretaker preference evaluate parents. Under either standard, when faced with parents of similar ability, courts should award custody to the parent who satisfies a majority of the positive factors taken into consideration. In reaching this decision, judges hold and exercise considerable discretion. This is appropriate considering the unique situations which exist in every family. Ideally, this discretion is "bounded by the rules and principles of law, and [is] not arbitrary, capricious or unrestrained."

Yet, when one parent differs from traditional notions of parental characteristics, a judge may negatively consider this difference while evaluating the parent, regardless of whether the parent's difference actually affects the child. Considering such

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7. West Virginia has explicitly moved to this primary caretaker preference. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (detailing the primary caretaker preference). Minnesota had adopted the primary caretaker preference judicially in Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985) (citing Garska, supra, and adopting the primary caretaker presumption), but in 1989 the legislature amended Minn. Stat. § 518.17.1 to incorporate the primary caretaker preference into the "best interest of the child" standard as another factor to consider within this standard. See In re the Marriage of Maxfield v. Maxfield, 452 N.W.2d 219, 220-221 (Minn. 1990) for a complete discussion of this change in law.


11. Fitzgerald criticizes the "best interest of the child" standard stating: The "best interests of the child" standard invites the same race, class, and cultural bias upon judicial interpretation as child abuse and neglect statutes. In custody disputes between parents, the "best interest" standard also, of course, invites gender bias. Courts have denied custody to one mother because she earned less money than her "good looking" husband, to another.
difference, especially when it does not affect the child, is an improper exercise of judicial discretion. Such impropriety is predicated upon a judge’s individual bias and represents an abuse of judicial discretion. This type of abuse does not occur in every case, but it happens with enough frequency to disadvantage parents who differ from the majority.\(^2\)

Homosexual parents are a reality for six to fourteen million children in the United States.\(^3\) Some of these homosexual parents are the single fathers raising 5,371 children and the single mothers raising 19,416 children in our state.\(^4\) Already, these parents are in our courtrooms fighting for custody of their children.\(^5\) However, despite the growing presence of a homosexual population in our state,\(^6\) no state supreme court precedent

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because she became a Jehovah’s witness, and to another because she married interracially. Indeed, the family law bar in every locale quickly ascertains the biases of different judges, knowing that the luck of the draw of judge more than any other factor may determine the outcome of a custody case.

Fitzgerald, \textit{supra} note 9, at 62 (citations and footnotes omitted). The bias Fitzgerald discusses extends to gay and lesbian parents. \textit{See}, e.g., David M. Rosenblum, \textit{Custody Rights of Gay and Lesbian Parents}, 36 \textit{VILL. L. REV.} 1665 (1991) (detailing common misconceptions surrounding gay and lesbian parents and how these can affect court decisions). This bias is even more egregious when one considers the empirical evidence which indicates that there is little difference between the psychological and social functions of heterosexuals and homosexuals. \textit{See generally} Gregory M. Herek, \textit{Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research}, 1 \textit{LAW & SEXUALITY} 133 (1991) (surveying recent psychological studies on the differences between heterosexuals and homosexuals); David K. Flaks, \textit{Gay and Lesbian Families: Judicial Assumptions, Scientific Realities}, 3 \textit{WM. & MARY BILL RTS. J.} 345 (1994) (detailing common assumptions regarding homosexual parents and comparing these with the scientific realities which indicate that one parent’s sexual orientation does not affect their parenting ability nor present a detriment to the child).

12. Fitzgerald, \textit{supra} note 9, at 61-63; \textit{see also} Steve Susoeff, \textit{Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard}, 32 \textit{UCLA L. REV.} 852, 856-862 (1985) (discussing judicial discretion in custody determinations under the “best interest of the child” standard when gay or lesbian parents are involved); Rosenblum, \textit{supra} note, 11, at 1665.


15. The author conducted a survey of the 37 judicial districts in Montana. Responses indicate that custody disputes involving homosexual parents have been heard in at least 13 districts. Since not every district responded to this survey, the results do not speak for the whole state, nonetheless, the survey provides valuable information. Survey of Montana District Court Judges (on file with the author). Further, one parent’s homosexuality may remain an unspoken issue in child custody cases. Telephone interview with Susan Leaphart, Special Master for Family Law Proceedings, Montana's Fourth Judicial District, Missoula, Montana (Aug. 4, 1995).

16. In 1995 an estimated 600 gay and lesbian people marched through Helena in the second annual Gay Pride march and celebration. Donn Forward, \textit{Montana's}
guides our courts on the issue of gay and lesbian parents.\textsuperscript{17}

Currently, the standards Montana courts use to evaluate gay and lesbian parents are broad enough to allow for abuses of judicial discretion. In other jurisdictions that use these same custody standards, such abuses of discretion are evident.\textsuperscript{18} Although there is no appellate record of these cases in our own state, it is clear from other jurisdictions that gay and lesbian parents are particularly susceptible to such abuses of judicial discretion. Accordingly, courts in Montana must recognize the need to curtail such abuses. This paper shall demonstrate, specifically, how our courts can curb such abuse by considering a parent’s sexual orientation only when a contesting parent proves a nexus between the parent’s sexual orientation and harm to the child.

Section two of this paper details how courts in other jurisdictions use the “best interest of the child” standard and the primary caretaker preference when considering a parent’s sexual orientation in contested custody cases. Section three then discusses these custody tests as courts currently employ them in Montana.


17. Montana’s lack of reported cases is not uncommon, as most custody cases never go beyond the trial level in any state. David S. Dooley, \textit{Immoral Because They’re Bad, Bad Because They’re Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes}, 26 CAL. W. L. REV. 395, 395 (1990).

18. See infra part II.A-B for a discussion of abuses of judicial discretion in other jurisdictions using the “best interest of the child” standard. For an explanation of the abuses of discretion in a jurisdiction using the primary caretaker preference, see infra part II.C.
Section four examines one case in which a Montana district court abused the broad discretion allowed under the "best interest of the child" standard. In addition, section four details how the Montana Supreme Court implicitly required a nexus to curtail the abuse of judicial discretion that occurred in that case at the trial court level. Section five then demonstrates how the Montana Supreme Court's implicit requirement of a nexus can be applied to cases involving homosexual parents. Finally, section five also shows how this nexus requirement can be used to curb abuse of judicial discretion by providing our courts with a test to determine when courts should consider a parent's sexual orientation under the "best interest of the child" standard.

II. CHILD CUSTODY STANDARDS IN OTHER JURISDICTIONS

A. Best Interest of the Child Standard: The Requirement of a Nexus

Many legislatures adopted the "best interest of the child" standard in an attempt to move away from the "tender years" doctrine (which favored the mother) and toward a more gender neutral standard. The "best interest of the child" standard allows courts to compare the relative abilities and circumstances of parents to determine which parent is best able to care for the child. Although this standard is ostensibly more gender-neutral, feminist criticism of this standard has been unremitting.

Some feminist critics argue that the "best interest of the child" standard tends to favor the parent with greater financial security. Generally, courts using this standard will prefer the parent who can provide the more "stable" environment, defining this environment in terms of job history or economic considerations that are more apt to favor men. Ironically, critics point out, it is often the woman's commitment to the caretaking of the

20. See Fitzgerald, supra note 9, at 61-63; see infra, notes 21-27 and accompanying text.
21. MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY (1991): "[N]on-nurturing factors assume importance which often favor men. For example, men are normally in a financially better position to provide for children without the necessity of child-support transfers or the costs of starting a new job that burdens many women." Id. at 91.
22. Becker, supra note 6, at 651.
child that limits her ability to work. In addition, some suggest this standard tends to overlook the parent who bore the primary caretaking responsibilities prior to the dissolution of the relationship. One observer concludes:

[N]ot only is it unfair to mothers to award custody to fathers because the fathers have not made the investment in their children that their wives have, but it is likely to be bad for children, who are likely to do best in the continued custody of their primary caretaker.

Further, critics attack the highly discretionary nature of this standard. Some suggest that these "judgments about what is best for children are as much the result of political and social judgments about what kind of society we prefer as they are about children." A judge exemplifies this criticism when he or she allows personal beliefs regarding homosexuality to color his or her evaluation of the contesting parents. In such cases, this subjective evaluation, rather than the parent's actual abilities, may become the basis for denying the homosexual parent custody of his or her children.

_In re Marriage of Pleasant_, an Illinois case, clearly demonstrates such use of the "best interest of the child" standard: the trial court judge in that case found "[t]hat the [Mother] expresses [sic] the inability to dissociate herself with known lesbians during periods of visitation, [consequently it] is not in the best interest of the minor child [to allow for unsupervised visitation], because it would seriously endanger the child's mental and moral well being." In the trial court judge's memorandum for the court order, he included a section entitled 'HOMOSEXUALITY,' that was based on a book that was neither introduced into evidence nor even mentioned during the trial proceedings.

In contrast, the appellate court applied the "best interest of the child" standard and determined that the mother's sexual

23. Becker, _supra_ note 6, at 651.
25. _Id._ at 616.
27. _Id._ at 303; _see_ Fitzgerald, _supra_ note 9, at 61-63.
29. _In re Marriage of Pleasant_, 628 N.E.2d at 643.
30. _Id._ at 642.
orientation was not a relevant consideration for the trial court without proof that it directly harmed the child. 31 Further, the appellate court found that, although the trial court specifically referred to the "best interest of the child" throughout its opinion, the decision rested entirely upon the mother's sexual orientation. 32 The differing responses of the trial court and the appellate court evidence the wide discretion afforded to courts in jurisdictions that use the "best interest of the child" standard. Moreover, the trial court opinion indicates how this discretion can be abused. The trial court judge focused not on the mother's ability to care for her child, but on his evaluation of the mother's sexual orientation.

When the appellate court required a causal link between a parent's sexual orientation and harm to the child, it applied what others refer to as a nexus requirement or standard. 33 This requirement makes a parent's sexual orientation relevant only when there is a clear connection—or nexus—demonstrated between the parent's sexual orientation and harm to the child. 34 Thus, when courts require a nexus, a custody decision cannot be based upon a presumption of harm that is predicated upon an individual judge's belief about homosexuality. Instead, a court must consider a parent's sexual orientation only when the party alleging harm has proven that the parent's sexual orientation adversely affects the child. 35

Requiring a nexus does not preclude the "best interest of the child" standard. In fact, a nexus requirement can complement this standard. In Blew v. Verta, 36 a Pennsylvania court rescinded a prohibition on a lesbian mother's visitation, illustrating such a complementary use. In the court's opinion, it stated:

The standard "best interest of the child" requires us to consider the full panoply of a child's physical, emotional, and spiritual well-being. Of primary importance to the child's well-being is the child's full and realistic knowledge of his parents, except where it can be shown that exposure to the parents is harmful to the child.... In [this child's] case, one of life's realities is

31. Id. at 642.
32. Id.
33. LAURA BENKOV, PH.D., REINVENTING THE FAMILY, THE EMERGING STORY OF LESBIAN AND GAY PARENTS. 45 (1994); see also Dooley, supra note 17 at 395, 407-414 (discussing judicial approaches to gay and lesbian parents in contested custody cases).
34. BENKOV, supra note 33, at 45.
35. Id.
that one of his parents is homosexual. In the absence of evidence that the homosexuality in some way harms the boy, limiting [the child's] relationship with that parent fails to permit him to confront his life situation, however unconventional it may be. . . . The trial court itself concluded there was "no question that the mother and [her partner] both care for the boy, have good parenting skills and have his best interest at heart."

In this instance, the court applied the "best interest of the child" standard in conjunction with a nexus requirement. Consequently, the court evaluated only the factors relevant to each parent's ability to care and provide for their child. By so narrowing the court's evaluation, the use of a nexus requirement facilitated the court's custody decision.

Currently, other jurisdictions use a nexus requirement to curb abuses of judicial discretion. Conkel v. Conkel exemplifies such use. The opinion in that case recognizes the emergence of the nexus requirement in other jurisdictions and articulates the rationale for its use in cases involving homosexual parents. In that case, a mother appealed a trial court decision granting a bisexual father overnight visitation with his two sons. The mother feared that contact with the boys' father would trigger homosexual tendencies in the boys, that the children would contract AIDS, and that they would be subject to "the slings and arrows of a disapproving society."

Although the appellate court recognized the genuine nature of the mother's concerns, the court still considered only the parent's conduct that was proven to adversely affect the child. The appellate court stated "[w]hatever their faults, unless the married parent's conduct is harming the child, the courts will not intervene in the parent child relationship."
The appellate court then considered each of the mother's allegations and the evidence offered to support them:

1) [The mother] expresses "fear" that contact with their father will trigger homosexual tendencies in the two boys. No evidence was presented to support this contention. This court

38. See infra note 54.
41. *Id.* at 986-987.
42. *Id.* at 985.
43. *Id.* at 985-986.
takes judicial notice that there is no consensus on what causes homosexuality, but there is substantial consensus that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual.\footnote{Id. at 986 (relying on Dr. Richard Green, Professor of Psychiatry, State University of New York at Stony Brook, an expert on gender identity in children, who has said that, "[n]o theory in the developmental psychology literature suggests that having homosexual parents leads to a homosexual outcome. Rather, heterosexual parents raise pre-homosexual children."); see also Richard Green, M.D., The Best Interests of the Child with a Lesbian Mother, 10 BULL. AM. ACAD. PSYCHIATRY L. 7, at 9 (1982) (discussing in greater depth his studies of gender identity in children).}

2) The appellant mother also indicates being "petrified" that the children will contract AIDS. Certainly, an incurable terminal illness is a frightening prospect. However, no evidence was presented that the father in the case is seropositive with HIV or has AIDS or ARC. AIDS or other HIV-associated diseases are not contracted by casual household contact.\footnote{Id. at 987 (citing Gerald H. Friedland et al., Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis, 314 NEW ENG. J. MED., 344 (1986).}

3) Finally, the appellant mother argues that increased visitation will subject the children to the "slings and arrows of a disapproving society." This court fails to see why the extension of visitation would exacerbate this issue. The children will have to come to terms with the fact that their father is homosexual. In a similar case [citation omitted], a New Jersey appellate court noted that changing custody would not remove the source of stigma and potential embarrassment. The New Jersey court left the children with their homosexual parent and postulated a beneficial effect for the children, i.e., overcoming "the constraints of currently popular sentiment or prejudice."\footnote{Id. at 987.}

The Ohio appellate court also stated, "[t]his court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship."\footnote{Id. at 987.} In this statement, the court relied upon \textit{Palmore v. Sidoti},\footnote{Id. at 986 (citing M.P. v. S. P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979)).} in which the Supreme Court recognized that:

[A child might] be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin . . . [however] . . . [t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law

\section*{References}

\textbf{44.} \textit{Id.} at 986 (relying on Dr. Richard Green, Professor of Psychiatry, State University of New York at Stony Brook, an expert on gender identity in children, who has said that, "[n]o theory in the developmental psychology literature suggests that having homosexual parents leads to a homosexual outcome. Rather, heterosexual parents raise pre-homosexual children."); see also Richard Green, M.D., \textit{The Best Interests of the Child with a Lesbian Mother}, 10 BULL. AM. ACAD. PSYCHIATRY L. 7, at 9 (1982) (discussing in greater depth his studies of gender identity in children).

\textbf{45.} Conkel, 509 N.E.2d at 987 (citing Gerald H. Friedland et al., \textit{Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis}, 314 NEW ENG. J. MED., 344 (1986).)


\textbf{47.} \textit{Id.} at 987.

cannot, directly or indirectly, give them effect.\textsuperscript{49}

The appellate court also relied upon an Alaska decision\textsuperscript{50} which explicitly set out its requirement for proof of a nexus between a parent's behavior and harm to the child.\textsuperscript{51} With the support of such precedent in other jurisdictions and the evidence presented at the trial court level, the Ohio Appellate Court held that the evidence presented did not support the proposition that the trial judge abused his discretion in awarding the bisexual father overnight visitation.\textsuperscript{52} Absent proof of a nexus between the father's bisexual conduct and harm to the child, neither the trial court nor the appellate court would consider the father's bisexuality as a factor in their custody determination.\textsuperscript{53}

By requiring a nexus between a parent's sexual orientation and harm to the child, courts in these cases, and in similar cases in other jurisdictions, refuse to make custodial evaluations that are based solely upon one parent's sexual orientation.\textsuperscript{54} A nexus

\textsuperscript{49} Palmore, 466 U.S. at 433.
\textsuperscript{51} Id. at 878 ("We have often endorsed the requirement that there be nexus between the conduct of the parent relied on by the court and the parent-child relationship."). The Alaska court explained this nexus requirement as follows:

For example, that a mother is living with another man in an adulterous relationship does not justify denying her custody absent any indication of adverse affect on that child. Nor does bearing children out of wedlock or instability in relationships warrant a custody change where the parent's conduct does not adversely affect the child or the mother's parenting abilities. Even the mental health of the custodial parent is "relevant only insofar as it has or can be expected to negatively affect the child."

In marked contrast to the wealth of testimony that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely. The record contains evidence showing that the child's development to date has been excellent, that Mother has not neglected him, and that there is no increased likelihood that a male child raised by a lesbian would be homosexual. Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian.

\textit{Id.} at 879 (footnote and citations omitted).
\textsuperscript{52} Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987).
\textsuperscript{53} Id.
\textsuperscript{54} See, e.g., Teegarden v. Teegarden, 642 N.E.2d 1007, 1009 (Ind. Ct. App. 1994) (holding that "no evidence had been presented of any adverse effect upon the children of her [mother's] homosexuality," and that, "the Court does not believe the evidence, on balance, established the existence of a present adverse effect upon the children . . . ."); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (holding that minor child is "very comfortable" in his lesbian mother's home and "has not been tormented by his friends in regard to his mother's lifestyle."); Benzio v. Patenaude, 410 N.E.2d 1207, 1215 (Mass. App. Ct. 1980) (holding that the trial court finding "that a lesbian household would adversely affect the child to be without basis in the record"); M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979)
requirement, restricts the scope of judicial consideration in custody cases to behavior that adversely affects the child. When judicial consideration is so restricted, gay and lesbian parents can be assured that custody decisions will reflect the “best interest of the child” rather than a response to that parent’s sexual orientation.

B. Problems with the Nexus Requirement in Other Jurisdictions

The coupling of a nexus requirement with the “best interest of the child” standard, however, is not enough to render custody decisions immune from judicial bias. While some courts use a nexus requirement to constrain abuses of judicial discretion, other courts use a broader application that legitimizes the consideration of a wide range of information. This broad application undermines the usefulness of a nexus requirement to constrain judicial discretion. In S.E.G. v. R.A.G., the Missouri Court of Appeals, which was informed by the “best interest of the child” standard and a nexus requirement, held that a lesbian mother should not be awarded custody of her children on the basis of her sexual orientation. At the trial court level, the mother attempted to counter the allegation that she posed a threat to the children. With the help of the American Civil Liberties Union, the mother cited articles that indicated there were no significant differences between heterosexual and homosexual parents.

(holding that the lesbian mother should be awarded custody and postulating that the children 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”; M.A.B. v. R.B., 510 N.Y.S.2d 960 (1986) (holding that a nexus test should be applied, whereby “the homosexuality of a parent should only be an issue insofar as the parent’s sexual orientation can be proven to have harmed the child.”) (citing Rivera, Queer Law: Sexual Orientation Law In the Mid-Eighties, 11 U. DAYTON L. REV. 275, 330 (1986)); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (holding that the parent’s conduct must be shown to have some harmful effect on the children and that the “[p]ersonal conceptions of morality held by the members of this Court have no place in the resolution of this controversy”).

55. See supra note 54.
56. 735 S.W.2d 164, 167 (Mo. Ct. App. 1987).
57. Mo. REV. STAT. § 452.375 (1986).
58. Id. at 166; see also, Flaks, supra note 11, at 395; Herek, supra note 11, at 133; David J. Kleber et al., The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature, 14 BULL. AM. ACAD. PSYCHIATRY L. 81 (1986) (detailing current data regarding studies of children raised in homes with gay or lesbian parents); David Cramer, Gay Parents and Their Children: A Review of Re-
However, at the trial court level, this evidence was not considered credible. And, at the appellate level, the court stated:

Since it is our duty to protect the moral growth and the best interest of the minor children, we find the Wife's arguments lacking. Union, Missouri is a small, conservative community with a population of about 5,500. Homosexuality is not openly accepted or widespread. We wish to protect the child from peer pressure, teasing, and possible ostracizing they may encounter as a result of the "alternative lifestyle" their mother has chosen.

Although the appellate court recognized that the lesbian mother was a loving and caring parent and that one of the children preferred to live with his mother, the court ultimately found that the mother's conduct could "never be kept private enough to be a neutral factor in the development of a child's values and character."

In conclusion, the appellate court noted:

We are not presuming that the Wife is an uncaring mother. The environment, however, that she would choose to rear her children in is unhealthy for their growth. She has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community. The purpose of restricting visitation is to prevent extreme exposure of the situation to minor children.

Despite the supplementation of the "best interest of the child" standard with a nexus requirement, the appellate court focused solely upon the mother's sexual orientation. In this narrow focus, the court seems to have taken judicial notice of the town's characteristics and the social stigma that might follow a

search and Practical Implications, 64 J. COUNS. DEV. 504, 506 (1986) (concluding upon review of recent studies that "[t]he gay parent is a living statement of the concept of difference, and society and the legal system have not to date recognized the strengths and abilities of these mothers and fathers."); Patricia J. Falk, Lesbian Mothers, Psychosocial Assumptions in Family Law, AM. PSYCHOL., June 1989, at 941 (rebuttering the assumptions that "lesbian women are emotionally unstable or unable to assume a maternal role" and "the assumption that their children are likely to be emotionally harmed, subject to molestation, impaired in gender role development, or themselves homosexual").

59. S.E.G., 735 S.W.2d at 165.
60. Id. at 165.
61. Id. at 167.
62. Id. at 166.
63. Id. at 167.
64. S.E.G., 735 S.W.2d at 167.

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child raised by a homosexual parent in that community. Thus, the father did not meet the nexus requirement. He did not present evidence that proved that the mother's sexual orientation actually harmed their children. Instead, the appellate court presumed this harm in a three-fold process. First, the trial court found that the mother's evidence was not credible. Then, both the trial and appellate court presumed that Union, Missouri is a small and intolerant town and took judicial notice of this "fact." Finally, the trial court denied the mother custody because of this "fact." Similarly, this "fact" controlled the appellate court's review of that decision.

A similar presumption of harm is evident in *T.C.H. v. K.M.H.*65, from the same court, two years later. In that case, the appellate court held:

The parties have not referred us to any case which holds that a homosexual parent is per se unfit to have custody of minor children. Nor has our research disclosed any. Rather, the rule appears to be that "[t]here must be a nexus between harm to the child and the parent's homosexuality." Here the trial court found "that the relationship is having an ill-effect on the morality of the children and will continue to effect their well being in the future."66

The court in *T.C.H.*, as in *S.E.G.*, presumed harm to the child through a similar three step process. First the trial court found that the mother's evidence that she presented no threat to her children was not credible.67 Further, the court gave no credence to the children's' desire to continue living with their mother68 and gave little consideration to the findings of psychologists and social workers who testified that the mother would be the better custodian.69 Then, the trial court presumed that "a parent's homosexuality can never be kept private enough to be a neutral factor in the development of a child's values and character,"70 and took judicial notice of this "fact." Finally, the trial court relied upon this "fact" in making its custody decision. Similarly, the appellate court relied upon this "fact" when it affirmed the trial court's decision.

65. 784 S.W.2d 281, 284 (Mo. Ct. App. 1989).
66. *T.C.H.*, S.W.2d at 284 (citing *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987)).
67. *Id.*
68. *Id.*
69. *Id.* at 285.
70. *Id.* (quoting *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987)).
In both of these cases, the court used presumptions rather than proven facts to satisfy a nexus requirement. This use of presumptions instead of proof indicates that just as the “best interest of the child” standard can be subject to abuses of judicial discretion, a nexus requirement can be similarly abused. To use a nexus requirement effectively, courts must be aware of the type of evidence presented, distinguishing between facts proven by evidence and facts that are presumed. This heightened awareness extends to judicial notice, forcing courts to reconsider whether such notice is predicated upon bias or presumptions. When misconceptions regarding homosexuality and homosexual parents abound, it is critical that courts using a nexus requirement do not defeat it by accepting faulty presumptions instead of facts proven by the evidence presented.

The Supreme Court, in *Palmore v. Sidoti*, indicated that such presumptions have no place in our courtrooms. In that case, a Caucasian woman married a African-American man and the woman’s ex-husband, the father of the child, sought to modify custody in light of these changed conditions. The trial court found that both parents were similar in “devotion to the child, [the] adequacy of housing facilities, [and the] respectability of the new spouse of either parent.”

However, the trial court disregarded the evidence of the mother’s parenting ability and seems to have taken judicial notice of the presumed “fact” that society would react negatively to a child raised in an inter-racial home. This “fact” then became the controlling factor in the custody decision. Consequently, the trial court held that it was in the “best interest of the child” to award custody to the father, sparing the child the social stigmatization that would come from the mother’s inter-racial marriage.

Upon appeal, the Supreme Court recognized the racism that exists in our country, stating:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living

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71. See *supra* note 11 and accompanying text.
73. *Palmore*, 466 U.S. at 430.
74. *Id.*
75. *Id.* at 431.
with parents of the same racial or ethnic origin.\textsuperscript{76}

Further, the Court recognized the trial court "was entirely candid and made no effort to place its holding on any other ground than race."\textsuperscript{77}

In contrast, the Supreme Court refused to consider the presumed "fact" of hostility toward inter-racial marriages as a controlling factor in a custody decision. The Court held that "the reality of private biases and the possible injury they might inflict [are not] permissible considerations for removal of an infant child from the custody of its mother."\textsuperscript{78} Further, the Court stated that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\textsuperscript{79} Thus, according to the Supreme Court in \textit{Palmore}, when the trial court presumed that a child in an inter-racial home might be subject to hostility and took judicial notice of this "fact," the trial court gave legal effect to private biases.

To ensure that courts do not give effect to private racial biases, the Supreme Court in \textit{Palmore} excluded "private biases and the possible injury they might inflict"\textsuperscript{80} from judicial consideration. If courts are to heed \textit{Palmore}, they can no longer presume that the private biases which exist in a larger society will result in harm to children. Moreover, courts can neither take judicial notice of these "facts" nor allow these presumed "facts" to control custody decision. To follow the Supreme Court decision in \textit{Palmore}, the scope of judicial consideration must be restricted to a parent's behavior as it directly affects his or her children.

This same narrow scope of consideration is evident in both the Alaska and Ohio decisions in which similar allegations of societal disapproval were raised.\textsuperscript{81} In both cases, the courts considered only the effect of the parent's sexual orientation upon the child. Moreover, in both cases courts applied the "best interest of the child" standard in conjunction with a nexus requirement. By supplementing the "best interest of the child" standard with a nexus requirement, the courts in Ohio and Alaska narrowly focused judicial consideration and evaluated only the parents' behaviors as they affected their children.

\textsuperscript{76} \textit{Id.} at 432.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Palmore}, 466 U.S. at 433.
\textsuperscript{79} \textit{Id.} at 433.
\textsuperscript{80} \textit{Id.} at 432.
\textsuperscript{81} See \textit{supra} notes 39-53 and accompanying text.
In contrast, broadening a nexus requirement, as in *S.E.G.* and *T.C.H.*, to accommodate presumptions of the private biases that might reside in any given community undermines the nexus requirement and detracts from its ability to contain abuses of judicial discretion. Further, such a wide application of a nexus requirement allows courts to “give effect” to the very “private biases” the Supreme Court in *Palmore* prohibited.82

**C. The Primary Caretaker Preference**

Given the sharp criticism of the “best interest of the child” standard, some states are moving toward a “primary caretaker preference.”83 This preference allows courts to acknowledge the role of the primary caretaker prior to the dissolution of the relationship and favors this “primary” parent in custody determinations.84 Thus, parental involvement with the child, rather than financial security, serves as the basis for custody.85 By grounding this preference in specific criteria, the legislatures adopting this preference also attempt to contain the discretion found in the “best interest of the child” standard.86 However,

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82. 466 U.S. 429, 433 (1984). As in *S.E.G.*, some argue that these private biases create a climate of fear which no child should grow up in. However, recent studies indicate that this fear of harm, though very real, is often exaggerated in the day to day life of children of homosexual parents. See David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUN. & DEV. 504, 505 (1986) for a discussion of recent findings which show that only 3 out of 27 children of lesbian mothers recalled being teased by peers regarding their mother’s sexuality. Conversely, he points out some studies have shown that at adolescence children can become more sensitive to peer comments and 79% of children from gay parents received negative messages from their peers about their parent’s sexuality; see also, Susoeff, *supra* note 12, at 877-878 (discussing the seriousness of anti-gay prejudice and stating that intense anti-gay prejudice can justify denial of custody in individual cases where children have actually suffered harassment and choose not to live with a gay or lesbian parent; he also indicates that limited research shows that only 5% of children who live with openly gay or lesbian parents have been harassed by other children, concluding that recognizing the problem of anti-gay harassment does not mean that custody should be routinely denied without evidence of actual harm).


84. Scott, *supra* note 24, at 617.

85. See, e.g., David M., 385 S.E.2d at 912.

86. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). The criteria to determine which parent has been the primary caretaker is listed as follows: 1) preparing and planning of meals; 2) bathing, grooming and dressing; 3) purchasing, cleaning and care of clothes; 4) medical care, including nursing and trips to physicians; 5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; 6) arranging alternative care, i.e., babysitting, day-care; 7)
just as the necessary discretion in the "best interest of the child" standard can be abused, the primary caretaker preference can fall prey to similar improper uses.

In jurisdictions that use the primary caretaker preference standard, courts ask two questions: 1) which parent was the primary caretaker; and 2) whether this parent is fit.\textsuperscript{87} Unlike the first question of this standard which is strictly enumerated and qualified,\textsuperscript{88} the second question offers one highly discretionary factor: a parent’s fitness. In West Virginia, a parent’s fitness is measured by the following test:

To be a fit parent, a person must: 1) feed and clothe the child appropriately; 2) adequately supervise the child and protect him or her from harm; 3) provide habitable housing; 4) avoid extreme discipline, child abuse and other similar vices; and 5) refrain from immoral behavior under circumstances that would affect the child.\textsuperscript{89}

In \textit{David M. v. Margaret M.}, the West Virginia Supreme Court of Appeals detailed the historic abuse of judicial discretion that has plagued this standard:

\begin{quote}
Although the primary caretaker rule as described [sic] appears to have been followed, the primary caretaker was denied custody through a broad interpretation of the fitness requirement. We have noted that our very narrow exception to the primary caretaker rule has of late developed a voracious appetite which, if left unchecked, will allow it to eat the rule. We write today to reaffirm and clarify the benefits of the primary caretaker parent rule to assist the family law masters and the circuit courts . . . .\textsuperscript{90}
\end{quote}

\begin{quote}
putting child to bed at night, attending to child in the middle of the night, waking child in the morning; 8) disciplining, i.e., teaching general manners and toilet training; 9) educating, i.e., religious, cultural, social, etc. and, 10) teaching elementary skills, i.e., reading, writing and arithmetic.
\end{quote}

\textit{Garska}, 278 S.E.2d at 363.


\textsuperscript{88} See supra note 86 for a complete list of the enumerated factors used in the primary caretaker preference.

\textsuperscript{89} \textit{David M.}, 385 S.E.2d at 924.

\textsuperscript{90} Id. at 914-915. The court in \textit{David M.} cites the following lower court decisions that applied a broad interpretation of the fitness requirement:

\begin{quote}
Issacs v. Issacs, 358 S.E.2d 833 (W. Va. 1987) (holding that custody should not be determined on apparent sexual misconduct); M.S.P. v. P.E.P., 258 S.E.2d 442 (W. Va. 1987) (finding that a lower court should place children with the non-caretaker parent as the primary residence in a joint custody
\end{quote}
Clearly, the second factor of West Virginia's primary caretaker preference was not exempt from abuse of judicial discretion despite the legislature's best intentions. In response, the court used the case of David M. to reaffirm the enumerated factors that define parental fitness. The court facilitated this reaffirmation by supplementing the primary caretaker preference with a nexus requirement.

In David M., the court found the mother to be the primary caretaker because she was more responsible for the child's daily necessities. However, the lower court found that the mother's sexual misconduct rendered her unfit to raise the child and awarded the father custody even though he was not the primary caretaker of the child. The West Virginia Supreme Court of Appeals reversed this decision, restricting the lower court's consideration of parental behavior to the acts proven to have an adverse affect upon the child. Thus, the appellate court required proof of a nexus between the mother's sexual misconduct and its effect upon the child. Absent such proof, the appellate court held that the lower court abused its discretion by finding that the mother was an unfit parent.

David M. demonstrates how abuses of judicial discretion can distort the strictest of preferences. Even when the factors were specifically enumerated and listed, both qualitatively and quantitatively, the question of parental fitness still allowed for abuses of judicial discretion. Thus, the primary caretaker preference, like the "best interest of the child" standard, offers no guarantee that custody decisions will be free from abuses of judicial discretion. However, the primary caretaker preference can, like the decision of the moral atmosphere at the caretaker's home); Bickler v. Bickler, 344 S.E.2d 630 (W. Va. 1986) (deciding that parental unfitness may not be based solely upon the fact that one parent is guilty of sexual misconduct); Stacy v. Stacy, 332 S.E.2d 260 (W. Va. 1985) (holding that adultery, without adverse affects upon the children is insufficient to prove parental unfitness); Rowsey v. Rowsey, 329 S.E.2d 57 (W. Va. 1985) (finding that the mother's friendship with a lesbian woman does not merit a change in custody); Mormanis v. Mormanis, 296 S.E.2d 680 (W. Va. 1982) (holding that "marijuana... smoked in a car in which the [mother] was at one point present [without evidence] that the child was in the car at the time is insufficient evidence of parental unfitness").

David M., 385 S.E.2d at 915.
91. Id. at 927.
92. Id. at 914.
93. Id. at 927.
94. Id.
"best interest of the child standard, be supplemented by requiring a nexus between the parent's behavior and its effect upon the child. Such supplementation can restrict a court's consideration solely to the parent's behaviors that are proven to have an adverse effect upon the child.

III. CUSTODY STANDARDS IN MONTANA

A. The Best Interest of The Child Standard in Montana

Custody decisions in Montana are made according to the "best interest of the child" standard, which reads:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors, including but not limited to:

(a) the wishes of the child's parent or parents as to custody;
(b) the wishes of the child as to a custodian;
(c) the interaction and interrelationship of the child with the child's parent or parents and siblings and any other person who may significantly affect the child's best interest;
(d) the child's adjustment to home, school, and community;
(e) the mental and physical health of all individuals involved;
(f) physical abuse or threat of physical abuse by one parent against the other parent or the child; and
(g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent.  

The statutory language, "including but not limited to," does not bind the court strictly to these factors. Moreover, the statute neither requires one factor to be weighed more heavily than another, nor does it require specific findings for each statutory element listed. Instead, the "best interest of the child" statute relies upon judicial discretion. For gay and lesbian parents, this can be devastating. In other jurisdictions, judges have abused their discretion under this standard when gay and lesbian parents have come before the court. As there is no definitive precedent from our state supreme court detailing the application of this standard to gay and lesbian parents, the author conducted a survey to determine how these cases are heard.

97. See supra part II.A-B; see also supra, note 2 and accompanying text.
98. See supra note 15 for an explanation regarding the author's survey.
In light of our state’s anti-homosexual law (which a district court has just found unconstitutional under the right to privacy afforded by Article II, Section 10 of the Montana Constitution), the survey questioned first whether an allegation of homosexuality might be sufficient to warrant a per se ruling of parental unfitness. The survey indicated that judges are not making per se decisions. Clearly, such a finding does not preclude the possibility that such rulings are made and will be made in the future. However, this finding does suggest that in the majority of Montana’s district courts the illegal status of homosexuals is not presently considered in custody decisions. This suggestion is supported by the absence of the “Deviate Sexual Conduct” statute from the enumerated criminal convictions that can affect custody modification or visitation. Instead, our courts seem to consider a parent’s sexual orientation as one of many factors taken into account under the “best interest of the child” standard.

On its face, consideration of a parent’s sexual orientation as one of many factors seems appropriate. However, it is difficult to determine if a parent’s sexual orientation is viewed as a positive, negative or neutral factor in the final custody decree. When a judge may have reservations about homosexual parents raising children, he or she may not make a per se ruling of parental unfitness; yet this reservation may color the custody decision. If a judge has such reservations, he or she clearly will not perceive the placement of a child with a gay or lesbian parent to be in the “best interest of the child.” However, a judge may be just as

99. MONT. CODE ANN. § 45-5-505 (1995) (describing the crime of deviate sexual conduct). At the district court level, this statute has been declared unconstitutional based upon the right to privacy afforded under Article II, Section 10 in the Montana Constitution. Further, although the plaintiffs asked for no remedy, the court ordered a permanent injunction against prosecution under the statute. Gryczan v. State, No. BVD-93-1869 (Lewis & Clark County, Feb. 16, 1996).

100. 26 of 37 courts responding to the judicial survey indicate that homosexuality is not considered a per se showing of parental unfitness. Survey of Montana District Court Judges (on file with the author). However, this survey does not reflect the reality in every judicial district in the state. Without a complete response to the survey, no such statement can be made, nor is suggested. However, the survey is useful for the result that can be deduced from responding districts. For a complete discussion of the author’s survey, please see supra note 15.


likely to decide that no such threat of harm exists, and accordingly, he or she may not consider a parent's sexual orientation in his or her custody decision.

Because Montana has no precedent on the issue of how our courts should consider a parent's sexual orientation, parents may be treated differently in different venues. This reality is illustrated in survey responses where one court ignores a parent's sexual orientation while another court restricts visitation to periods in which a homosexual parent's partner is not present. There is no consensus on how our courts are and should be considering the issue of one parent's sexual orientation in contested custody cases. When courts in other jurisdictions have abused judicial discretion under the same custody standards, Montana courts should take action to ensure that the same abuse does not occur here.

B. The Primary Caretaker Equivalent in Montana: The Psychological Parent

Although Montana currently employs the "best interest of the child" standard, our state may consider adopting another standard in child custody decisions in light of criticism and the broad discretion required under our current standard. Just as other jurisdictions are considering the primary caretaker preference, Montana courts may be moving toward such a consideration. Already, under subsection (c) of the "best interest of the child" statute, Montana courts are authorized to consider the child's primary relationships.

Therefore, it is not surprising to find that the Montana Supreme Court considers both the amount of child care provided and the amount of responsibility taken by parents. In re Marriage of Nash illustrates such a consideration as the court granted sole custody to the child's mother on the basis that "she

105. Survey of Montana District Court Judges (on file with the author); see supra note 15 for an explanation of the author's survey.
106. See discussion supra parts II.A, II.B.
107. See supra notes 21-27 and accompanying text.
109. MONT. CODE ANN. § 40-4-212(3)(a) (1995) (creating a rebuttable presumption that "[c]ustody should be granted to the parent who has provided most of the primary care during the child's life.").
is the child's psychological parent and has provided for the child's physical needs, environmental stimuli, emotional needs, and moral development, as well as interaction with [the father's] family and home community."111 The court, in that decision, held that it was in the child's best interest to be placed in the home of the primary caretaker.112

Similarly, in *In re Marriage of Burleigh*113 the Montana Supreme Court affirmed a custody award of two minor children to the mother based upon evidence that she was the primary person involved in their care and schooling.114 Both parents in this case were considered "fit and proper."115 However, the court weighed heavily the mother's status as the primary parent "involved in the care, education and rearing of the children since their birth."116 As in *Nash*, the court in *Burleigh* considered the child's psychological parent or primary caretaker as a relevant factor within the "best interest of the child" standard.

The Montana Supreme Court endorsed similar recognition of alternative custody arrangements in *In re Marriage of K.E.V.*117 In that case, the court recognized a non-biological father as the presumed father of a child under the principle of equitable estoppel.118 Further, the court explicitly recognized the increase in the numbers of families that do not reflect the traditional family.119 The court also suggested that principles of "equitable estoppel, equitable parentage, in loco parentis, de facto parent and psychological parent" are appropriate to accommodate the changes within our families.120 These principles recognize the strength of the bond established over time between a caretaker and a child. Moreover, these cases indicate that our courts already consider the roles both parents play in the day-to-day life

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111. *Nash*, 254 Mont. at 234, 836 P.2d at 600.
112. *Id.* at 234, 836 P.2d at 600.
113. 200 Mont. 1, 650 P.2d 753 (1982).
114. *Burleigh*, 200 Mont. at 5-6, 650 P.2d at 755.
115. *Id.*
116. *Id.* at 6, 650 P.2d at 755.
119. *Id.* at 330, 883 P.2d at 1251.
120. *Id.;* for a discussion of these principles in the context of parenthood in non-traditional families, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother Families and Other Nontraditional Families*, 78 GEO. L.J. 459 (discussing not only the current legal status of parenthood, but the new theories available to establish parenthood, such as equitable estoppel, *in loco parentis, de facto* parents and psychological parents).
of the child. Given that the primary caretaker is already considered in our courts and the "best interest of the child" standard is so roundly criticized, it is not unforeseeable that Montana may move toward greater emphasis on the primary caretaker preference.

By carefully enumerating the factors a court is to consider, a primary caretaker preference could seemingly restrict abuses of judicial discretion. And yet, David M. details how even a carefully enumerated primary caretaker preference can be undermined by abuses of judicial discretion.¹²¹ For gay and lesbian parents, such abuses can mean losing custody of their children. However, these losses can be avoided and the these abuses of judicial discretion can be contained. If Montana courts follow the David M.¹²² decision and use a nexus requirement in conjunction with a primary caretaker preference, the broad scope of judicial consideration that allows for such loss can be restricted.

Instead of broad authority to consider the fitness of a gay or lesbian parent, courts using a nexus requirement in conjunction with a primary caretaker preference will consider only those behaviors that adversely affect the child. Thus, a parent's sexual orientation will be beyond the scope of judicial consideration unless it is demonstrated to adversely affect the child. Absent such a demonstration, Montana courts will focus solely upon that parent's involvement in his or her child's daily life. If Montana does move to a primary caretaker preference, only a preference applied in this way will ensure that gay and lesbian parents are not the victims of prejudicial abuses of judicial discretion.¹²³

IV. THE MONTANA SUPREME COURT IMPLICITLY REQUIRES A NEXUS

A. In re Marriage of D.F.D.

Though there is no precedent directly on point, In re Marriage of D.F.D.¹²⁴ suggests that the Montana Supreme Court implicitly required a nexus between a parent's behavior and harm to a child. In that case, after the father and mother separated, the father filed for temporary custody of their son.¹²⁵ The

¹²¹. David M., 385 S.E. at 927.
¹²². Id. at 927-28; see supra notes 89-94 and accompanying text.
¹²³. When parents fall into non-traditional categories, they are more likely to face adversity in the courts. See supra notes 11-12 and accompanying text.
¹²⁵. D.F.D., 261 Mont. at 188, 862 P.2d at 369.
mother responded with a similar motion, and offered no affidavit or other evidence in support of her motion other than the allegation that her husband had, in the past, cross-dressed or worn women's undergarments.\footnote{Id. at 188, 862 P.2d at 329.}

The mother alleged that the father's conduct was a form of sexual deviation which would be harmful to the couple’s son, were he exposed to it.\footnote{Id. at 196, 862 P.2d at 374.} The district court judge in that case acknowledged his “difficulty with the issue, largely out of ignorance, because he did not understand transvestism.”\footnote{Id. at 193, 862 P.2d at 372.} Further, the judge said he “would have to rely on experts . . . and that as soon as he saw some expert opinion telling him he had no reason to be concerned, he would have no reason to disbelieve that expert.”\footnote{D.F.D., 261 Mont. at 192-93, 862 P.2d at 371-72.}

One expert, a psychologist, testified on the father’s behalf after conducting a series of psychological tests and a parenting evaluation.\footnote{Id. at 193-94, 862 P.2d at 372-3.} His results corroborated the findings of a second expert, a psychologist and professor of psychiatry and behavioral sciences at the University of Washington Medical School who specialized in sexual disorders.\footnote{Id.} Nothing in the father’s psychological test results indicated that his cross-dressing affected his effectiveness as a parent or his ability to act as a role model to his son.\footnote{Id. at 193-94, 862 P.2d at 372-3.} In addition, a third expert, Dr. Richard Green, a psychiatrist from U.C.L.A. Medical School who had done extensive studies on the impact of parental sex roles on children,\footnote{See, e.g., Richard Green, M.D., Best Interest of The Child with a Lesbian Mothers, 10 BULL. AM. ACAD. PSYCHIATRY L. 7 (1982); Richard Green, M.D., Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, AM. J. PSYCHIATRY, June 6, 1978 at 692.} contributed the following findings: “[T]here was no evidence that transvestism by a father affects parenting qualities, nor was there any evidence that fathers who cross-dress are inclined to sexually abuse children, any more than any other adult male.”\footnote{D.F.D., 261 Mont. at 196, 862 P.2d at 371-72.} Further, Dr. Green pointed out that in his study of children with sexually atypical parents, he has found no evidence of sexual identity conflicts.\footnote{Id.} Finally, the opinion states that the father felt not only ashamed of his behavior, but also assured

\begin{footnotes}
126. \textit{Id. at 188, 862 P.2d at 329.}
127. \textit{Id.}
128. \textit{Id. at 196, 862 P.2d at 374.}
129. \textit{Id. at 193, 862 P.2d at 372.}
130. \textit{D.F.D., 261 Mont. at 192-93, 862 P.2d at 371-72.}
131. \textit{Id. at 193-94, 862 P.2d at 372-3.}
132. \textit{Id.}
133. \textit{See, e.g., Richard Green, M.D., Best Interest of The Child with a Lesbian Mothers, 10 BULL. AM. ACAD. PSYCHIATRY L. 7 (1982); Richard Green, M.D., Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, AM. J. PSYCHIATRY, June 6, 1978 at 692.}
134. \textit{D.F.D., 261 Mont. at 196, 862 P.2d at 374.}
135. \textit{Id.}
\end{footnotes}
the court that his cross-dressing would never be repeated.\footnote{136} The experts buttressed this assurance, testifying that they thought it unlikely that the father would ever cross-dress again.\footnote{137}

Despite this promise and the evidence presented which stated that such behavior presented no risk to the child, the district court found that the father was an admitted transvestite who might expose the parties’ son to such role modeling and cause irreparable harm.\footnote{138} Further, the district court found that “the child’s mental health is potentially at risk and that the child faced irreparable sexual misidentification if he saw his father cross-dress.” \footnote{139} Accordingly, the district court awarded sole custody to the mother and allowed the father visitation so long as it was supervised by either the mother or an adult “non-transvestite member” of the father’s family.\footnote{140}

The Montana Supreme Court found no credible evidence to support the district court’s finding which denied joint custody.\footnote{141} In fact, the court concluded:

\begin{quote}
[T]he custody and visitation arrangement ordered by the District Court was contrary to the child’s best interest and there was no evidence, other than the District Court’s unfounded fears, to deny joint custody. . . . The husband’s counselor, whose testimony was undisputed, expressed the unequivocal opinion that this man would not cross-dress in the future, that even if he did, it would be a very private matter as it had been in the past, and that there was no risk of observation by his son. However, even assuming that, contrary to the counselor’s expectation, the husband did cross-dress, and further assuming, contrary to all prior behavior, his cross-dressing was observed by his son, every counselor who testified in this case testified that the negative impact on the son would be less than the impact from not having a normal relationship with his father.\footnote{142}
\end{quote}

The unequivocal nature of this decision clearly indicates that the Montana Supreme Court will not look favorably upon district courts that rely upon any unfounded fears that may be brought into the courtroom.

\footnotesize{
\begin{itemize}
\item 136. \textit{Id.} at 195, 862 P.2d at 374.
\item 137. \textit{Id.} at 261 Mont. at 200, 862 P.2d at 376.
\item 138. \textit{Id.} at 198, 862 P.2d at 375.
\item 139. \textit{D.F.D.}, 261 Mont. at 198, 862 P.2d at 375.
\item 140. \textit{Id.} at 190, 862 P.2d at 370-71.
\item 141. \textit{Id.} at 191, 862 P.2d at 371.
\item 142. \textit{Id.} at 199-200, 862 P.2d at 376 (emphasis added).
\end{itemize}
}
B. *In re Marriage of D.F.D. as Precedent*

The opinion of the Montana Supreme Court differs sharply from that of the district court in *In re Marriage of D.F.D.* This difference demonstrates the wide discretion available under the "best interest of the child" standard. With this discretion, the district court disregarded the testimony and reports of the three experts involved in the proceedings. Moreover, the district court presumed that the father would continue cross dressing and that this behavior would adversely affect the child. The district court took judicial notice of this presumed "fact" despite the expert testimony presented. Further, this "fact" once recognized by the court, became the controlling factor of the custody decision. Thus, this Montana district court relied upon a similar three step process as used in the appellate courts in *S.E.G.* and *T.C.H.* where lesbian mothers were denied custody of their children.

In contrast, the Montana Supreme Court decision was not controlled by any such presumed "facts." Instead, the court restricted the scope of judicial consideration to the parent's behavior as it directly affected his child. To reach this conclusion, the court relied not upon their private biases, but upon the expertise of psychologists, doctors and researchers. Accordingly, the decision in *In re the Marriage of D.F.D.* does not give legal effect to any private biases but reflects one parent's ability to care for his child.

In *In re Marriage of D.F.D.*, the Montana Supreme Court clearly articulated its view that "unfounded fears" have no place in custody determinations. The court recognized this, in part, by acknowledging the damage that can be done to children's lives if such considerations are allowed into the courtroom and into custody decisions. Further, in that decision, the court implicitly provided a way of limiting future abuses of judicial discretion.

In *In re Marriage of D.F.D.*, the Montana Supreme Court looked to the trial court record for a connection between the father's cross-dressing and the harm this behavior allegedly

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143. 735 S.W.2d 164 (Mo. Ct. App. 1987); see notes 55-70 and accompanying text.
144. 784 S.W.2d 281 (Mo. Ct. App. 1989).
146. *Id.* (noting the damage done to the child by such rigid restrictions upon his relationship with his father).
caused the child. In doing so, the court implicitly required a nexus between a parent’s behavior and harm to the child. Upon consideration of the evidence presented, the court found no such nexus between the father’s cross-dressing and its purported effect upon the child. Instead, there remained simply the mother’s allegations. Without support, the supreme court held that these allegations were insufficient to establish a nexus.

The decision in *In re Marriage of D.F.D.* requires that there be a nexus between a parent’s behavior and harm to the child if the behavior is to be considered under the “best interest of the child” standard. Further, this decision demonstrates that mere presumptions will not suffice to establish a nexus. The court in *In re Marriage of D.F.D.* used a nexus requirement to narrow the scope of judicial consideration and limit abuses of judicial discretion. This decision is analogous to decisions in other jurisdictions where the unfounded presumptions of lower courts are exposed at the appellate level. 147 As in these other jurisdictions, our supreme court in *In re Marriage of D.F.D.* unequivocally stated that such abuses of judicial discretion will not be tolerated in Montana.

V. SUGGESTION

A. Requiring a Nexus Between a Parent’s Sexual Orientation and Harm to the Child

In *In re Marriage of D.F.D.*, the Montana Supreme Court required a nexus between a parent’s behavior and harm to the child. This decision reflects how our courts should consider custody cases involving homosexual parents. In contrast, the trial court decision demonstrates the risk to homosexual parents if Montana courts do not require a nexus if similar allegations of harm are raised. The father’s cross-dressing caused the trial court to question, to disregard expert testimony, and to rely upon its own presumptions of harm. Further, the trial court took judicial notice of this presumed harm and found that the child’s “mental health was potentially at risk and that the child faced irreparable sexual misidentification . . . .” 148

Similar concerns are raised about homosexual parents and the effect their sexual orientation might have upon their chil-

147. *See supra* note 54 and accompanying text.
dren. Just as the father deviated from what is considered characteristic of a father, gay and lesbian parents deviate from the notions of who men and women should traditionally love. This difference, as seen in other jurisdictions, may cause courts to question, to disregard expert testimony or credible evidence, and to presume that this difference will cause harm to the child. If a court takes judicial notice of such a presumption, it can control a custody decision and preclude a court awarding custody to a gay or lesbian parent.

Presumptions regarding gay and lesbian parents can prompt courts to abuse the broad judicial discretion afforded under the “best interest of the child” standard. In In re Marriage of D.F.D., our state supreme court recognized that decisions based upon such presumptions have no place in our custody decisions. Thus, when homosexual parents, by the nature of their difference, may prompt such unwarranted presumptions, our courts must take action.

B. Practicality: Using a Nexus Requirement

The decision in In re Marriage of D.F.D. provides a test for courts when one parent alleges that another parent’s sexual orientation threatens or harms the child. In In re Marriage of D.F.D., the court evaluated the credibility and sufficiency of the evidence offered to support the allegation that the father’s behavior adversely affected the son. Ultimately, the Montana Supreme Court concluded that the evidence was insufficient to establish a nexus between the father’s behavior and harm to the child. Absent credible and sufficient evidence to establish a nexus between the alleged harm and the father’s behavior, the court found that the trial court abused its discretion.

By following the In re Marriage of D.F.D. decision, courts are provided with a pattern of inquiry if similar allegations arise involving a parent’s sexual orientation:

1) If a party in a contested custody case alleges that a parent’s sexual orientation causes harm to the child, the court must consider:
   a) the credibility of the evidence presented,
b) and the sufficiency of the evidence to establish a nexus between a parent's sexual orientation and direct harm to the child.

2) If the evidence is credible and sufficient to establish a nexus between a parent's sexual orientation and direct harm to the child, then a court is within its discretion to consider a parent's sexual orientation under the "best interest of the child" standard as one of the relevant factors in the custody decision.¹⁵⁴

Thus, if one parent in a contested custody case alleges that a parent's sexual orientation threatens or harms a child, a court using this test will first consider the credibility of the evidence presented. This requires a court to consider whether the evidence presented is a mere presumption or a substantiated fact.¹⁵⁵ The court in *In re Marriage of D.F.D.* is instructive on this point, relying upon the expert testimony of three specialists.¹⁵⁶ Further, the Supreme Court in *Palmore* reminds Montana courts that although there may be credible evidence of substantial bias or intolerance, courts cannot take judicial notice of presumptions that such intolerance will result in harm to the child. To ensure that Montana courts do not give legal effect to private biases,¹⁵⁷ Montana courts cannot allow such presumptions of "fact" to control custody decisions. Therefore, to satisfy the first prong of the test, the evidence presented to support the allegation of harm must be demonstrably credible and must indicate more than mere bias or intolerance.

If the evidence presented does not meet this criteria, then the court shall not consider the parent's sexual orientation as a relevant factor in the custody decision. Any consideration of the parent's sexual orientation in the absence of credible evidence constitutes an abuse of judicial discretion. However, if the evidence is credible and indicates more than mere prejudice or bias, the court is then obligated to consider whether the evidence is

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¹⁵⁴. *MONT. CODE ANN.* § 40-4-212 (1995) (detailing all of the factors courts are to consider under the "best interest of the child" standard).

¹⁵⁵. *See S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987) (relying upon a presumption that the gay parent presented a threat to her child).

¹⁵⁶. *D.F.D.*, 261 Mont. 182, 862 P.2d 368 (1993) (relying upon scientific evidence, studies and reports to determine that a father who cross-dressed presented no threat to his son).

CUSTODY & HOMOSEXUAL PARENTS

sufficient to prove a nexus between the parent’s sexual orientation and alleged harm to the child.

To meet the sufficiency requirement, the evidence presented must not only be credible, but must also demonstrate that the parent’s sexual orientation directly causes harm to the child. Essentially, this requires that the party alleging harm prove, by the credible evidence presented, that a nexus exists. *In re Marriage of D.F.D.*, the Montana Supreme Court considered expert testimony to determine whether a nexus existed between the father’s behavior and the alleged harm to the child. For each allegation raised, the court considered the credibility of the evidence and whether it could sufficiently establish a nexus between the alleged harm and the father’s behavior.

Similarly, any court using this proposed test will require proof of a nexus for each allegation raised. Each side will offer evidence to support or refute the allegation; further, like in *In re Marriage of D.F.D.*, the court will weigh the credibility and sufficiency of the evidence to determine if a nexus exists. If the evidence is not sufficient to prove a direct nexus between a parent’s sexual orientation and the alleged harm, the court will not consider a parent’s sexual orientation as a relevant factor in the custody decision.

However, if the evidence presented is both credible and sufficient to prove a direct nexus between a parent’s sexual orientation and the alleged harm to the child, then a court will be within its proper discretion to consider a parent’s sexual orientation as a relevant factor in its custody decision. This authorization does not empower a court to construe one parent’s sexual orientation as the sole determining factor in a custody decision. A court must consider any harm proven to be the direct result of a parent’s sexual orientation as one of the many relevant factors a court is authorized to consider within the “best interest of the child” standard. Obviously, if the harm is grave, it could be the decisive factor, but its presence alone does not preclude the possibility that this parent could still be awarded custody. This test, when applied as discussed, purports to ensure that one parent’s sexual orientation will not disadvantage that parent, unless, by credible and sufficient evidence this parent’s sexual orientation is shown to be the cause of the alleged harm.

158. However, such a finding is unlikely given studies that consistently show that children raised by homosexual parents are not adversely affected by that parent’s sexual orientation. See supra note 11 and 58.

159. See supra part III.A for a complete discussion of all of the relevant factors considered under the “best interest of the child” standard.
Gay and lesbian parents are our neighbors, our friends and our co-workers in Montana. And these parents are in our courtrooms, struggling for custody of their children. Their struggle may be made easier by the recent district court decision in *Gryczan v. State* which declared the "Deviate Sexual Conduct" statute unconstitutional under the right to privacy afforded by Article II, Section 10 of the Montana Constitution. Although this decision may affect the way some courts view gay and lesbian parents, Montana courts will still determine custody under the "best interest of the child" standard. As demonstrated by case law in our own state and that of other jurisdictions using this same standard, the "best interest of the child" standard offers gay and lesbian parents no security from abuses of judicial discretion. In light of the criticism this standard has received, a primary caretaker preference might seem a reasonable alternative. However, not even this standard, with its careful enumerations, is immune from abuses of judicial discretion. Neither standard offers gay and lesbian parents any assurance that they will be judged on their ability to parent rather than their sexual orientation.

The Montana Supreme Court recognized the devastating effect abuses of judicial discretion can have upon the lives of children of sexual minorities. Accordingly, our state supreme court urges Montana's lower courts to move beyond their "unfounded fears" and toward decisions that accurately determine which parent is best able to care for his or her children. To heed our state supreme court, Montana courts must require a nexus between a parent's sexual orientation and harm to the child before they may consider a parent's sexual orientation as a relevant factor in a custody decision.

Such a requirement might have assured my grandmother that a court would consider her care and concern for her children. Such a requirement can offer this assurance now. For my grandmother, for every lesbian and gay parent who has followed, and for every child, our courts must finally answer the question my grandmother's life presented more than forty-four years ago. To respect her life and parenting, our courts must firmly refuse...
to consider a parent's sexual orientation in the absence of a proven nexus. Only such a definitive answer to the question my grandmother's life presented will assure that custody decisions involving homosexual parents in our state will not be predicated upon "unfounded fears." Only then will we, as a state, move closer to decisions that truly reflect the "best interest of the child."