

V. Adoption and Fostering for LGBT People

a. basic concepts

adoption is a legal mechanism available in many countries for establishing parental rights and responsibilities with regard to a child (usually a child in the care of the state, or one for which the state has created a temporary caring relationship) to whom one does not have a biological/genetic tie. It differs from fostering or foster care in that adoption usually involves a significant and lasting surrender to the adoptive parent of the state's interest in the child, so that the relationship becomes indistinguishable from full parenthood as defined in national law. It can also differ in that adoption often involves the termination of all parental rights of the child's biological or genetic parents.

States which allow adoption (and not all states do: Islamic law generally forbids so complete an erasure of the child's biological parentage) are asserting, on a symbolic level, their control over parenthood and their right to reassign it. At the same time, for individuals who do not choose to or cannot have biological children, adoption provides one path to experiencing parenthood and founding a family. It is therefore important that state control be fair: that it submit to judicial as well as legislative oversight, and that it adhere to the conditions of consistency and equity already stated. The Convention on the Rights of the Child requires, in Article 21, that "States Parties that represent and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration." It also urges that adoption be "authorized only by competent

106 · conceiving parenthood

authorities” acting “in accordance with applicable law and procedures and on the basis of all pertinent and reliable information.”

Despite this, authority over adoption decisions in many states is in fact parcelled out among a confusing variety of agencies. Service providers—many unrelated to the state, and not a few affiliated with religious bodies—may in fact have the final say in a way that mocks professions of judicial power. And multiple, informal, inconsistent and unexpressed standards may hold sway over the process.

In practice, at every level and in almost every country, LGBT people face a wide array of significant barriers to adoption.

b. second-class citizens, second-class parents: discrimination based on sexual orientation

LGBT people may be prevented from adopting specifically because of their sexual orientation. Because of the many different levels at which adoption decisions are made, this denial, and this discrimination, may take place in many ways. Laws may forbid adoption by LGBT people. Other agencies or individuals involved in the adoption process may exercise a covert or open veto. Or, even in cases where no law or policy prohibits such adoptions, bias may still have a wide scope to influence decisions.

Provisions preventing LGBT people from adopting are sometimes explicitly written into law. Paradoxically, such discriminatory provisions are often adopted in the course of passing “progressive” legislation on LGBT rights, including partnership rights—as if states felt compelled to reserve one final privilege and retain one persistent stigma, as a sign that full equality would not *quite* be allowed. Same-sex couples in **Hungary**, **Iceland**, and **Sweden** and a number of other countries are not allowed to adopt children by the terms of the registered-partnership legislation creating their official status—as one way in which that

status is distinguished from civil marriage.¹⁴⁸ In some countries, since these laws were passed, there has been movement to revisit the question of adoption. The **Netherlands** is likely to replace its partnership legislation with a measure opening civil marriage, and the possibility of adoption, to homosexual couples. In **Sweden**, a governmental commission was established in February 1999 to examine the possibility of permitting adoption for same-sex couples.¹⁴⁹

In **Finland**, which does not presently offer such partnership to gay and lesbian couples, a bill has been introduced which would create the status but also would deny adoption rights to same-sex couples. It has received the backing of Finnish Justice Minister Johannes Koskinen, but the restriction on adoption has been criticized by the Finnish lesbian and gay association SETA.¹⁵⁰

Discrimination does not always come from the state: it can also come from the decision of hard-pressed social welfare departments to surrender their responsibilities to non-state actors. In some countries, adoptions are primarily handled through private agencies. Many of these are church-related; they often take a dim view of what they characterize as “non-traditional” families. For example, until July 1999, the Children’s Society, a charity in the **United Kingdom** closely linked with the Church of England, maintained a ban on lesbian and gay adoptive and foster parents.¹⁵¹ When the charity finally moved to lift the ban, the *Gay Times* (UK) reported that “some 37 Anglican churches have

148. Hungary— Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 130–131; ILGA World Legal Survey, www.ilga.org. Iceland—ILGA World Legal Survey, www.ilga.org; Sweden— Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 208; *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 83.

149. Agence France-Presse, February 4, 1999.

150. Reuters, “Finland to Allow Gays to Register Marriages,” June 3, 1999.

151. “Charity Backs Gay Adoptions,” BBC News, Wednesday, July 28, 1999.

108 · conceiving parenthood

said they will not contribute their end-of-year donations” in protest against the decision.¹⁵² A 1998 report by ILGA-Europe in **Belgium** noted that only a few agencies in that country were willing to accept open homosexuals as prospective adoptive parents.¹⁵³

In some countries, including **Canada** and the **United Kingdom**, the birth mother or birth parents of the child, if living, are asked to approve any adoption placement. In **Canada**,

The biological mother will be provided with non-identifying personal information [about the potential parent] and can exercise complete discretion in giving consent [to the adoption]. Although . . . divulging such information may be a violation of provincial human rights codes, in practice, agencies and licensees often reveal an applicant’s sexual orientation. Gay men and lesbians may have difficulty finding a birth mother who will choose them from all the other potential parents.¹⁵⁴

In the **United Kingdom**, such refusal by the birth parents can be overridden by the government on the grounds that it is “unreasonable.”¹⁵⁵ It is not clear that this would be uniformly the case in situations where the primary objection is the sexual orientation of the adoptive parent.

Finally, in countries where there is no explicit ban on adoption by gays and lesbians, more subtle bias may in practice prevent it. Courts and other agencies may apply their powers of scrutiny so as to scrutinize any homosexual applicant effectively out of the running. Clearly states must devise extensive mechanisms to determine the suitability of individuals or couples to

152. “Charity Stays at Home,” *Gay Times*, January 2000, p. 41.

153. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 35.

154. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 27.

155. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, pp. 125–126.

adopt. These mechanisms must, however, be both consistent and fair. Bearing in mind that there is no evidence that homosexuals are less fit to be parents, and that children raised by homosexuals do not differ in negative ways from peers raised by heterosexuals, homosexuals should face no different scrutiny than other prospective adoptive parents do.

In **France**, adoption is a particularly important issue for LGBT people who wish to become parents, especially in light of restrictions on access to reproductive technology. APGL President Eric Dubreuil explains the discrimination which results in gays and lesbians concealing their sexual orientation when seeking to adopt:

In France, if during the approval proceedings, a person reveals his/her homosexuality, he/she has no chance of being given approval. However, if people do not speak of their homosexuality, they are given approval in the same statistical proportions as heterosexual people. This fact is evidence of real discrimination, made worse by the fact that lying is encouraged by the authorities.¹⁵⁶

French attorney Flora Leroy-Forgeot mentions two cases from the early 1990s. In one, the application to be accepted as a potential adoptive parent was denied on March 18, 1993, with this reasoning:

I have decided not to grant acceptance for the following reasons: the free choice of adults to live outside the norms of society cannot be imposed on a child in the context of adoption. The interest of the adoptable child lies in not being placed directly into a marginalized situation.¹⁵⁷

156. "Homoparental Families in France 1998: Reality and Discriminations," a talk given before the European Parliament, June 17, 1998; available on the APGL web site, <http://apgl.asso.fr>.

157. Flora Leroy-Forgeot, *Les Enfants du PACS: Réalités de l'homoparentalité*, L'Atelier de l'Archer, 1999, p. 74; translated by L. Minot.

110 · conceivingparenthood

A decision dated April 19, 1994 followed a similar line of reasoning in informing the applicant:

Considering the place given to homosexual couples in our society, as much in law as in culture and mores, you do not, under current circumstances, offer conditions conducive to social integration necessary for receiving an adopted child, who is necessarily a transplanted child.¹⁵⁸

The APGL has also shared with IGLHRC documents relating to a 1997 case in which approval as an adoptive parent was denied to a lesbian, “V.M.” V.M. was in a happy relationship with another woman, her employment involved working with children and young people, and her parents were supportive of her decision to adopt. Her request was rejected in a letter from the Conseil General of the Departement (region) in 1997 due to “psychological concerns . . . because of your involvement in a homosexual couple. This mode of life produces significant difficulties for the child, as much in her/his psychological formation as for her/his social integration.” The refusal has been appealed to the appropriate Administrative Tribunal on several grounds: because it discriminates on the basis of marital status and because it “rests on considerations of private life that it has no power to evaluate, and that it condemns in a general manner. It is not possible, in fact”—the plaintiff claimed—“to affirm in a general and peremptory way that this or that type of adult sexuality is in itself prejudicial to children received for adoption.”¹⁵⁹

Perhaps the best known of French adoption cases is the case of a gay man who had been found to have desirable qualities as an adoptive parent in the initial, obligatory “home-visit” report.

158. Flora Leroy-Forgeot, *Les Enfants du PACS: Réalités de l'homoparentalité*, L'Atelier de l'Archer, 1999, p. 74; translated by L. Minot.

159. The APGL has asked that the woman's name and information on the region in which this case is taking place be withheld from publication; translated by L. Minot

He has challenged his subsequent exclusion from adoption in a case which went unsuccessfully through the French court system. The European Commission of Human Rights is currently considering the admissibility of the case. His case is particularly interesting in the light of the legal reasoning used to deny him approval as a potential adoptive parent.

“From the first interview,” he says in an interview published in 1998, “I had the feeling above all that I had fallen into a trap.” When asked by investigators to explain why at 37, he had not had a child, he eventually admitted that his “companion” was a man. The psychologist told him “that the child would never be able to represent to himself the ‘primal scene’ (read: the sexual act which gave birth to him), that I was going create a neurotic, and that in any case, she would oppose my candidacy during the meeting of the approval commission.”

Since he was working in London, the next investigation into his situation was organized by the French Consulate there:

This went better. I said to myself: this time, it’s not a question of provocation or of putting my sexual orientation forward. I would be a bachelor who wanted to be a daddy. There were plenty of questions about my work, my family, life in general, my plans. . . . I didn’t do too badly. But, as she was leaving, after having taken her coat, the woman sat down again on the sofa and asked me seriously, “Pardon me, but are you a homosexual?” I responded in the affirmative. She had no doubt suspected it from the beginning, but her modesty had probably led her to hold back this question until the last moment. She was astonished that I had not mentioned this spontaneously during the course of the interview, as if I didn’t trust her. And that was a bit true, for good reason! . . . Although she mentioned this “particularity” in her report, her recommendation was clearly favorable to approval, and that was enough. All was not lost.

He had three more interviews, all with social workers in Paris.

112 · conceiving parenthood

When they came to the house, my boyfriend Duncan was there. I asked them if they would like him to participate in the interview or if they had any questions to ask him. Even if my request for acceptance was not the request of a gay couple, my boyfriend would share this adventure on a day-to-day basis and we had discussed it at length. No, definitely not, they didn't have anything to say to him and besides, that kind of initiative would be outside the scope of their mission.

The report, when he was finally able to obtain a copy of it, turned out to be equivocal, containing a mass of details, only to arrive at a conclusion in the form of a question: "A child would probably be happy with him. Do his characteristics as an unmarried homosexual man make it possible to entrust him with a child?"¹⁶⁰

One aspect particularly disturbing to him was that while his "life choices"—the expression used for his homosexuality—became the core problem both during the initial refusal and the ensuing legal battle, "that had not been the object of any precise investigation: no question during the investigation about the quality of our relationship, our way of life, our joint plans."¹⁶¹ His homosexuality was understood not as a living fact but as a static role which served simply to make him different from a "normal" family member.

Approval was initially denied in May 1993; it was later granted in a court appeal. Authorities appealed again, and the case eventually reached the *Conseil d'État*, the highest French court to hear the case. In rejecting the appeal, this tribunal noted four arguments in favor of approving the man as a potential adoptive parent:

160. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp. 193–196; translated by L. Minot.

161. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp. 199–200; translated by L. Minot.

- The law authorizes adoption by single people;
- Everyone has the right to choose his or her sexual life;
- Precedents exist (*e.g.*, in custody cases) for giving parental authority to a homosexual parent;
- Accepting someone as a potential adoptive parent is not the same as approving an adoption, which must be done by another tribunal.

They also noted six arguments against approval:

- There is not a specific right to have a child;
- The parallel between parental authority being given to an existing parent who is homosexual (as in custody cases) is not relevant, because there a relationship of filiation already exists, while this case is about creating such a relationship;
- The question whether “sexual otherness” constitutes a psychological risk to the child is relevant; where there is a doubt, it’s best to give the adoptee a “stable familial environment conducive to development”;
- The law has not explicitly authorized adoption by homosexuals;
- The issue of accepting or rejecting homosexual parenthood has a broader importance; through it “society expresses what ought to be the qualities of adoptive parents”: “society does not seem to us ready to accept that a child should be given to certain persons”;
- The acceptance by the court is not absolutely necessary, since a judge can make a decision for adoption in a particular instance even when the applicant has not received general approval as a prospective adoptive parent (although this would not be the normal procedure).¹⁶²

162. Caroline Méçary and Gérard de la Pradelle, *Les droits des homosexuel/les*, Presses Universitaires de France, 1998, pp. 50–54; Daniel Borrillo and Thierry Pitois, “Adoption et homosexualité: analyse critique de l’arrêt du Conseil d’Etat du 9 octobre 1996,” in Daniel Borrillo, ed., *Homosexualités et droit: De la tolérance sociale à la reconnaissance juridique*, Presses Universitaires de France, 1998, pp. 139–150.

We have noted earlier in the report that while there is no explicit “right to a child,” the formulation of “the right to found a family” speaks to a common human aspiration to bring children into the world and to raise them, to build an enduring relationship of care and guidance with children.

This impression that a faulty logic has guided the decision is reinforced by the appeal to the notion that the law has not *specifically* authorized adoption by homosexuals: the law mentions few if any other authorized classes individually. The appeal to public sentiment is also disturbing in such a context, since it implies that the court—as an arm of the government—is obliged to base its decisions on popular prejudice, rather than recognizing its duty to promote equality and respect for the dignity and worth of all people.

A similar situation—no explicit legal prohibition, but no approval of openly lesbian or gay parents either—exists in **Austria**. In a 1998 report for ILGA-Europe, Kurt Krickler explains, “Same-sex couples cannot adopt children. Although a lesbian or a gay man could adopt a child as an individual, in practice this would only be possible if the homosexuality of the person was not revealed.”¹⁶³ Likewise, Aris Bastioulas reports that in **Greece**, “It is . . . theoretically possible for a single lesbian or gay man to adopt a child. However, the ‘suitability’ of prospective single parents is checked by a court and, in practice, anyone who turns out to be gay would almost certainly not be approved.”¹⁶⁴ In **Poland**, the gay and lesbian organization RLG reported that “courts routinely exclude homosexual people from approval as adoptive parents.”¹⁶⁵

Juris Lavrikovs of the Homosexuality Information Center in **Latvia** reports:

163. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 32.

164. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 57.

165. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 175.

Adoption is open to every capable person who is at least 25 years of age and at least 18 years older than the adopted child (Articles 162–163 of the Civil Law). Thus theoretically this option is open to lesbians and gay men. But Article 162 requires that adoption is to be allowed only if this will be “in the interest of the child.” A decision of the Orphan’s Court is necessary for adoption to take place (Article 169.4). This Orphan’s Court is the institution responsible for the adoption cases and investigates whether adoption will be “in the interest of the child.” It is very doubtful that the Orphan’s Court will allow adoption of a child by a homosexual person. While a married couple can adopt a child together, lesbian and gay couples are denied such an opportunity. According to Article 166, persons “who are not married cannot at the same time adopt the same child.”¹⁶⁶

Potential adoptive parents can be required to undergo various psychological tests and/or evaluation by social workers; these can easily be manipulated to exclude gays and lesbians. McCarthy and Radbord note that in **Canada**, “agencies and licensees routinely place lesbians and gay men at the bottom of eligibility lists” and cite research indicating that “84% of adoption workers would reject a woman applicant with a stable female partner. Couples in which the applicant or partner had a history of child abuse or neglect were rated more positively.”¹⁶⁷

Even acceptable results of such evaluations can be overruled by the authorities. For example, when asked by the LGBT organization Triangulo Rosa, a representative of PANI (The Na-

166. E-mail to the author from Juris Lavrikovs, Homosexuality Information Center, Latvia, excerpting his report “Latvia: the legal situation for lesbians and gay men during the periods of its first independence, Soviet occupation and present time” (October 1998); sent May 24, 1999.

167. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, pp. 26–27.

116 · conceiving parenthood

tional Children's Foundation, a state agency) in **Costa Rica** indicated:

Any person who legally qualifies as an adult can apply for an individual adoption to PANI's Technical Secretariat on Adoptions. Our legislation does not explicitly mention the particular situation of gays or lesbians.

Once an application is made, the person must meet some official requirements such as psychological and social testing. If these tests are done privately, they must be approved by the Secretariat, otherwise they can be done free of charge by PANI. If the person qualifies, then his/her file is submitted to the National Council of Adoptions (or to any of the regional Councils, depending on where they live). The Council has full authority to decide if the person qualifies to care for a particular child. It is important to remember that that our job is to choose the best possible family for minors and not the other way around. It is important to point out that should the Council be faced with the option to place a child with a couple or an individual, it will tend to opt for the couple.¹⁶⁸

Some steps to eliminate official discrimination have taken place. In the **United Kingdom**, in the wake of the 1997 *Re:W* case, in which a lesbian woman living in a stable couple was permitted to adopt, the Official Solicitor stopped the previous practice of insisting that lesbian and gay applicants for adoption (unlike heterosexual applicants) see a psychiatrist. (The Official Solicitor's office can be required by the court to act as the child's guardian in adoption cases.) The Deputy Official Solicitor stated that "in future, there is no need to drag experts into Court to give 'psychological opinions' . . . lesbianism is no longer a contraindication."¹⁶⁹

168. Letter of June 1, 1999 from Dr. Jorge Sanabria León, Technical Manager, PANI, to Triangulo Rosa; text supplied to IGLHRC by Triangulo Rosa; translated by Susana Ackerman.

169. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 98, citing *Re:W* (1997) 2SLR406.

c. single and second-class: discrimination based on marital status

In some countries, LGBT people are indirectly barred from adoption because it is only possible for married couples, not for single individuals. Sometimes this requirement is enshrined in law; sometimes it is a matter of policy, or simply an implicit understanding. It can sometimes be circumvented by the powerful or wealthy, adding a further turn of the screw to discrimination. *However, since lesbians and gay men do not have the right to marry in any country, discrimination against single people serves to exclude them from adoption rights.*

Italy, for example, generally does not allow single people to adopt (with, reportedly, the notable exception of a famous film star, who was able to obtain permission, as a single woman, to adopt a child).¹⁷⁰ Patricia Prendiville notes in her report on **Ireland** in *Lesbian Motherhood in Europe*, “Adoption for lesbian couples who are open about their relationship is not available. . . . Single women are also excluded from adopting.”¹⁷¹ Kieran Rose further clarifies in a 1998 report on Ireland that the law does not require *being* married—only having *been through* marriage as a certificate of civil responsibility: “The law on adoption discriminates against lesbians and gay men as well as all unmarried persons. You can only adopt a child if you are legally married, widowed, or judicially separated people.”¹⁷² With regard to **Serbia**, Lisa Mulholland wrote in 1996, “Adoption is normally restricted to heterosexual couples. A few, well-connected single women have been allowed to adopt, but no known lesbian has been successful.”¹⁷³

170. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 145.

171. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 137.

172. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 62.

173. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 190.

118 . conceiving parenthood

In many countries, even if single people are technically allowed to adopt, married and cohabiting heterosexual couples are given clear preference, as is the case in most of **Australia**.¹⁷⁴ Even lesbians and gay men who are in stable same-sex couples thus will face a fatally disabling failure to recognize that they provide a two-parent family. Jenni Millbanks explains,

In all states in Australia it is impossible for a lesbian or gay couple to adopt a child as a couple. The New South Wales Law Reform Commission recommended in 1997 that same sex couples be eligible to adopt, but the government very publicly refused to even consider the proposal.

It is possible to apply to adopt as a "single" applicant in all Australian states. This eligibility is fairly token in nature, as single people are clearly not preferred applicants. For example, many Acts specify that there must be "exceptional" or "special" circumstances, or that the child is a "special needs child", or that explicit permission be given by the birth parents before a child can be adopted by a single applicant.

Statutory bars of adoption are only the first hurdle, however, as policy and custom also stand in the way of lesbian or gay applicants. There are, in practice, many more adults wishing to adopt than children available for adoption. While a lesbian or gay applicant is legally entitled to adopt a child as a "single person," s/he will be less favoured by government and private agencies which place children, than the many married and heterosexual de facto couples who apply. Thus same sex couples are excluded by law from adopting, while a single, or apparently single, lesbian or gay man is disadvantaged by law and almost completely excluded in practice.¹⁷⁵

174. International Lesbian and Gay Association (ILGA) World Legal Survey at www.ilga.org (December 12, 1999).

175. Jenni Millbanks, "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" *Australian Journal of Family Law* 12 (1998), p. 120-121.

In **Germany**, as well, in the few known cases where lesbians have applied openly for adoption, apparently sympathetic rhetoric masks the reality of discrimination based on marital status.

That the lesbian couples were open and self-confident about their lifestyle was considered a plus for the children's development. The applications obtained permission to adopt in the cities responsible for them, but they have little chance of having a child assigned to them in Germany. [In Germany] approximately 10 recognized adoption applicants—mostly married couples—are available for selection [as adopting parents] for one child given up for adoption. The adoption agencies and parents who give up their children for adoption and must consent to it, prefer to assign children to the '*traditional family formation*.'

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In countries where there are many fewer children available to adopt than parents waiting to adopt, the decision to prioritize married parents can effectively ban adoption by single people. Moreover, a general reluctance to place children with a lesbian or gay adoptive parent has resulted in some countries, where gays and lesbians do adopt, in a situation in which lesbian and gay adoptive parents effectively are found eligible to adopt only the most difficult to place children, including those with physical and developmental disabilities, babies born with addictions, or large groups of siblings who must be adopted together. The stigma is double: the children are marked as less worthy by the adoption agencies, and hence placed with parents disparaged as less desirable.

For example, in **Germany**, the HIV/AIDS Research Commission noted in 1990, "Concerning [the assignment] of HIV-positive children [to adopting parents], persons not consistent

176. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 44; translated by Ute Rupp.

120 · conceiving parenthood

with the traditional family image should not generally be denied.” This conclusion was also adopted by the Berlin Senate in 1992.¹⁷⁷ In the **United Kingdom**, activists report,

The vast majority of placements where lesbians are considered as prospective foster or adoptive parents involve what the agencies define as ‘hard to place’ children. This has a very broad meaning and can include a range of categories, from children suffering emotional trauma as a result of sexual abuse to those with learning or physical and mental disabilities. It can include large numbers of siblings who need to be adopted together.

Such a situation has come about not only because there is a preference for placing children with heterosexual couples, but also because of the very small number of babies available for adoption since the late 1970s.¹⁷⁸

A decision in the **United Kingdom** case *Re: E* (1995) made explicit the connection between the child’s disability and the single status (and sexual orientation) of the would-be mother. This case involved the placement with a single lesbian social worker of a 13-year-old girl with severe behavioral difficulties, whose previous four placements had been unsuccessful. The judge declared with somewhat unctuous solicitude:

Prima facie, it is undesirable that E should have gone to a lesbian. . . . but this [situation] is a special one. E is a special girl who has had a specially unhappy past and has an unusual and unique opportunity now.¹⁷⁹

177. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 49; translated by Ute Rupp.

178. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, p. 123.

179. *Re E* [1995] 1 FLR 382, CA, cited in “Lesbian and Gay Parenting—Recent Legal Developments” by Gill Butler, Solicitor, and Mark Harper, Solicitor, in the materials for the Lesbian & Gay Parenting Conference organized by Stonewall UK on November 21, 1998.

Similarly, in **Finland**, where gays and lesbians may seek adoption as single people, “Usually single parents get an older or handicapped child.”¹⁸⁰

d. informal “adoption”: one transgender woman and the law

Discrimination in adoption has sometimes led LGBT people to approach the problem of adoption in ways both creative and legally risky, leaving them open to blackmail and criminal charges. IGLHRC has for some years been following the case of Mariela Muñoz, a male-to-female transgender person in **Argentina**, whose adoptive children were ultimately taken from her by the action of a court. Ms. Muñoz’s situation is complicated by the fact that her “adoption” of the children was effected in a variety of informal ways, which adds difficulties to the legal questions in her case.

Before her gender-reassignment surgery, Muñoz had adopted and raised 17 children. In 1981, Muñoz went to Chile to have the surgery performed—it is illegal in Argentina. With a Chilean ID that reflected her status as a female, she married an Argentinean man and returned to Argentina. There, the couple adopted other children, among them Maira.

Muñoz explains,

I met the biological mother [of Maira], who was pregnant and did not want children. I asked her not to have an abortion. She in turn asked me to take care of her baby after birth. Another pregnant woman who did not want children allowed me that year to adopt her twin babies. She gave birth to them in a hospital where she was admitted under my name. My marriage ended soon thereafter, but I continued raising the children.

180. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 108.

122 . conceiving parenthood

Maira's mother started to blackmail me. First she demanded money. Then a lot and a house. She threatened to abuse me. When I bought a car for the kids, she demanded it in exchange for the girl. When I refused, she reported me to the police. Soon thereafter, on May 17, 1993, there was a big police raid in my workplace. I was arrested and taken to Police Precinct of Berazategui, in the Province of Buenos Aires. At 2:30 AM the next morning, the police came to my house and took away Maira and the two twins, Luciano and Leonardo. . . . I was accused of abduction of minors and document forgery.¹⁸¹

Muñoz was held for 10 days in a women's prison. Following her release, she began efforts to regain custody of the three children. Although she had not been convicted, they had been taken, placed in foster care, and then returned to their birth mothers. She explains,

I underwent five medical and psychiatric examinations, and some of my children did too, in order to establish that under no circumstances had I been a negative influence on them. All the examinations, official and extra-official alike, indicated that I was suitable to raise children and that my motherhood was preferred over that of the biological mothers, and that the judge should not cut the ties between the children and I, since that could cause permanent psychological damage.¹⁸²

Initially, she was granted limited visitation (one hour per week) with the children, but this contact was ultimately severed. The judge would not allow her to send Christmas gifts to the children. An order was issued prohibiting her from coming within

181. IGLHRC, "The International Tribunal on Human Rights Violations Against Sexual Minorities" (booklet of testimonies), October 17, 1995, p. 25.

182. IGLHRC, "The International Tribunal on Human Rights Violations Against Sexual Minorities" (booklet of testimonies), October 17, 1995, p. 26.

one block of where the children lived. This order continues to be in force at the time of writing.¹⁸³

In 1995, the warden of minors requested new psychological tests for Muñoz and her children, but the order was denied, and the proceedings seeking visitation went forward.

Recently, Muñoz once again requested visitation rights; presently, a court is considering the request and seeking expert testimony. Muñoz has also been granted Argentinean identity papers which recognize that she is female.¹⁸⁴

It is worth noting that other countries present a different legal picture for transsexuals, beginning with recognition of their right to control over their own gender identity. In **Italy**, for example, activists report that post-operative transsexuals “can change their name and their official sexual gender in documents like passports and identity cards. They can marry and adopt.”¹⁸⁵

e. fostering

Fostering provides a way for children—whose parents cannot (or are not allowed to) care for them—to live, temporarily or over a longer term, in a non-institutional setting with a caring adult or adults. Sometimes foster parents receive a form of payment from the government. As is the case with adoption and custody, the eligibility of gay men and lesbians for fostering often varies on the local, state, regional, and institutional level. In fostering situations, the rights of the parent have not necessarily been terminated, and the parent may have a say in the child’s placement, as in **Germany** or the **United Kingdom**.

183. E-mail from the organization SIGLA, with which Mariela Muñoz works, in response to questions by the author about the status of her case, June 8, 1999.

184. E-mail from the organization SIGLA, with which Mariela Muñoz works, in response to questions by the author about the status of her case, June 8, 1999.

185. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 69.

124 · conceiving parenthood

In many cases, the regulations that govern fostering of children are similar to those which govern adoption, and fostering is sometimes a first step in becoming an adoptive parent. In some cases, even where lesbians and gay men have been excluded from adoption, they are allowed to foster children. For example, in **Italy**, IGLHRC has learned of one open lesbian in Genoa who has been allowed to foster children with her partner.¹⁸⁶ Reports also indicate that lesbians and gay men are sometimes permitted to foster children in **Austria, Germany, Norway, the United Kingdom, and the United States**.¹⁸⁷ In 1995, Gro Lindstad wrote of **Norway**, "There are examples of lesbian foster parents, but the prevailing attitude is negative, due probably to lack of information combined with general prejudice."¹⁸⁸

In the **United Kingdom**, the government has offered guidelines on fostering, noting that

it would be wrong arbitrarily to exclude any particular groups of people from consideration. But the chosen way of life of some adults may mean that they would not be able to provide a suitable environment for the care and nurture of a child. No one has a right to be a foster parent. Fostering decisions must centre exclusively on the interests of the child.¹⁸⁹

186. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 145.

187. Austria—*Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 32; Germany—Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 122 and *Equality for Lesbians and Gay Men in Europe*, p. 55; Norway—Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 169–170; United Kingdom—Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, p. 122; United States—Sue Rochman, "Taking Aim at Parents," *Advocate*, June 22, 1999, pp. 78–80.

188. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 169–170.

189. Cited in Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, p. 127.

This resembles in many ways the arguments in the French adoption case (above), in the assertion that there is no “right” to be a foster parent.

As with adoption cases, discrimination is not always enforced by the state. Governments abdicate authority over fostering decisions to non-state agencies and actors; these are free to apply their own covert prejudices. In **Australia**,

Departmental policy in New South Wales and South Australia explicitly states that all of those involved in the provision of foster care must avoid discriminatory practices, including on the basis of sexuality. However, current indications are that religious service providers may not be prepared to follow these policies. Informal departmental policy in Victoria and Western Australia is nondiscriminatory, but there are no written guidelines advising providers or agencies to this effect. Currently, Queensland, the Australian Capital Territory, Northern Territory, and Tasmania have written policies regarding foster care provisions, but they make no mention of non-discrimination or eligible or preferred categories of applicants.

Where policies are silent, it must be borne in mind that many of the agencies that arrange foster care placements are run by religious groups. It would seem likely that discrimination against lesbians and gay men who wish to provide foster care continues to be prevalent in those states, regardless of anti-discrimination laws.¹⁹⁰

For example, in August 1997, Harry Goodhew, Anglican Archbishop of Sydney, wrote, in an article in the *Sydney Morning Herald* titled “Suffer the Little Children”: “Care of children is too

190. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 122.

126 · conceiving parenthood

important an issue for issues of discrimination to have any primary relevance.”¹⁹¹

In the **United States**, in January 1999, the state of Arkansas adopted regulations specifically preventing gays and lesbians from fostering children. The regulations were not passed as legislation, but were adopted as policies by the state’s Child Welfare Agency.¹⁹² In the state of Texas, the Liberty Legal Institute, a right-wing organization, is also seeking a statewide ban on fostering and adoption by gays and lesbians. Their action comes in the wake of an incident in which a social worker was reprimanded and demoted for removing a child from a lesbian couple; she claimed their lifestyle was immoral and in violation of the state sodomy law.¹⁹³ The social worker has since become a heroine to many conservative groups. In response to these legal efforts, one Texas foster child wrote to legislators,

I’ve been beaten within an inch of my life, I’ve had people tie me up and shoot me up with drugs, I’ve been gang-raped by family members—and these are the straight people that did this to me. The lesbians that I live with now are the best people I have ever met in my life.¹⁹⁴

Removing children from loving, secure foster homes simply on the basis of the foster parents’ sexual orientation can hardly be said to serve the best interest of the children—who are often in foster care because they have already experienced familial difficulties or insecurity.

191. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 122, note 99.

192. ACLU, “ACLU Challenges Arkansas Policy Banning Gay and Lesbian Foster Parents,” April 6, 1999; the challenge to the Arkansas policy is *Sands et al v. Child Welfare Agency Review Board*.

193. Jim Vertuno, Associated Press, “Group Asks Judge to Halt Gay, Lesbian Adoptions,” *San Antonio Express-News*, May 4, 1999.

194. Sue Rochman, “Taking Aim at Parents,” *Advocate*, June 22, 1999, p. 80.

f. positive developments

Access to adoption can vary not only from country to country but from one city, state, region, or agency to another. As is the case with custody, the combination of broad discretion and local and institutional control of review processes leads to very uneven access to adoption. Below are two examples of positive developments and one example of a policy that is designed, at least partly, to reduce discrimination (although it does not allow same-sex couples to adopt a child jointly).

Two different bodies in **New Zealand**, where adoptions have decreased by two-thirds, are seeking public input on whether to end its ban on lesbian and gay adoptive parents. On November 1, 1999, New Zealand's Law Commission published a discussion paper on adoption law reform which includes the statement: "We offer for consideration the proposal that sexual orientation towards the same gender should not constitute a general disqualification for making an adoption application."¹⁹⁵ In August, the Ministry of Justice published a discussion paper, "Same-Sex couples and the law," which also considers adoption. Its contents are considered elsewhere in this report.

In **South Africa** a lesbian couple was first allowed to adopt a child in 1995.¹⁹⁶ In 1997, the magazine *Femina* reported the story of Riaan Pretorius and his partner of eight years, Braam Snyder. The couple, who had wanted a child for some time, were allowed, after several applications to Pretoria Child Welfare, to foster Victor, an HIV+ baby abandoned by his mother at birth. After a year however, "Riaan and Braam were told they

195. Planet Out, "NZ Considers Gay Adoption," November 2, 1999, www.planetout.com/pno/.

196. International Lesbian and Gay Association, World Legal Survey, www.ilga.org (December 12, 1999), citing Kevan Botha and Edwin Cameron's chapter on South Africa in D. J. West and R. Green, eds., *Sociolegal Control of Homosexuality—A Multinational Comparison*, Plenum Press, 1997.

128 . conceiving parenthood

were not suitable parents because they were 'both men.'" They had to appeal against this decision to the Department of Welfare before being able to adopt Victor.¹⁹⁷

In **Spain** no questions about sexual orientation can be asked of the prospective adoptive parent, although gays and lesbians still have to adopt as single people.¹⁹⁸

197. *Femina* magazine, April 1997, p. 81.

198. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 80.

VI. *“Treating Infertility” and “Buying Babies”*: How to Stigmatize and Suppress Access to Reproductive Technologies

a. language and its discontents

new reproductive technologies offer some LGBT people the possibility of having biological children without the process of heterosexual intercourse. These means are called “technologies” as a way of opposing them to other so-called “natural” means of reproduction—though many of the latter, of course, may also require professionals to assist, or implements to intervene. The new “technologies” include self-insemination, artificial or alternative insemination through a doctor or clinic, in-vitro fertilization, and surrogacy.

Legislation and regulations dealing with reproductive technologies have shown local, state, regional, and institutional variations, much like other issues discussed in this report. Many governments, however, have established some level of national regulation. This might include, as in the **United Kingdom**, laws governing the “storage” of gametes, or as in **Germany**, legal prohibition of certain practices by doctors. In some countries, as in **Canada** and the **United Kingdom**, private contracts drawn up in relation to gamete donation or surrogacy arrangements are not illegal, but simply are not legally enforceable through the

courts.¹⁹⁹ In those cases, the process may work out if all parties follow their expressed intentions; but if, for example, a surrogate mother decides she wants to keep the child she agreed to have for someone else, no contract can bind her to give it up. Moreover, in some jurisdictions (including the **United Kingdom**, **Australia**, parts of the **United States**, and in general in **Canada**), donor and surrogacy contracts regarding anonymity may be unenforceable, because adults are not permitted to sign away the child's right to know and have access to her or his parents, or the right to support or inheritance.²⁰⁰ Some countries, like the **United States**, have chosen a largely *laissez-faire* policy, with difficulties being addressed through subsequent jurisprudence rather than by pre-emptive legislation.

New reproductive technologies raise ethical and legal questions about the sale, transfer, and/or storage of human tissues/human genetic material/human embryos; the rights of children to know or know about their genetic parents; and the limits and uses of the human body. They raise fundamental questions of what can be decided for a child, with regard to her or his parents, before her or his conception or birth.

The language of reproductive technology is also problematic in the context of both single and LGBT prospective parents. Practitioners of various reproductive technologies as well as laws and regulations adopt a medicalized discourse of "treatment." Reproductive technologies "treat" a problem, an abnormality, which tends to be characterized as "the infertility of the couple."

199. Canada—Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15., pp. 32–33. UK—"Lesbian and Gay Parenting—Recent Legal Developments" by Gill Butler, Solicitor, and Mark Harper, Solicitor, in the materials for the Lesbian & Gay Parenting Conference organized by Stonewall UK on November 21, 1998, citing the Surrogacy Arrangements Act 1985.

200. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, pp. 32–33, notes 88 and 89.

It should be noted that some forms of reproductive technology allow the couple to overcome a sexual or physical problem in a way that still uses reproductive material from both partners. However, in a large number of cases, the problem is not with the heterosexual “couple” itself: it is that *one* member of the couple is infertile and cannot provide effective reproductive material, or cannot physically carry a child to term. The “treatment” then consists of finding substitute reproductive material from a third party—a sperm or ovum donor—or a surrogate mother. In neither case is the problem “treated” in itself—its effect (not being able to have a child) is overcome by other means. The language of “treatment” tends to gloss over the nature of the procedure. The phrase “infertility of the couple” glosses over which individual is actually infertile—although the success of the procedure for “treatment” will actually depend on determining this.

However ill-fitting the language of “treatment” may be in the first place, practitioners, lawmakers, and bureaucrats have their reasons for using it. It confirms the idea that heterosexual couples “naturally” reproduce: reproduction is both a “natural” process to them (hence any problem is an “unnatural” illness to be treated), and is a primary purpose of their joint existence (hence any problem is an *urgent* and necessarily *mutual* disorder). Reproduction, instead of being seen as an option for individuals, becomes the “normal” condition of the heterosexual couple, and any failure to fulfil it justifies medical intervention. Moreover, the fact that reproduction is expected for the heterosexual couple helps to normalize the fiction that the resultant child is “theirs,” even if genetic material came from other persons.

The language of “treatment” also serves, backhandedly, to exclude both single women and lesbian couples. A single woman who is medically infertile is not *expected* to reproduce, because she is single; her medical condition therefore does not translate into a social condition deserving “treatment.” Thus distinguished

132 · conceiving parenthood

from the woman who is in an “infertile couple” by virtue of her husband’s sterility, she would have no claim to the healing benefits of medically administered insemination. A gay or lesbian couple’s “infertility” is self-evident; yet because it is not expected that a gay or lesbian couple would conceive a child through sexual relations, this condition is not abnormal, and likewise cannot be said to require “treatment.”

A new language is needed, one which eliminates these slippery exclusions: one which sees reproductive technology simply as enabling individuals to found a family even though they might not be able—or do not desire—to have children through sexual intercourse. Only such a language will be consistent with the language of human rights, which insists that reproduction be a realm of freedom, not discrimination. As the Platform for Action of the 1994 International Conference on Population and Development stated, in words germane to all the issues in this chapter: “Reproductive health is a state of complete physical, mental and social well-being *and not merely the absence of disease or infirmity*, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people . . . *have the capability to reproduce and the freedom to decide if, when and how often to do so.*”²⁰¹

“Treatment” is a fiction principally useful for doctors and the state. The media seizes on other, less abstruse approaches. Sensationalist press accounts warn that lesbian parenting through reproductive technology is a seductive mix of sex work and child slavery. These headlines and sub-heads from newspapers in the **United Kingdom** and **Australia** illustrate the tone:

Lesbians Pay £5 for a Baby
Lesbians Advertising for Sperm Degrade the
Act of Procreation
Sun Readers Want Lesbian Mums Ban

201. U.N. Conference on Population and Development, A/CONF.171/13, October 18, 1994, at 7.2; emphasis added.

access to reproductive technologies · 133

Lesbian Fertility Clinics
“Like Hitler’s Super Race Scheme”
Too Many Rights, Little Thought for Responsibilities
\$12,000 Aid for Lesbian Families²⁰²

A recent article in the *London Evening Standard* (July 25, 1999), titled “Scandal of Single Gay’s Baby Factory,” discussed a self-insemination service designed to introduce lesbians to potential gay male sperm donors. The article noted that “MPs, family rights groups, church leaders and ethics experts who fear a new generation of children being born into dysfunctional families expressed fury and dismay at the scheme.”²⁰³ Lesbian parenthood becomes an assembly line for deviance; what is benevolent “treatment” for the married turns, once outside the precincts of wedlock, into a fiendish factory of dysfunctionality.

Such journalism clearly feeds intolerance toward LGBT people as parents and prospective parents. More generally, the emphasis on “buying babies,” on specific amounts of money (either too much to be going to lesbians, or too little for the value of a child), and on the idea of commercial production (“baby factories”) illustrates societal unease with the economics of new reproductive technology—their consequences and their cost. However, heterosexual couples using fertility treatments rarely instigate such debates or rouse such discomfort. In the tabloid press, it is usually triggered only when the sleekly artificial meets the feared and physical: when reproductive technology (and its seeming scientific circumvention of sex) joins with the nightmare image of despised and demonized sexual practices.

202. The first three are quoted in Pam Alldred, “Making a Mockery of Family Life?: Lesbian Mothers in the British Media, in Gillian A. Dunne, ed., *Living “Difference”: Lesbian Perspectives on Work and Family Life*, New York and London: The Haworth Press, 1998, pp.; the last three are quoted in the Queensland entry of the International Lesbian and Gay Association World Legal Survey, www.ilga.org (December 12, 1999)

203. Alison Gordon, “Scandal of Single Gay’s Baby Factory,” *London Evening Standard* (www.thisislondon.co.uk), July 25, 1999.

134 · conceiving parenthood

b. artificial/alternative insemination and in-vitro fertilization by doctors or in clinics

As with adoption, access to artificial or alternative insemination, or to in-vitro fertilization, by doctors or clinics varies by locality. It may be governed by both legislative and administrative regulation; it is frequently subject to the discretion of doctors, clinic personnel, and mental health or social workers. Since homosexual couples are not recognized as married couples, lesbians can be excluded both explicitly on the basis of sexual orientation and implicitly on the basis of marital status.

Countries with national-level restrictions on access to insemination (which may cover only official clinics or both official clinics and private clinics/doctors) by lesbians or single women include:

- **Austria** (lesbians and single heterosexual women excluded, as only married or long-term heterosexual cohabiting couples have access, 1992 Reproductive Technology Law)²⁰⁴
- **Czech Republic** (restricted to married couples)²⁰⁵
- **Denmark** (lesbian couples barred, Act of Parliament, Act 460, June 10, 1997)²⁰⁶
- **France** (available only to married or cohabiting heterosexual couples, Bioethics Act of 1994)²⁰⁷
- **Iceland** (lesbian couples do not have access, 1996 partnership law)
- **Norway** (lesbian couples do not have access, 1993 partnership law)
- **Sweden** (lesbians and single women do not have access in medical settings; lesbians in registered partnerships are also

204. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 32.

205. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 89.

206. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 39.

207. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 47.

explicitly banned from access to insemination in a medical setting by the provisions of the partnership law).²⁰⁸

In Denmark,

The bill [on alternative insemination] was originally proposed in a form including no constraints regarding who could be treated. During the bill's second reading in Parliament, a change requiring marriage or marriage-like partnership between man and woman in order to obtain assisted insemination was passed.

The National Danish Organisation for Gays and Lesbians mounted a huge lobbying campaign in Parliament, and at the third and final reading three amendments were put forward. One sought to remove the article introduced, whereas another sought to restrict its applicability to insemination involving conception outside the body [IVF]. This would have made it possible to provide artificial insemination to lesbians. A third amendment sought to make available treatment to lesbians if the identity of the male donor was known. None of the three proposals was carried.

Thus, from 1 October 1997, assisted insemination in a medical environment has been denied to lesbians, both in public hospitals and private clinics. Several doctors have already said publicly that they will not ask questions about the private life of women seeking their assistance for insemination. The law does not, however, regulate non-clinical treatment, so artificial insemination in private is not criminalized.²⁰⁹

In **Costa Rica**, legislation proposed in 1998 would have banned insemination of single women. Arguments in favor of the measure included the need for a traditional family headed by a father

208. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 208; *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 83.

209. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, pp. 39–40.

136 · conceiving parenthood

and a mother, and the associated need to prevent lesbians from using insemination.²¹⁰ One news article stated, “Parliamentary sources revealed that the motion approved last Wednesday at the plenary session to prohibit artificial insemination for single women is founded on the fear held by many congresspeople who voted in favor of it that lesbians will resort to this method in order to have children.”²¹¹ LGBT and feminist activists were able to persuade legislators to vote the measure down.

A lesbian couple in **Zimbabwe** has reported that the only sperm bank in that country is restricted to married couples; the women experienced difficulties in obtaining information, as well as overt prejudice on the part of medical personnel they consulted when seeking insemination.²¹²

In some countries, doctors face stiff penalties for infringing the law, and may be punished for violating unstated norms. In **Germany** doctors may face legal action if they perform donor insemination in a way not specified by the law. For example, if a doctor performs alternative insemination with sperm from an anonymous donor, the child “may take legal steps for compensation because of the (supposed) claim to an inheritance. And if the doctor originally promised the donor anonymity, only to re-

210. See, for example, Sileny Rivera Chang, “Defensoria combatira la prohibición: Traba inseminación va dirigida a lesbianas,” *Al Día*, March 27, 1998; Rocio Estrada Alvarado, “Propuesta será discutida hoy en la Asamblea Legislativa: Abogan por inseminación,” *La Republica*, March 31, 1998; Mario Bermudez, “Iniciativa pasó de comisión a plenario en Asamblea: Integridad de cuerpo crea polémica,” *La Republica*, March 26, 1998; Sileny Rivera Chang, “Prohibirían inseminación de solteras,” *Al Día*, March 1998; Emilia Mora, “Dictaminado proyecto de ley: Solteras no podrán inseminarse,” *El País*, March 26, 1998; Betsy Rojas Z. and Betania Artavia U., “En Costa Rica: Inseminación artificial en solteras ¿si o no?” *Diario Extra*, March 27, 1998; Betsy Rojas Z., “Iglesia Católica opina lo contrario: Cualquier mujer sea lesbiana o no tiene derecho a tener un hijo,” *Diario Extra*, March 28, 1998.

211. Sileny Rivera Chang, “Defensoria combatira la prohibición: Traba inseminación va dirigida a lesbianas,” *Al Día*, March 27, 1998; translated by Susana Ackerman.

212. Conversation with author April 1999; confirmed by e-mail November 16, 1999.

veal his name at a later date, the donor himself can claim compensation.”²¹³ Specifically, in one case,

The Federal Constitutional Court deduced from the constitutional protection of the personality (S 2[1] in conjunction with S 1 of the German constitution) that a child has a right to information about its biological father’s identity. The basic assumption is that biological origin is a constituent factor in an individual’s personality.²¹⁴

As a matter of principle, in accordance with the professional guidelines of the board of physicians, insemination is only practiced in **Germany** on married, or in rare cases cohabiting, heterosexual couples.²¹⁵

In **Italy** in 1994, a Dr. Ambrassa was suspended from a professional organization for reproductive health practitioners after he admitted to a journalist that he had a lesbian couple among his patients.²¹⁶ While there is currently no general law on insemination, in 1994 the Professional Order of Doctors developed an internal regulation excluding lesbians and single women from insemination.²¹⁷

In many countries, the situation varies from doctor to doctor, clinic to clinic, and state to state, often at the discretion of individual medical or mental health professionals. In some countries, such as **Belgium**, insemination is not specifically banned but left

213. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 121–122; also Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 52.

214. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 122.

215. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 52.

216. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 13.

217. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, pp. 66–67.

138 . conceiving parenthood

to the discretion of the clinics.²¹⁸ As in the case of adoption, it is common for some type of evaluation of prospective parents to take place, allowing discrimination even where lesbians are not automatically excluded from insemination. In the **United Kingdom**, for example, the Human Fertilisation and Embryology Act (1990) includes the statement:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment, and any other child who may be affected by the birth, including the need of that child for a father.²¹⁹

This section of the Act, with its general and elastic references to “welfare” and its absence of evidentiary requirements or specific grounds, enables clinics to deny services at will to lesbians and single women. It can also provide a basis for denying services to the female partner of a transsexual man, according to the group Press for Change.²²⁰ Press for Change notes that “Many clinics will not treat single women at all because of the requirement . . . Hence, the transsexual man needs to be involved in the application for treatment in order for the first barriers to be crossed.”²²¹ As the possible “cause” of the couple’s infertility, the male parent will be asked to give sperm samples, making it difficult to conceal transsexual status. The matter of treating the partner of a transsexual man is often referred to an Ethical

218. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 35.

219. Cited in Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, p. 112; HEFA 1990 s. 13 (5).

220. “Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom: A report for the Interdepartmental Working Group on Transsexual Issues,” Press for Change, June 1999; available at www.pfc.org.uk.

221. “Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom: A report for the Interdepartmental Working Group on Transsexual Issues,” Press for Change, June 1999; available at www.pfc.org.uk.

Committee, which plays an advisory rather than decision-making role.²²² (The legal status of transsexual parents is discussed in the context of the European Court of Human Rights case *X, Y and Z v. United Kingdom*, in a later section on the rights of the coparent.)

Clinics elsewhere enjoy similar latitude to deny and discriminate. According to Astrid Matijssen and Mirjam Turksma, in the **Netherlands**, “there are still denominational hospitals that deny lesbians artificial insemination. Although some hospitals refuse insemination to lesbians or single parents, there are enough hospitals that do offer the possibility.”²²³ In **Canada**, McCarthy and Radbord indicate, “Many Canadian infertility clinics and doctors have a written or unwritten policy that prevents them from assisting single or lesbian women to conceive.”²²⁴ They cite a 1992 study published by the Royal Commission on New Reproductive Technologies (Ontario), “in which 76% of practitioners surveyed said they would refuse donor insemination to a woman in a stable lesbian relationship.”²²⁵ (Denial of fertility services to lesbians has been successfully challenged under human rights legislation in British Columbia.)²²⁶

Discrimination in access to insemination remains common for both lesbian and single women in **Australia**.²²⁷ Laws explic-

222. “Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom: A report for the Interdepartmental Working Group on Transsexual Issues,” Press for Change, June 1999; available at www.pfc.org.uk.

223. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 74.

224. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 30.

225. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 30, note 84.

226. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 31, citing *Benson v. Korn* (1995) C.H.R.R. D/319.

227. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), pp. 117–118.

140 · conceiving parenthood

itly restricting donor insemination to married couples and heterosexual *de facto* couples who have been living together for several years exist in the states of South Australia, Western Australia, and Victoria.

Providers of donor insemination services in these states must be licensed by a governing body, and there are criminal penalties for inseminating a woman without license to do so. Effectively, these three states not only prevent lesbians from having access to state-funded (as well as privately-run) donor insemination services, but may penalise, through fines and imprisonment, service providers who refuse to discriminate, or lesbians who self-inseminate.²²⁸

Moreover, the states of South Australia, Victoria, Western Australia, and New South Wales also exclude gay men from donating sperm. Jenni Millbanks notes that if “the required ‘lifestyle’ declarations or other forms are filled out without revealing that a donor is gay, the donor may be penalised (including, in New South Wales, imprisonment).”²²⁹ In Victoria, where a ban on in-vitro fertilization for lesbians remains in force, a gay man and a lesbian, both in the police force, are under investigation for posing as a heterosexual couple in order to have a child.²³⁰

Little recourse is available for persons facing such inequities. Millbanks reports:

Despite high levels of discrimination in this context, there has been only one contested discrimination action on this basis brought by a lesbian. She was found to have suffered both direct and indirect discrimination by the Queensland

228. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 118.

229. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 118.

230. Rex Wockner, International News, #265—May 24, 1999, citing the Melbourne *Sun*.

Anti-Discrimination Tribunal, a decision revised by the Supreme Court of Queensland. The court held, among other things, that only a heterosexual couple could be infertile (and indeed held, with much assistance from the *Shorter Oxford Dictionary*, that only heterosexuals could form “couples” or have “intercourse”). Therefore in the court’s view, the service provider’s exclusion of lesbians as ineligible by reason of not being “an infertile couple” was both lawful and reasonable. The decision is under appeal, and its applicability in other jurisdictions remains unclear.²³¹

At the national level in **Australia**, the National Health and Medical Research Council, which has responsibilities for clinic funding, previous to 1996 recommended prioritizing “accepted family relationships.” The Council currently refers to “serious regard for the long term welfare of any . . . children who may be born.”²³²

Some problems arise which are unique to the lesbian couple. Some lesbian couples prefer the idea of using the same donor for both women to have children. A lesbian in **Israel** reports, “The head of our sperm bank has informed us that he is not comfortable with the lesbian family and he will not inseminate my partner with sperm we have paid for and put aside from our first child. He is only prepared to let me use it.”²³³ A discrimination claim in a situation for which there is no exact heterosexual parallel may be complex. There can be little question, though, that the rationale for denying the request is the essence of unequal treatment: the privileging of one form of family over another.

231. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), pp. 119–120.

232. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 119.

233. E-mail to the author, June 17, 1999.

In some countries there are also positive developments. In **Spain**, it is not permitted to inquire into the sexual orientation of a person seeking access to alternative insemination.²³⁴ In **South Africa**, proclamation R.1354 of October 17, 1997, issued by the Minister of Health, has reinterpreted the Human Tissue Act (65 of 1983) so as to remove restrictions on single women accessing donated sperm. Lesbians, as single women, can now legally obtain insemination.

c. self-insemination

The editors of the *Harvard Law Review* (**United States**) have noted, "Most lesbians wishing to become pregnant can do so through either artificial insemination or sexual intercourse. Both techniques are simple procedures easily done at home. Thus, although some states have fornication statutes and/or statutes that can be interpreted as prohibiting the artificial insemination of unmarried women, states cannot easily prevent access to either technique."²³⁵ It is not quite clear how jocular this comment is: the impact of legal provisions, however arcane they may appear, should not be underestimated. However, the practice of self-insemination at home has become important and empowering to lesbians in a number of countries where access to insemination through doctors or clinics is difficult or impossible. Lesbians have also developed formal and informal networks for sharing information about self-insemination. The work of Lisa Saffron in the **United Kingdom** has been particularly valuable to lesbians planning self-insemination there.²³⁶ In **Argentina** the LGBT or-

234. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 80; single women in Spain have access to insemination under legislation dating from 1988.

235. Editors of *The Harvard Law Review*, "Family Law Issues Involving Children," reprinted in Dolores J. Maggiore, ed., *Lesbians and Child Custody: A Casebook*, New York: Garland Publishing, Inc., 1992, p. 167.

236. For example, *Challenging Conceptions: Planning a Family by Self-Insemination*, London: Cassell, 1994.

ganization *Comunidad Homosexual Argentina* (CHA) also gathers and shares such information with its members.²³⁷

Self-insemination can be less expensive and involve less bureaucracy than insemination through a clinic, but it also carries its own set of legal and medical risks. In some countries, bans on insemination in “unauthorized facilities” (as in **France**, for example) or by “unauthorized personnel” may include self-insemination. As noted above, **Australian** state laws in South Australia, Western Australia, and Victoria punish—sometimes with fines or imprisonment—medical service providers who disobey bans on insemination of single women, and may also provide penalties for women who self-inseminate.²³⁸ **France** also bans insemination with fresh (rather than frozen) sperm.²³⁹ The handling of reproductive materials is also a concern in the **United Kingdom**, where it is illegal for unauthorized personnel to store frozen sperm.²⁴⁰ (Thus a couple cannot take sperm home from a clinic and keep it for multiple insemination attempts.)

Self-insemination can involve some medical risks. Use of a clinic—depending on its procedures—often ensures appropriate medical screening of the sperm (for HIV and other diseases, for conditions that may be passed genetically to the child, and to assess the likelihood of insemination being successful with the sperm).

Legal barriers to self-insemination may also be designed at

237. A. Wagmaister and J. Bekerman, “Niños criados por parejas homosexuales: caracterización socio-jurídica de ese contexto. Hacia una construcción de la relación coparento-filial para que el derecho adopte a esos niños.” X Congreso Internacional de Derecho de Familia, “El Derecho de Familia y los Nuevos Paradigmas,” Mendoza, November 1998.

238. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 118.

239. *Loi de bioéthique* (July 29, 1994), as summarized in April 1999 by *Ça se discute*, www.casediscute.com.

240. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, p. 112, citing HEFA 1990.

144 · conceiving parenthood

least in part to avoid confusion in determining the legal parents of a child. An important legal difficulty arises from the use of reproductive material from someone who is not intended to be a “parent”—determining who will or will not, under law, have parental rights and responsibilities. While private agreements can be drawn up by the parties involved, such contracts may or may not be considered valid in court.

Both the prospective mother, who in most cases does not want the donor to have legal grounds to sue for custody or access, and the prospective donor, who usually does not intend to take financial responsibility for the child or to have the child inherit from him, have an interest in gathering reliable information on their legal situation.

The effective exclusion of the sperm donor from parental rights may depend on an insemination being performed in accordance with the law. In some countries or states, this may exclude self-insemination. While the exact law may vary, the law may specify an appropriate setting, the supervision of a doctor, and/or the donor signing certain paperwork.²⁴¹

Poorly planned self-insemination may result in unexpected economic consequences to one or both parties. In both the **United Kingdom** and **Sweden**, for example, women with children who seek support from the government are asked to provide the name of the children’s fathers and to assist in contacting them so that the government can obtain child maintenance payments from them for the children. Women who do not disclose the father’s name may face cuts in their support. Self-insemination may not be considered an adequate reason for exemption from this provision.²⁴² (In contrast, officially recognized insemination carried out in accordance with legal regulations

241. See, for example, NCLR, *Lesbians Choosing Motherhood* and Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997.

242. UK—Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997,

would protect the mother from such questions and an anonymous donor from such claims.)

Due to the health and legal risks involved, the status of self-insemination—empowering or very risky—varies from country to country and movement to movement, and the tensions between legal imperatives and the desire for the privacy and control offered by self-insemination can be difficult to resolve.

d. surrogacy

The practice of surrogacy has different implications for gay men and for lesbians. The use of a surrogate mother allows a gay man to have a child who is biologically related to him. Surrogate motherhood allows a lesbian mother to establish a legally recognized link—that is to be the gestational or birth mother—to a child created from her partner's ovum and from donated sperm. In this way, both women are related to the child in ways that are recognized as legally valid, one as the genetic mother and one as the birth mother. While this remains a new and very uncommon scenario due to the cost and to the health risks associated with the procedure, it has sparked interest among lesbian couples.²⁴³ In March 1999, a lesbian couple in California (**United States**) who used this procedure were granted a “Decree of Parental Relationship,” making them both legal mothers, several weeks before the birth of their son.²⁴⁴ Surrogacy may be used by heterosexual couples when there is a physical reason that the genetic mother cannot carry the child to term or when the social-mother-to-be cannot either produce ova or carry the child.

pp. 114–116; Sweden—Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 208.

243. NCLR, *Lesbians Choosing Motherhood*, 1996, pp. 35–36; McCarthy and Radbord, p. 36.

244. “Moms are Parents from Conception,” *Washington Blade*, front page, April 23, 1999.

The regulation of surrogacy is deeply involved with sensitive and crucial issues such as the exploitation of the surrogate mother and the traffic in children. A number of countries, including **France**, have banned surrogacy outright (*Code civil*, Article 16–7).²⁴⁵ In **Germany**, it is prohibited and punishable by law to procure surrogate mothers, and any agreements regarding surrogacy are considered unenforceable.²⁴⁶ In the **United Kingdom, Canada, Australia**, and some parts of the **United States**, surrogacy is legal, but surrogacy agreements are similarly unenforceable.²⁴⁷ The legal terrain is complex, particularly if the surrogate mother decides she wants to keep the baby in opposition to the terms of her contract. The primary question then becomes who will be granted parental rights.

In the **United States**, a surrogacy agency called Growing Generations was founded in 1996 (by lesbian Gail Taylor). Serving gay and lesbian couples, in June 1999 it had more than 60 clients from around the world.²⁴⁸ Due to the lack of legal prohibition in the US, gay male couples from elsewhere sometimes turn to American surrogate mothers. Two gay men from the **United Kingdom** were recently both legally recognized by a US court as the parents of the twins who were born to them through a surrogacy arrangement. (One of them is the genetic father, although they will not reveal which.)²⁴⁹

Despite this recognition, the twins faced barriers entering the **United Kingdom** and obtaining British nationality when the couple tried to bring them into the country. The parents were

245. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 47.

246. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 55.

247. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, pp. 32–33.

248. "Baby by Proxy," *The Advocate*, June 22, 1999, pp. 83–91.

249. John Sturgis, "Gays Ruling Gives Babies Two Fathers," Yahoo! Headlines: This is London, Wednesday October 27, 1999.

told by immigration officers that the children did not have the automatic right to live in Britain, and the children's American passports were confiscated.²⁵⁰ (A child can only receive British nationality through the father if the father and mother are married, and as neither of the men is married to the American mother, the children are considered American.²⁵¹)

Legal experts have noted the importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which will shortly be incorporated into British law) to the outcome of this situation:

One senior lawyer said: "Everybody has a right to respect for family life. A child has the right to see its parents but whether that would extend to the right to live here is another matter. But if a failure to have immigration status would mean you have no family life there is an arguable breach of the convention there."

Another expert said she believed the European law, which judges have been told to take into account when making decisions ahead of October when it comes into full force, would count them as a family. "This couple are British and have no space in America," she said. "It is a bit unclear why immigration are making such a fuss about them. There is a good argument to suggest that there is some discrimination going on here because they are gay men."²⁵²

e. lesbians and maternity care

Safe and appropriate health care is a right for lesbian mothers and their children. A number of international human rights instruments note the need for special care for expecting and nursing

250. "Gay Men Told Twins May Not be Able to Live in UK," Reuters, January 2, 2000.

251. E-mail from Mark Watson, Stonewall UK, January 10, 2000.

252. Jo Dillon, "Gay Couple's Twins to Get Right to Stay," *The Independent*, January 9, 2000.

mothers. Article 24(2) Convention on the Rights of the Child declares, “States Parties shall pursue full implementation of this right [to the highest attainable standard of health] and, in particular, shall take appropriate measures . . . to ensure appropriate pre-natal and post-natal health care for mothers.” The International Covenant on Economic, Social, and Cultural Rights declares in Article 10 (2), “Special protection should be accorded to mothers during a reasonable period before and after childbirth.”

Yet numerous studies agree that LGBT people, and lesbians in particular, face barriers in accessing health care in general.²⁵³ These barriers may complicate accessing reproductive technologies. Even being open about their sexual orientation and practices with health care providers may be difficult for many LGBT people. In *Who Cares?: Institutional Barriers to Health Care for Lesbian, Gay, and Bisexual Persons*, Michele J. Eliason reviews US research on health care provider attitudes toward homosexuals in studies conducted from 1979 to 1995. This included studies done with doctors, nurses, social workers, and psychologists. Eliason notes, “All these studies indicate that a significant number of health care providers have negative attitudes about lesbian, gay, and bisexual people. They also suggest a lack of knowledge about homosexuality, and some studies find a link between lack of knowledge and prejudice.”²⁵⁴

Moreover, whether due to negative past experience or anticipation of difficulties, a number of studies indicate that many lesbians choose not to disclose their sexual identity to health care providers.²⁵⁵ This can be particularly important in accessing gy-

253. Lesbian, gay, and bisexual people may also be affected by economic barriers wherever their sexual orientation makes them vulnerable in unemployment, underemployment, or low wages. Where women earn disproportionately less than men, lesbian households are likely to be particularly economically disadvantaged.

254. Michele J. Eliason, *Who Cares?: Institutional Barriers to Health Care for Lesbian, Gay, and Bisexual Persons*, New York: National League for Nursing, 1996, p. 116. See also Christy M. Ponticelli, ed. *Gateways to Improving Lesbian Health and Health Care*, New York: Haworth Press, 1998.

255. Michele J. Eliason, *Who Cares?: Institutional Barriers to Health Care for*

necological care. For example, in a study conducted among Buenos Aires lesbians in 1993, 64% of those interviewed had not seen a gynecologist for more than 5 years, and 12% had never consulted a gynecologist.²⁵⁶ Similarly, the Glasgow Lesbian Health Services (**Scotland**), was established in response to a 1995 survey that found that 40% of respondents “were unable to discuss their sexual orientation or their sexual health needs with their primary care doctor.”²⁵⁷

The Royal College of Midwives in the **United Kingdom** recently undertook a survey to assess how well midwives were serving lesbian mothers.²⁵⁸ The sample was relatively small (50 respondents reporting on a slightly higher total number of pregnancies) and not fully representative of the general lesbian population (disproportionately from London, Brighton, or Bristol—areas with relatively high lesbian visibility; disproportionately older than most maternity-service users; disproportionately white). Despite its limitations, the survey provides useful preliminary information about various aspects of lesbian mothers’ experience of maternity care. It also provides a useful model of the kind of information that can be gathered about lesbian mothers’ interactions with health care providers.

While the majority of responses reflected favorably on the midwives and on the health services in general, more than half

Lesbian, Gay, and Bisexual Persons, New York: National League for Nursing, 1996, p. 120. See also Christy M. Ponticelli, ed. *Gateways to Improving Lesbian Health and Health Care*, New York: Haworth Press, 1998.

256. Alejandra Sarda, “Salud Sexual: Un Enfoque desde la Diversidad,” Third International Women’s Solidarity Meeting, Havana, 1998.

257. “Lesbian-sensitive clinic makes healthcare accessible,” *Reuters Health*, November 19, 1999, discussing a study by Dr. Susan V. Carr et al., *British Journal of Family Planning* 1999, 25:93–95.

258. Royal College of Midwives (1999) *Maternity Care for Lesbian Mothers: Survey Report*. RCM, London. Readers should note that in the UK, midwives are the statutorily recognized lead professionals in the care of normal pregnancy and birth, and this study thus addresses the mainstream care available to lesbians.

150 . conceivingparenthood

were asked by at least one health provider about their marital status or sexual orientation in the course of maternity care.

Moreover:

- Among lesbians who had come out, a significant number were asked inappropriate questions—for example, how they got pregnant or what they would tell the child about her/his biological origins;
- Among lesbians who had come out, more than half were not asked if she had a partner who would be co-parenting;
- Among lesbians who had come out, the majority were not asked how her partner was feeling and what support the partner might be needing;
- Among lesbians who had come out, the majority were not asked about their wishes regarding confidentiality;
- Those who did not disclose their sexual orientation did so (1) because of fear of a prejudiced reaction, (2) because they worried it would affect the care they were offered, and (3) because they were concerned that their confidentiality would not be respected.

While only a few of the women surveyed reported substandard care when asked directly, significantly more volunteered information on incidents that could be considered unacceptable. What follows are accounts from the survey bearing witness to prejudice that affected lesbian mothers' experiences of care:

When I first disclosed my relationship status with my GP [general practitioner], she was very disappointing, she stated outright that a woman should not consider childrearing unless married to a man; she was in fact quite rude.

My GP stated that he did not agree with two women bringing up children.

The midwife said she had never heard of people like us. She wouldn't book me in, espoused her Christian beliefs.

[They] placed [my] child on [the] concern list! Because of the nature of our relationship, i.e. lesbians.

The midwife was brilliant, but because I had high blood pressure and had been induced at 38 weeks there was a high level of medical intervention—which was uncomfortable for my partner, as she couldn't be as supportive as she wanted with lots of strangers trooping into the room all the time. Also, the male obstetrician didn't treat her with respect or listen to her requests on my behalf. I'm sure this would have been different if she had been a man.

Generally helpful, but my partner was not given automatic rights equal to that of a male partner, not included fully in decision making, not taken seriously, not given proper acknowledgement/respect.

My GP was rude and abrupt; this may not have had anything to do with my sexuality. She didn't feel it right that another woman was supporting the family financially and that I should be independent and support myself. It was obvious that she didn't see us all as a family, but rather a bit of a mess.

My partner had to fight to be acknowledged as the baby's mother, and to be included in her care.

The first midwife I saw suggested I could have conceived a disabled baby because of self-insemination!

Asking about Zachary's father was irrelevant—I knew enough about him to know the health history of him and his family. I felt pressurised to give his name. I did give his name in the end—it felt like it was so they could fill in the box and 'win'!

One woman reported a particularly bad experience with a midwife so unpleasant as to make her fear for her own health and that of her baby:

I did see one particular midwife a few times in my first pregnancy who I feel did not like me at all. She was particularly rough with me—every injection left many bruises as she'd jab up and down my arm, each time blaming me for having bad veins. An internal examination at nine

152 · conceiving parenthood

months was so rough it made me bleed, and worse, was so painful and frightening I felt I had been assaulted. No other midwife has ever hurt me like she did, nor laughed at my questions or put me down as she did. She ignored my partner, turning her back to her during my antenatal appointments. Before appointments, when she saw us in the waiting room, she'd roll her eyes and point at us to the receptionist. Because of my experience with her, I was frightened each time I met another midwife that she would hurt me or my baby because she didn't like lesbians. This definitely affected my labours as we never knew who would be on duty at the time of birth—I was so scared it would be her that I wouldn't even contact the midwives until I was well into labour.

In my second and third pregnancies, I reduced the risk of encountering that particular midwife by asking a midwifery team on the other side of my borough to take me on for antenatal care. . . . They also advised me what I could do if she was on duty when I went into labour. The fear of having this particular midwife is the vein that runs through all of my pregnancies.

Positive comments revealed key patterns in what constituted safe and appropriate care, with a particular emphasis on inclusion of the partner, support of the mother/mother and partner as capable parents, and acknowledgement of the need for support:

My midwife made me feel like we were good parents by saying we had planned well and had done all the right things.

Warmth and a total acceptance of my partner's involvement in the whole pregnancy, birth, and parenting future.

Checked if I knew other lesbians mothers and gave me [an] article about midwives and lesbian parents.

When we went to the initial booking-in interview they very patiently amended the form, changing reference to 'father' to either 'donor' or 'partner' depending on the circumstances, apologising for the inadequacy of the form.

I felt accepted as a woman, a mother-to-be, a mother, and as a lesbian.

While preliminary, this study highlights key issues in ensuring the highest available standard of health, and of health care, for lesbian mothers and their babies:

- Recognition of the mother's partner and her role as co-parent;
- Respecting the mother's wishes concerning confidentiality about her sexual orientation;
- Withholding judgment about the mother's lifestyle;
- No abusive physical treatment;
- Developing intake forms and other documents that accommodate a variety of family situations;
- Recognizing the need for community support and adequate provision of resources in this area.

f. "who else has to be sterilised before they are recognised by the state?": reproductive issues for transgender/transsexual people

Among the relatively small number of states which recognize sex reassignment (including **Germany**, **Sweden**, the **Netherlands**, and some jurisdictions within the **US** and **Canada**), a number have explicit provisions that make sterility a precondition for such recognition. For example, the 1972 law in **Sweden** requires that an individual "have undergone sterilization or be sterile"; the 1980 **German** law requires that an individual be "permanently incapable of procreating"; the 1985 law in the **Netherlands** also stipulates an inability to procreate.²⁵⁹ Activist

259. Colette Chiland, *Changer de Sexe*, Paris: Editions Odile Jacob, 1997, pp. 196, 198, and 202 respectively; translated by L. Minot; Whittle (next citation) also quotes the first two of these laws in slightly different translation. Accord-

154 · conceiving parenthood

and scholar Stephen Whittle comments that in discussion of similar provisions in proposed legislation in the **United Kingdom**, “on a very rudimentary level, one question asked by the transsexual members of the forum was ‘who else has to be sterilised before they are recognised by the state and allowed to take up their full legal rights and responsibilities?’”²⁶⁰

Whittle further notes that

at the 1993 XXIIIrd Colloquy on European Law which concerned ‘Transsexualism, Medicine and The Law’, Professor Michael Wills of the University of Berne, who writes extensively on European law and transsexualism, and who was a rapporteur (expert ‘witness’) to the Colloquy took the view that “sterility [of the transsexual person] must be absolutely certain and permanent” . . . before a full recognition of gender change is afforded in law, but he does not explain his reasoning: it is presented as a natural “common sense” assumption. A common sense assumption that appears to be prevalent in any legal discussion in this area by those who are not actually members of the transsexual community. It also seems that it is a common sense assumption made by medical practitioners who are providers of gender assignment treatment. . . . At the 1993 Colloquy, itself, no fewer than 4 rapporteurs mentioned the sterility requirement without ‘batting an eye’

This assumption, that the transsexual person should be sterile before legal recognition, does beg certain questions. On one level it seems almost obsessional on the part of legislators to demand that the transsexual person is infer-

ing to Whittle, the Swedish law stipulates that one must “have been sterilised or at least incapable of procreating” (Lag om andring i lagen (1972: 119) S 2) and that the German law states that one must be “continuously non-reproductive” (TSG (1980) Second Section, SS 8. 1 (iii)).

260. “*Gemeinschaftsfremden*, or how to be shafted by your friends: Sterilisation requirements and legal status recognition for the transsexual,” Stephen Whittle, Ph.D, M.A, LL.B, B.A, Lecturer, The School of Law, The Manchester Metropolitan University, May 17, 1996. This can be found on the Press for Change web site, www.pfc.org.uk.

tile. In reality, in almost all cases, after a few years, the hormone therapy undertaken by transsexual people will certainly have rendered them infertile (albeit it not necessarily permanently, that generally takes longer). Thus they will be to all practical purposes incapable of reproduction at that time when they might be considered to have sufficient commitment to their new role for any legal recognition of a status change. If they undergo genital reconstructive surgery they will certainly be permanently unable to procreate.

These facts do not alter the barbarity of compulsory sterilization—they only reinforce the absurdity of states' insistence on it, and on denying transsexuals even the ghost of a reproductive option. No stray sperm or ovum can be allowed to survive the change and its effects. Whittle discusses a case from **Germany**, involving the question of what surgery would be necessary before a (female-to-male) change of sex designation could be granted in law:

[T]he court held that a reversible interruption of the fallopian tubes might be sufficient, because a transsexual man would be very unlikely to seek such a reversal. However Wills argues that this does not preclude the possibility of in-vitro fertilisation, therefore such practice according to him must not prevail.

Based on this case, Whittle suggests broader implications of such sterility requirements with regard to reproductive technology.

The apparently inconceivable scenario referred to above is not only possible, but in some people's real lives, specifically transsexual and transgendered people, it is a real possible (if improbable) legal complexity for which there is no provision, except perhaps in the negative.

Requiring that transsexual persons no longer be able to reproduce through the biological mechanisms concordant with their

156 · conceiving parenthood

natal sex designation is a cruel residue of the state's own need to regulate gender. Governments in this area still enforce a relentless, ruthless either/or. Their anxiety to eradicate any ambiguity indicates that the spectacle of (for instance) a legally recognized woman still able, with her own sperm, to inseminate another woman would not merely be a *logical* conundrum, but a *political* one: it would strike in some way at the state's own conceptual foundations, its predication on patriarchal systems separating "masculinity" unequivocally from "femininity." The state insists on absolute and binary gender oppositions: to achieve them, it claims extraordinarily invasive control over the body. Human rights cannot allow that claim. Forced sterilization is unacceptable.

Principle 8 of the Program for Action of the 1994 United Nations Conference on Population and Development states, "Reproductive health-care programmes should provide the widest range of services without any form of coercion."²⁶¹ Freedom from coercion is an essential goal in the intersection of health and human rights. When such physical modifications are imposed by the state as a condition for participating in civil life in the gender of one's choice, they are no longer modifications—they are mutilations. They are no less clearly so than such widely condemned practices as female genital mutilation (the product of an equally repressive regime of gender policing). As such they constitute inhuman treatment, prohibited by the Universal Declaration on Human Rights as well as every major human rights covenant and standard.

261. U.N. Conference on Population and Development, A/CONF.171/13, October 18, 1994.

VII. Parenting Rights for Same-Sex and Transgender Partners of Parents

a. basic concepts

In most countries, there is little legal recognition of the relationship between same-sex partners—or of the relationship established between a person and the children of his or her same-sex partner—even when both partners were part of the decision to have a child, and when both act as parents. Similarly, the parental rights of transgender people in relation to the children of their partners are often not recognized as the rights of a non-transgender person of the same gender would be.

In some countries, same-sex couples have begun to seek legal recognition of their relationships and of their parental rights. Essentially, such shared parental rights serve two functions:

- They extend a variety of protections to the children during the relationship and in the event of the dissolution of the relationship or the death of either parent;
- They provide legal rights for the same-sex partner, who would not otherwise be a legal parent a) in terms of day-to-day care of the children (making medical decisions, picking children up at school, etc.), b) in the event of the death of the biological parent, and c) in the event the relationship dissolves.

Some of the core components of parenting rights were elaborated in chapter II. These functions authorize and empower the parent to make important decisions and negotiate with the world in the child's best interest, and sometimes enable the par-

158 . conceiving parenthood

ent to receive particular government services or monies designed to provide added security to families.

Where there is no legal recognition of parental rights of same-sex partners of parents:

- The child will not automatically inherit from the partner in the event of the partner's death.
- The partner may not be allowed to authorize medical treatment for the child in an emergency.
- The partner may not be able to interact officially with the child's school on the child's behalf.
- The child may not be allowed to remain with the partner in the event of the death of the legal parent, even if the partner has been the primary carer for the child.
- The partner may be denied custody or visitation in the event of the dissolution of the same-sex relationship, even if the partner has been the primary carer for the child.
- The child may be denied financial support from the partner, even if the partner had been the primary earner in the household, in the event of the dissolution of the same-sex relationship.

Where same-sex relationships are disadvantaged in relation to heterosexual marriages and partnerships or *de facto* couples, the well-being of children may also be affected by lack of access to legal protections or financial benefits, or subsidies given to officially recognized couples.²⁶²

In many countries, parental rights accrue automatically to opposite-sex partners through marriage, partnership, or in some cases *de facto* relationship for a certain period of time. For transgender people, achieving legal recognition of the designated sex/gender may or, more likely, may not include access to legal

262. Please see IGLHRC's fact sheet "Registered Partnership, Domestic Partnership, and Marriage: A Worldwide Summary" for more information on this issue.

marriage in the designated sex/gender and the rights associated with marriage.

In some cases, a few of these problems can be addressed by establishing private contracts between the parties and by naming a guardian for the child in the parent's will. Such contracts, however, may be challenged in court. The primacy of civil marriage as a state-guaranteed contract covering relationships of intimacy, and rights and responsibilities within them, often translates into state discrimination against any other attempt to fix such relationships contractually. In many cases courts are free to overrule a parent's choice of guardian, particularly if a biological relative of the child contests. This approach also often involves seeking legal advice. It may not be practicable where a sympathetic attorney cannot be found, or where the couple cannot afford one.

b. joint parenting rights where
recognition of same-sex partnerships
or *DE FACTO* couples exists

Among the countries which legally recognize same-sex partnerships, **Iceland** was the first to include joint custody of children in its 1996 legislation. In May 1999, **Denmark** changed its partnership law to include the possibility of joint custody of children. ILGA-Europe reports that in the **Netherlands**,

Since 1 January 1998 lesbian or gay parents have been able to share custody with their same sex partners. Before then, shared parental authority was impossible for same-sex couples. Under the Law of Succession, the child under shared parental authority is seen as a legal child of the co-parent, giving him or her maintenance obligations for the child, and legal authority. The parent can also ask to change the name of the child.

To achieve this, the legal mother or father and his or her partner have to ask a judge to grant shared parental authority. This Act has already been criticised by the les-

160 . conceiving parenthood

bian and gay movement and the women's movement, as it still does not allow the co-mother or co-father to be a full legal parent. This will be an obstacle to the child as well as for the social (not fully legal) parent with regard to inheritance rights and the right to shared nationality.²⁶³

The differences between shared parental authority and full legal parenthood include:

- Reference, in the legislation, to the co-parent as "the other person" or "the nonparent";
- No automatic inheritance for the child from the co-parent;
- No right to inherit from members of the co-parent's family, as no legal relationship is created with members of the co-parent's extended family;
- Rights obtained by a co-parent under shared parental authority terminate when the child is 18.²⁶⁴

In July 1999, the **Netherlands** introduced proposed legislation (which activists hope will go into force in 2001) allowing civil marriage and adoption of children for same-sex couples. The current option of registered partnership would continue to remain available for at least five years afterward, and partnerships could be converted to marriages.²⁶⁵ Legal expert Kees Waldijk explains,

There will hardly be any differences between the legal consequences of a same-sex marriage and those of a traditional different-sex marriage. The only exception will be that if a child is born to a woman in a lesbian marriage, her female spouse will not be deemed to be the "father"

²⁶³. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 74.

²⁶⁴. Nancy G. Maxwell, Astrid Mattijssen, and Charlene Smith, "Legal Protection for all the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions," *Electronic Journal of Comparative Law*, Vol. 3, August 1999, section 3.2; available at <http://law.kub.nl/ejcl/31/abs31-2.html>.

²⁶⁵. Kees Waaldijk (Faculty of Law, Universiteit Leiden, NL), "Dutch Bills on Same-Sex Marriage and Adoption," August 1999; confirmed by e-mail January 16, 2000; see also *ILGA Euroletter* 74, August 1999.

of the child. However, through adoption she will be able to become the second legal parent of the child.²⁶⁶

This new proposed legislation would equalize the situation of same-sex and opposite sex partners with regard to co-parent adoptions.²⁶⁷ The rules of adoption will be largely the same for same-sex and opposite-sex partners, with the exception that same-sex couples will not be allowed to adopt foreign children.²⁶⁸

In **Sweden**, same-sex partners cannot adopt each other's children. However:

Child benefits are relevant to registered partners as children belonging to one of the partners are considered step-children of the other partner. Parent subsidies are paid for 450 days until the child is eight years old. These rights may be claimed by a step-parent in the biological parent's stead. Temporary parent subsidies are paid when a parent needs time off from work to take care of a sick child, visit the child's school, etc. Subsidies can also be paid to step-parents. Under the law, parents are entitled to parental leave until the child is 18 months old. They are also entitled to work three-quarter time for a limited period. Here too, a step-parent may claim these entitlements instead of the biological parent.²⁶⁹

The recent ground-breaking decision in **Canada** in the case of *M v. H*, which concerned same-sex spousal support on the dissolution of a relationship, is expected to lead to a broad change

266. Kees Waaldijk (Faculty of Law, Universiteit Leiden, NL), "Dutch Bills on Same-Sex Marriage and Adoption," August 1999; confirmed by e-mail January 16, 2000; see also *ILGA Euroletter* 74, August 1999.

267. Nancy G. Maxwell, Astrid Mattijssen, and Charlene Smith, "Legal Protection for All the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions," *Electronic Journal of Comparative Law*, Vol. 3, August 1999, section 4.1; available at <http://law.kub.nl/ejcl/31/abs31-2.html>.

268. Kees Waaldijk (Faculty of Law, Universiteit Leiden, NL), "Dutch Bills on Same-Sex Marriage and Adoption," August 1999; confirmed by e-mail January 16, 2000; see also *ILGA Euroletter* 74, August 1999.

269. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 84.

162 . conceiving parenthood

in the rights of same-sex couples. In that case, the Supreme Court ruled that the term “spouse” in a *de facto* relationship also included same-sex partners. The full implications for family law are not yet clear, but overall more than 1,000 laws throughout **Canada** may undergo change to include same-sex partners in the definition of “spouse.” Laws and court rulings in British Columbia and Ontario have already allowed some same-sex partners to have joint custody of their children.²⁷⁰

c. joint parenting rights where recognition of partnership does not exist

In a few other countries, some provision for joint custody has been made. Rainer Hiltunen, an attorney in **Finland**, reports: “As confirmed by the Ministry of Justice, the law on custody and visiting rights enables a person who is not a legal parent to gain joint custody of a child with a parent. The Ministry confirmed that this allows also homosexual couples to gain joint custody of a child.”²⁷¹

In the **United Kingdom**, same-sex partners can acquire parental responsibility by applying for a joint residence order under section 8 of the Children Act (1989). This is most commonly done in cases of a child born by insemination; there may be barriers, however, if the child has another known parent. Parental responsibility includes: sharing with the biological parent in making major decisions about a child’s life; making independent decisions about the child when the biological parent is ill or not available; and travelling out of the country with the child with-

270. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 7, citing the 1997 British Columbia *Family Relations Amendment Act* and the *Family Maintenance Enforcement Amendment Act*.; also, p. 28.

271. “Equality for Lesbians and Gay Men in Europe,” ILGA-Europe, 1998, p. 43.

out the biological parent.²⁷² A co-parent with a joint residence order “also retains parental responsibility if the biological mother dies, which means that it is much more difficult for the child to be removed by other biological relatives, such as grandparents.”²⁷³ A joint residence order does not automatically lapse on separation, although the biological parent can ask that it be cancelled. In this case, a contact order can be made to allow the other parent to maintain contact with the child. For the purposes of the Child Support Agency, a non-biological parent who has a residence order is not financially liable for the support of the child.²⁷⁴

The Family Court in **Australia** may make a “parenting order” in favor of parents and “any other person concerned with the care, welfare or development of the child,” and has done so for lesbian co-parents.²⁷⁵

In the **United States**, “second-parent adoption” is legal in some places and can be obtained through the courts in some places, but not in others.²⁷⁶

A lesbian couple in **Israel** who had previously obtained the right to be guardians of each other’s children were recently denied the right to be jointly recognized as the “mothers” of the children by a Family Court.

Although the court addressed the mothers and the children as a family throughout the summation, the judge determined that it was not possible to allow the requested adoption, since Israel’s Adoption Law does not allow adop-

272. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, pp. 95–98.

273. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 97.

274. These last points about separation and child support are made by Gill Butler in “Joint Residence Orders,” Stonewall Parenting Group, Lesbian and Gay Parenting Conference booklet, November 21, 1998.

275. Jenni Milbanks, in “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 120.

276. National Center for Lesbian Rights (NCLR), “Lesbians Choosing Motherhood: Legal Implications of Alternative Insemination and Reproductive Technologies,” 1996, pp. 54–60.

164 · conceiving parenthood

tion that will recognize mutual parenting by two women. It was stated that, although the benefit of the child is the most supremely important principle in adoption laws, and even if it can be assumed that it would be to the benefit of those children to be adopted by those mothers, such adoption cannot be permitted, since the law itself as written does not allow it.²⁷⁷

Currently, another lesbian couple in **Israel** is seeking recognition as the mothers of their son for purposes of the official population registry. The couple had previously ensured joint parent rights through second-parent adoption in California (**United States**), where the couple lived when their child was born (both women have joint US-Israeli citizenship). In January 1996, Ruti Berner-Kadish gave birth to a son, Mattan, through alternative insemination in California, where she and her partner Nicole were living. Nicole Berner-Kadish obtained parental rights through second-parent adoption in the **United States** in June of the same year. Nicole and Ruti are now fighting for recognition of this adoption in Israel. Nicole explains,

We immediately went to the Israeli consulate to have Mattan recorded as an Israeli citizen. Israel has an official population registry wherein all of the citizens of the state are recorded with an identification number and with their year of birth, nationality (i.e., Jewish or Arab), marital status, and names of parents. Each Israeli carries around an identity card with this information in it, and every parent has the names and ID numbers of our children. We asked the Interior Ministry, specifically the population register, to record Mattan in both of our identity cards, in other words to record him as having both of us as his mothers.

What is at stake is basically the same as what is at stake in any second parent adoption case—if Mattan isn't recorded in my identity card, I can't make decisions for him, Ruti could take him away from me, I could leave her (both of them) without having any responsibility for him.

277. *Yediot Achronot* (Israel), August 20, 1999.

And of course, perhaps most important, is the social and political recognition of the reality of our family, that we are both equal parents of the child and that we both intended that to be the case when he was conceived.²⁷⁸

The consulate in the US wrote to the Israeli Interior Ministry for guidance. It received the reply, “Israel does not recognize the adoption of a child by a woman when the child already has one mother.”²⁷⁹

Ruti and Nicole then secured *pro bono* legal assistance in Israel and filed an internal administrative appeal, which was again denied. When they moved back to Israel in 1998, they appealed this decision directly to the Supreme Court. The parties are at this time currently awaiting a court date for a final hearing of the case.²⁸⁰ After the first hearing, Nicole told the press, “I didn’t expect to be so shaken up in court. I was on the verge of tears. I felt that these three people [the Justices on the panel] are going to decide whether I’m actually the mother of my son or not, but I’m the one who has been there ever since he was conceived.”²⁸¹

This case illustrates the stakes for same-sex couples and the lengths to which they must go to ensure protection of their children’s, as well as equality with other family forms.

Countries that permit joint custody or some form of guardianship are the exception rather than the rule. It [appears] that there are no general provisions for joint custody of children in same-sex relationships in **Austria**,²⁸² **Belgium**,²⁸³ **Germany**,

278. E-mail communication from Nicole Berner-Kadish to the author, November 21, 1999, following up on previous communication of July 25, 1999.

279. E-mail communication from Nicole Berner-Kadish to the author, November 21, 1999, following up on previous communication of July 25, 1999.

280. E-mail communication from Nicole Berner-Kadish to the author, November 21, 1999, following up on previous communication of July 25, 1999.

281. “Lesbian asks court to declare her adoptive mother of partner’s child,” *Jerusalem Post*, April 26 1999

282. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 75; *Equality for Lesbian and Gay Men in Europe*, ILGA-Europe, 1998, p.32

283. “Deux mamans pour un bébé,” *Le Journal du médecin*, Brussels, December 15, 1998, citing the following case: Trib. Jeun. Courtrai 18 mars 1997 in J.T. 98.

166 · conceiving parenthood

Poland, and **Spain**,²⁸⁴ although of course the absence of a country from this list does not imply that same-sex partners do have parental rights in that country. (The presence of a country on such a list also does not indicate that specific rights—such as custody of a partner’s child following the partner’s death—cannot occasionally be secured through the courts.)

In **Poland**, for example, the lesbian and gay group RLG noted in 1995 that “when a biological mother dies, her lesbian partner is denied custodial rights over the children.”²⁸⁵ In **Germany**, there is “no legal security for the common parenthood of homosexual couples.”²⁸⁶ This includes non-recognition of such couples/families:

- In the laws governing the right to rent and live in given areas/districts, although some improvements have been made in recent years in some federal provinces to extend these laws to cover unmarried couples, including homosexuals;
- In inheritance laws, where partners and their children are treated as legal strangers;
- With regard to tax deductions available for expenses incurred in caring for children by the non-legal parent;
- With regard to subsidies that may be obtained for the child’s education;
- With regard to state-subsidized “child money” (*Kindergeld*), for which children of co-parents may not be counted together in the household, although higher numbers of children result in higher overall payments;
- With regard to the co-parent having any power to authorize medical care or treatment;

284. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 80.

285. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 174.

286. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 40; translated by Ute Rupp.

- In the case of separation, where there are no regulations governing the further conduct of partners toward the child.

Some—but not all—of these situations can be addressed by other legal means by the legal parent, but such means remain uncertain in their permanence and force.²⁸⁷

d. obtaining parenting rights for transgender partners of parents

As noted above, transgender people often are not accorded the same parental rights as other persons of their sex, and frequently face discrimination in seeking parental rights. The case of *X, Y and Z v. United Kingdom*, heard in 1995 by the European Court of Human Rights, illustrates some of the barriers faced by transgender parents.

The essential facts of the case are that X, a **United Kingdom** female-to-male transsexual, lived in an established relationship with Y. Together, as a couple, they applied for donor insemination for Y to bear a child. They were initially denied, but on appeal were allowed to begin the process. The hospital ethics committee asked X to acknowledge himself to be the “father” of the child under the Human Fertility and Embryology Act 1990, and X agreed. In 1992, Z was born.

X and Y approached the Registrar General about the possibility of X being registered as the child’s father. Court documents indicate that “[i]n a reply dated 4 June 1992 to X’s Member of Parliament, the Minister of Health replied that, having taken legal advice, the Registrar General was of the view that only a biological man could be regarded as a father for the purposes of registration.”

The case was appealed to the European Court of Human

287. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, pp. 40–41; also p. 45.

168 · conceivingparenthood

Rights as a violation of Article 8 of the European Convention, which protects privacy and family life, and Article 14, which provides protection from discrimination.

X, the father, explains,

When we made our application to the European Court of Human Rights, our main concern was that our children would one day have the space in which to understand how much they meant to us, and that having gender reassignment was not something to be ashamed of or stigmatised by, but was in fact something to be proud of.

As the case proceeded and we investigated our position in law, we became really horrified at the legal loophole our children were in. I was not in a position to provide them with support for the things that would happen in their lives. Their school was not meant to give me any information about how they were progressing, their doctor was not meant to discuss with me any illnesses they had etc. In reality we are an articulate, able and strong family—and the school and the doctor have always regarded me as the children's father, just as the children do, and as family and friends do—but they are breaking the law in doing so, and risk prosecution or a negligence claim by doing so.

One of the things parents can do for their children is endeavour to ensure that when things are difficult, their children do not have to suffer more than necessary. I am unable to do that—for example, what if our children and my partner were in a car accident. If their mother was unconscious I would not be allowed to consent to them having medical treatment. We would have to wait for a court order and a social worker to give that permission—that delay could cause them to have their lives risked whilst the wheels of bureaucracy turn. What if my partner was killed—my children would have to face risking losing their dad whilst the courts debated who they were to live with.

I know that in our lives, we would deal with these matters and undoubtedly the children would get to stay with me—but what if we were not articulate and able, what if I

wasn't a professional, what if we were refugees in a country we did not know?²⁸⁸

Because the United Kingdom does not recognize sex changes by allowing a change of sex on birth certificates, the government reasoned that X and Y could not be said to enjoy "family life" that should be protected since they were still, legally, two women living together. It also contended that X and the child could not be said to enjoy "family life" since they were not related by blood, marriage, or adoption.

The European Court of Human Rights disagreed with the presumption that there was no "enjoyment of family life" to protect, and the unanimous recognition that Article 8 was applicable to the case was a major victory achieved for transgender parents. Nevertheless, the court ultimately ruled in favor of the government in large part due to lack of broad European consensus around both gender reassignment and the issues of filiation with regard to donor insemination.

The court's majority decision did note consequences which followed from the denial, citing the applicant's list:

Perhaps most importantly, the child's sense of security within the family might be undermined. Furthermore, the absence of X's name on her birth certificate might cause distress on those occasions when a full-length certificate had to be produced, for example on registration with a doctor or school, if an insurance policy was taken out on her life or when she applied for a passport. Although Z was a British citizen by birth and could trace connection through her mother in immigration and nationality matters, problems could still arise if X sought to work abroad. For example, he had already had to turn down an offer of employment in Botswana because he had been informed that Y and Z would not have been recognised as his "dependants" and would not, therefore, have been entitled to receive certain benefits (see paragraph 19 above). Moreover,

288. E-mail to the author, January 23, 2000.

170 · conceiving parenthood

in contrast to the position where a parent-child relationship was recognised by law, Z could not inherit from X on intestacy or succeed to certain tenancies on X's death.²⁸⁹

However, the majority ultimately declared that these issues could be resolved by means other than being listed on Z's birth certificate. These included seeking a joint residence order and making a will. (However, a joint residence order does not automatically entitle Z to support from X, should the relationship between X and Y be terminated. This in itself might be seen as working against the best interests of the child.)

The majority also stated that, considering the complex issues raised by transsexuality, it was not clear that there might not be unintended harms to Z or to other children in the same situation as Z.²⁹⁰ *Specific* harm was not postulated; and the decision illustrates a number of areas in which transgender people face discrimination in seeking parenting rights:

- Discrimination in many countries in legal recognition of the sex/gender to which they have transitioned (if X were legally recognized as male, the denial might not have happened, and would certainly have involved different legal arguments);
- The assumption, unproven, that a transgender parent might be harmful to the child;
- The assumption that a variety of legal and contractual means can substitute without inconvenience or harm for the types of parental rights automatically granted to married *or de facto* heterosexual couples in many countries.

X notes, "The situation for my children makes me feel a failure—a failure in providing for them the security a loving father wants to provide. We will continue, for our children's sake—they are entitled to have a family, it was not their choice to be born, but it must be their choice as to who they call dad."²⁹¹

289. *X, Y, and Z v. The United Kingdom* (75/1995/581/667).

290. This was explicitly disputed in the dissenting opinion of Justice Foighel.

291. E-mail to the author, January 23, 2000.

e. broadening the concept of parental rights and responsibility

In its submission to the South African Law Commission on the Review of the Child-Care Act, the National Coalition for Gay and Lesbian Equality (NCGLE) in **South Africa** has proposed a formula for giving parental responsibility to individuals who are not biological parents. NCGLE explains,

In addition to biological parents, many family members play an integral role in the development and upbringing of children. This is particularly relevant in Africa, Asia and Latin America where societies grant *de facto* recognition to such relationships between caregivers and children. Providing for automatic parental responsibility protects the child's interests by ensuring continuity of care crucial to development. Persons who—by their conduct—have created the legitimate expectation that they indeed do have responsibilities in respect of children should be legally obliged to fulfil such responsibilities. This legal obligation will be—effected by the automatic vesting of parental responsibility. . . . There is no rational reason for differentiating between different categories of non-biological parents. The primary concern is the best interests of the child—the formal relationship between a family member and a child does not necessarily correspond with the nature of that relationship.²⁹²

Under the proposed *functional* rather than *formal* model, a family member who is the *de facto* primary care giver for the child will gain automatic parental responsibility in a number of circumstances including the death or disappearance of the parent, the failure of the biological parents to assume parental responsibility, or with the informed consent of a parent. Different people exer-

292. NCGLE submission, "South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship," April 20, 1999, p. 12.

172 · conceiving parenthood

cising parental responsibility may act alone in exercising that responsibility, except in the case of what are called major decisions, decisions involving a significant change to the child's:

- social, educational, or physical environment;
- physical, spiritual, or psychological integrity; or
- legal status.

These may include such issues as emigration or relocation, determining the child's religion or education, and consenting to the child's medical treatment. Parents with whom the child ordinarily resides have somewhat different responsibilities in this context than those with whom the child does not normally reside. Decisions made in the context of emergencies are excepted from the restrictions placed on major decisions.²⁹³

While this model emerges from particular circumstances in South Africa, it shows how parental responsibility might be extended to persons besides the biological parents, in a way that could accommodate a wide variety of family forms, including same-sex couples raising children. Although many family law systems seek to limit the number of people who can be vested with parental responsibility at one time, this model gives the child's right to parental care clear primacy, recognizing that persons besides biological parents may often provide such care—and that multiple sources of care benefit the child.

e. dissolution of same-sex relationships

By contrast with heterosexual marriage, which offers a state-controlled framework of legal responsibility from the beginning, the dissolution of a same-sex relationship (particularly one with children) is sometimes the first occasion when the official mechanisms of the state will consider the legal status of the relation-

293. NCGLE submission, "South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship," April 20, 1999, p. 14.

ships of the parties. Where the relationship between the separating parties is no longer amicable, the legal parent may actually use the lack of legal provision for same-sex partners (the fact that such partners are “legal strangers” to the children, with no particular rights) to argue that the other partner was never really a parent and should have no further contact. Such behavior can confuse and distress the children involved, especially if they had earlier been taught to regard the legal parent’s partner as their parent, and now find that relationship swept away. In 1999, a group of LGBT advocacy organizations based in the **United States** issued ethical guidelines encouraging separating same-sex parents not to reinforce the discrimination against gay men, lesbians, and bisexuals inherent in much family law, and advising them to make agreements while their relationships are going well about how separation might be handled.²⁹⁴ While cohabitation agreements by partners are vulnerable, since not legally binding on the court, they do provide useful guidance for the court about the intentions of parties in the relationship.²⁹⁵

A key element of many systems of family law in the dissolution of heterosexual relationships is to protect children from private decisions made to serve the conflict between the parents, rather than the best interests of the children. Personal agreements should not carry the full burden of this task: it should lie with the law. Establishing standards in law that recognize children raised in same-sex relationships both during the relation-

294. Gay & Lesbian Advocates & Defenders (GLAD), “Groups Issue Standards for Custody Disputes in Same-Sex Relationships,” May 3, 1999. The standards are published in a document titled, “Protecting Families: Standards for Child Custody Disputes in Same-Sex Relationships,” and are issued by GLAD, the National Center for Lesbian Rights (NCLR), the American Civil Liberties Union (ACLU), the Family Pride Coalition, Children of Lesbians and Gays Everywhere (COLAGE), and Lambda Legal Defense and Education Foundation (LLDEF).

295. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 67.

ship and at its dissolution would protect these children. They deserve the same safeguarding as children raised by heterosexuals—particularly at times when parents may not, due to their own disputes, be in the best position to make decisions about the child.

In some countries, including **Belgium**,²⁹⁶ **Canada** (see below), **New Zealand** (see below), and the **United States**, partners have won access rights in court, or have been held liable to provide support for a former partner and children. These cases are decided very unevenly, and do not represent a sufficient guarantee of the best interest of the children, or the rights of the parents, when compared with positive legislation in this area.

McCarthy and Radbord discuss an unpublished case in Ontario (**Canada**), in which interim sole custody was awarded to the non-biological co-mother. They note that the court relied on the Children's Law Reform Act, "which states that the parties to an application for custody and access in respect of a child shall include a person who has demonstrated a settled intention to treat the child as a child in his or her family."²⁹⁷ This act provides that "any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that any female person is the mother of a child."²⁹⁸ In another case in **Canada**, *Buist v. Greaves* [1997], a non-biological mother's claim that she was a "mother" was dismissed on two ground: doubt whether the court had the jurisdiction to find two women to be mothers, noting the use of the terms "the mother" in the law; and uncertainty over how to

296. "Deux mamans pour un bébé," *Le Journal du médecin*, Brussels, December 15, 1998, citing the following case: Trib. Jeun. Courtrai 18 mars 1997 in J.T. 98.

297. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, p. 58, citing, *Re L. and S.*, File No. 195/89 (Ont. Prov. Div.) per Pedlar J.

298. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, p. 58.

determine that “the relationship of mother and child has been established.”²⁹⁹

Moreover, “parent” may be defined significantly more broadly for child-support purposes than in other spheres of Canadian law. (It is again important to remember the frustrating fact that key terms are likely to be mean different things in different parts of family law, or in different areas of state practice). In Ontario, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, and Newfoundland, the definition of parent for these purposes is couched in similar language, including “those who have shown ‘a settled intention’ to treat a child as a child of his or her family or who stand *in loco parentis* to a child.” Quebec also has provisions which run on comparable lines.³⁰⁰

In **Australia**, although one need not be a biological parent to seek custody/residence or access/contact, “the court has often noted a preference for biological parents over applicants with other relationships to the child, who are often referred to, rather tellingly, as ‘strangers.’”³⁰¹ In the only known lesbian case, the co-mother, who had participated in raising the child from birth to the age of eight, was never characterized by the court as having a parenting relationship to the child, and the trial judge ultimately decided that it served the welfare of the child to “no longer live in circumstances where he is forced to accept there are two persons who regard themselves as his mother.”³⁰²

299. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, pp. 58–59, citing *Buist v. Greaves*, [1997], O.J. No. 2646 (Gen. Div.) (QL).

300. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, pp. 61–62.

301. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 125.

302. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 126, citing *X, Y, Z and A, B* unreported, Family Court, Joske J, September 2, 1992; unreported, Appeal to the Full Court of the Family Court, Baker, Lindemayer, McCall JJ, September 13, 1993.

176 · conceiving parenthood

A recent **New Zealand** case in which a lesbian mother sought child support from her ex-partner illustrates the hypocrisy of denying parental identity, and the failure of courts to provide disinterested and adequate protection—as well as the incoherence of multiple definitions of parental rights. While the partner had obtained guardianship of the three children born in the relationship, legal attempts were made to achieve a more direct parental relationship with the third child through adoption. The adoption was denied on the grounds that it would create a “fictional” relationship not in the best interests of the child.

When the relationship later dissolved in acrimony after 14 years, the partner’s guardianship rights were terminated by the mother without objection from the partner. The mother later sued for child support. According to the press, the partner told the court through her lawyer that she was not allowed to marry, or adopt, but now found herself liable to support children she could no longer see.³⁰³

In this case, the definition of “step-parent” for the purposes of child support in the Child Support Act (1991) is apparently broader than the definition of step-parent for other purposes, creating responsibilities for same-sex parents on the dissolution of their relationship greater than the parental rights they were able to obtain during the relationship.

On a positive note, it should be observed that **New Zealand** takes with some seriousness the task of harmonizing its family law with protections against discrimination. The above case was touched upon in a discussion paper put out by New Zealand’s Ministry of Justice in August 1999, in order to seek public input on possible legislation bringing the rights and responsibilities of same-sex partners into line with the rights and responsibilities of cohabiting heterosexual couples and/or married couples. This information-gathering is part of the *Consistency 2000* project, designed to begin rectifying inconsistencies between the Human

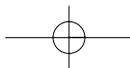
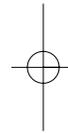
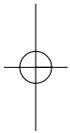
303. *New Zealand Herald*, December 18, 1998.

Rights Act—which protects against sexual orientation-based discrimination—and other legislation in New Zealand. The discussion paper notes that same-sex “can’t legally marry or jointly parent a child. Parents, step-parents, and guardians have a clear right to apply to the Court for child custody. Everybody else must get the permission of the Court to do so.”³⁰⁴

Questions on which specific input is sought include:

- Do you think same-sex couples should have the same rights as opposite-sex couples to jointly adopt children?
- In what circumstances do you think a same-sex couple ought to be able to have joint legal parent status?
- What are your views about same-sex couples being able to be joint parents of a child born from an assisted human reproductive procedure that they both agree to?
- What is your opinion of a same-sex couple both having the right to parental leave if one of them gives birth or adopts a child?
- What are your views on the law on custody and access being changed to take account of same-sex relationships?

304. New Zealand, Ministry of Justice, “Discussion Paper: Same-Sex Couples and the Law,” August 1999.



VIII. Ensuring Protection for the Children

a. discrimination

Children of lesbian, gay, bisexual, and transgender parents may experience discrimination and prejudice directed at their families. They may also be particularly vulnerable to generalized homophobia and the attendant discrimination in schools, religious bodies, community groups, and the media.³⁰⁵ While steps designed to eliminate unequal treatment of LGBT people are key to addressing this problem, other types of laws and regulations may also be necessary to protect these children more directly. State-run services, including education and child-care, have particular obligations not to discriminate directly or through omission against these children on the basis of their parents' sexual orientation or gender identity. The Convention on the Rights of the Child specifically dictates, in its Article 2(2), that

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Flore, a French lesbian mother who had her twins through insemination, recounted a story from her son Charles' school in 1998:

³⁰⁵ See the discussion on pp. 88–90 of why social stigma does not constitute grounds for denying custody to LGBT parents.

180 · conceiving parenthood

Charles' teacher asked the children to draw their family. Charles drew a woman, another woman, a little girl, and a little boy. That same evening, I saw in his notebook a huge red "scratch-out" across one of the women. And the child hadn't even said anything about it! I was beside myself that a teacher dared to attack the family context of a six-year-old child.³⁰⁶

In a 1997 article, Amanda Harvey recounted problems she experienced as a child in the **United Kingdom** when classmates discovered—before she herself had been told—that her mother was living in a lesbian relationship. "I was beaten up. One day, a girl just came up and hit me in the face. I used to try to block it out. When I was 13, I started playing truant because I couldn't stand it any more." Amanda dropped out of school the next year. Neighbors harassed the family, "Our windows used to get smashed. It was very frightening. In the end we had to move."³⁰⁷

As an adult, Amanda remained close to her mother and became less embarrassed about her mother's lesbianism: "She has been a mum and dad to me. I don't see her as a lesbian—she's just my mum. She was unhappy with my dad and now I'm glad she has met someone she is happy with." Amanda notes, "I think that, if it is explained to the children when they are young enough about their mum and partner being lesbians, they can cope." Amanda planned to tell her son Anthony about his grandmother and her partner when he turned six.³⁰⁸

Institutions and communities should be made accountable to all their members, and especially to the needs of children for protection from discrimination and hate violence. In this light, schools can also have a significant positive impact by recognizing

306. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp. 281-282, translated by L. Minot.

307. "The Anguish of Being Raised by My Mother and Her Lesbian Lover," by Dina Malik, *Int. Express*, May 21, 1997.

308. "The Anguish of Being Raised by My Mother and Her Lesbian Lover," by Dina Malik, *Int. Express*, May 21, 1997.

protection for the children . 181

and acknowledging the families of their students. Marie-Laure, a French lesbian, who with her partner is raising two daughters born through insemination, tells the following story about their daughter Giulietta:

On her coat-hook at school our two [last] names are written with a hyphen, as the name she uses [not her actual, legal surname] and there is also a photo of the family with the two of us and her sister stuck up. It is important that her family—the family about which she will talk at school and which is made up of the four of us—that that family exists.³⁰⁹

States have direct responsibilities to intervene in cases of harassment and discrimination, however. In **South Africa**, equality protections in the 1996 Constitution have again shown their effectiveness in this field. In one recent case, the National Coalition for Gay and Lesbian Equality was able to gain an interdict against a man who had been violently attacking a 14-year-old girl because her mother was a lesbian.³¹⁰

Few countries are likely to emulate South Africa soon, by protecting sexual orientation in their constitutions. However, in every country, anti-discrimination legislation and regulations should be formulated—as well as interpreted—to include protection from discrimination on any basis. This should include discrimination based both on the victim's own status, and the status of family members or others with whom the victim is associated. Anti-discrimination legislation in **New Zealand**, for example, bans discrimination on the basis of sexual orientation and defines sexual orientation to mean heterosexuality, homosexuality, lesbianism, or bisexuality. In addition to making it illegal to discriminate against a person based on the person's sexual

309. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp.231–232; translated by L. Minot.

310. Information from Jonathan Berger and Mazibuko Jara of the National Coalition for Gay and Lesbian Equality, November 5, 1999 and October 8, 1999, respectively.

182 · conceiving parenthood

orientation, it is also illegal to discriminate against a person because the person's relative or associate is of a particular sexual orientation.³¹¹ Similar protections from discrimination on the basis of being transgender, or having a relative or associate who is transgender, are needed to protect children of transgender people.

b. knowledge about biological parents

For both adopted children and children conceived with genetic material from a third party, there may be a strong desire to know more about their biological parents. As genetics is playing an increasing role in medical prevention, diagnosis, and treatment, there may be an increasing need to know about their biological origins. In countries including the **Netherlands**, the **United Kingdom**, and the **United States**, it is sometimes possible for adopted children and children conceived through artificial insemination, when they reach the age of majority, to access some information about their biological parents. As adoption and the use of reproductive technology become increasingly common for LGBT people, LGBT communities—along with heterosexuals who use these means and technologies—have an increasing stake in working toward reasonable solutions that address the needs of the social parents for clear legal rights; the needs of the birth parents or donors for privacy; and the needs of the children for information of both emotional and perhaps also medical importance.

311. New Zealand Human Rights Act 1993, cited in International Lesbian and Gay Association, World Legal Survey, www.ilga.org (December 12, 1999).

IX. Conclusion: Parenthood and Human Rights

a. human rights and “non-traditional” family forms

How do human rights intersect with, and affect, the family?

Parenting, family life, and the rights of children are addressed in a broad range of international and regional human rights instruments. None of these documents explicitly acknowledges the particular situations faced by families headed by lesbian, gay, bisexual, and transgender parents, but neither do they specify a wide range of other common family forms. *This absence of specific reference to family forms and issues which concern homosexual, bisexual, and transgender parents does not exclude LGBT people from enjoying equal rights associated with the family—or any other fundamental human rights.*

Indeed, the breadth of formulations which protect the right to “family life” provides a framework for understanding and progressively including under existing rights protections the many forms of families which have evolved within and among cultures throughout the world, including families formed by lesbian, gay, bisexual, and transgender people.

Human rights instruments suggest that the complex concept of what constitutes a recognizable family form is steadily evolving. In addition to privacy-based protections, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) include protection of the right to marry and to found a family, usually linked in the same article, providing key early articulations of rights

184 · conceiving parenthood

around relationship of emotional intimacy, caring, and nurturing. Article 16 (1) of the UDHR reads:

Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.

Article 23 of the ICCPR reiterates this right in similar terms, requiring again the protection of the family “by society and the State.”

The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women have further developed the interpretation of these rights, as regards both traditionally-recognized family forms and family forms that may be understood as “non-traditional.” The Convention on the Elimination of All Forms of Discrimination Against Women attends particular to discrimination both *in regard to* marriage rights and discrimination *within* the marriage relationship. Article 16 provides a comprehensive framework for addressing both, requiring states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.” Including in the measures mandated are “the same right to enter into marriage.” Specifically with regard to the care of children, the Convention requires the enjoyment of “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children”; it also affirms “the same rights and responsibilities with regard to guardianship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation.”³¹² The Convention also states that “in all cases the interests of the children shall be paramount.”

As has already been observed, the Convention on the Rights of the Child constitutes, as a whole, a guide to understanding

312. Convention on the Elimination of All Forms of Discrimination Against Women, U.N.G.A.R. 34/180, December 18, 1979.

conclusion . 185

how states may locate and define those “best interests.” The preamble of the Convention on the Rights of the Child provides perhaps the clearest and most expansive statement of how family protection connects to the broader human rights goals and protections of the United Nations. The preamble states that the people of the United Nations have reaffirmed their “faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.” It describes the family as “the natural environment for the growth and well-being of all its members” and further recognizes “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” Finally, it considers that “the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”

While the *form* of family life is not stipulated above, its nature and goals are described. Indeed the Convention, while in no way contravening the assertions of the UDHR that the family is the “natural and fundamental group unit of society,” offers a fuller way of understanding its essence: not as an independent good but as a purposeful entity, meant among other things to prepare its members (as well as children) for a complete civil existence. The family life that is protected and promoted is one sustaining the “growth and well-being of *all* its members,” as is consonant with the recognition of the “dignity and worth of the human person.” The ideals against which a “family life” appropriate for children are to be measured are not a particular form or a particular set of members, but its ability to provide “an atmosphere of happiness, love and understanding” conducive to raising children “in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”

The Committee on the Rights of the Child has in varying

186 · conceiving parenthood

ways confirmed that no single model of family life meets these needs. In an outline for a General Discussion of “The role of the family in the promotion of the rights of the child,” the Committee noted:

When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging family relationships. In this regard, the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family. Such situations deserve to be studied in the framework of the rights of the child within the family.³¹³

The United Nations Human Rights Committee has also stressed the importance of latitude in defining the family—and has observed that the requirement to “protect” the family implies protecting all its flexible array of forms, not protecting (and pitting) one form against another. In General Comments on the ICCPR, the Committee has noted that

. . . the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23 [see above]. Consequently, States Parties should report on how the concept and the scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, ‘nuclear’ and ‘extended,’ exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmar-

313. Committee on the Rights of the Child, Report on the Fifth Session, January 1994, CRC/C/24, Annex V, p. 63.

conclusion . 187

ried couples and their children or single parents and their children, States Parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.³¹⁴

The 1994 United Nations Conference on Population and Development, in its Program for Action, noted with concern occasions “when policies and programmes that affect the family ignore the existing diversity of family forms.” It urged that “Governments should maintain and further develop mechanisms to document changes and undertake studies on family composition and structure, especially on the prevalence of one-person households, and single-parent and multigenerational families.” It placed this recommendation specifically in the context of a call to take “effective action to eliminate all forms of coercion and discrimination in policies and practices.”³¹⁵ The 1995 United Nations Fourth World Conference on Women also observed that “In different cultural, political and social systems, various forms of the family exist,” noting in this light that “The rights, capabilities and responsibilities of family members” in these different forms “must be respected.”³¹⁶

Pursuing a comparable argument, Radhika Coomaraswamy, the UN Special Rapporteur on Violence against Women, has written,

Throughout the world, there exist divisions between the dominant, normative ideal of the family and the empirical realities of family forms. Whether the ideal is the nuclear family or a variation of the joint or extended family, such ideals in many cases are not wholly consistent with the realities of modern family forms. These family forms

314. U.N. Human Rights Committee, General Comment 19, HRI/GEN/1/Rev.2, p. 29).

315. U.N. Conference on Population and Development, A/CONF.171/13, October 18, 1994, at 5.1., 5.5., 5.6.

316. U.N. Fourth World Conference on Women, Platform for Action, A/CONF.177/20, October 17, 1995, at 29.

188 · conceiving parenthood

include, in increasingly large numbers, female-headed households in which women live alone or with their children because of choice (including sexual and employment choices), widowhood, abandonment, displacement or militarization.³¹⁷

That these norms are often structurally based on a specific vision of gendered role is made explicit in the cases and examples she cites. Coomaraswamy explains the coercive role of such structural norms and their role in promoting gender-based violence, stating:

Despite such differences, however, the culturally-specific, ideologically dominant family form in any given society shapes both the norm and that which is defined as existing outside of the norm and, hence, classified as deviant. Thus, the dominant family structure—whether it is dominant in fact or merely in theory—serves as a basis against which relationships are judged.³¹⁸

Such an analysis is particularly useful in addressing such non-traditional families as LGBT relationships, and Coomaraswamy explicitly includes the right to non-traditional forms of sexual expression and behavior within her discussion of gender-based oppression.³¹⁹

Moreover, Coomaraswamy explains,

All international human rights texts underscore the notion of choice (i.e. free and full consent) as the basis for forming a family. The Convention on the Elimination of All Forms of Discrimination against Women took a significant additional step in calling for the elimination of “discrimi-

317. U. N. Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 8.

318. Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 9.

319. Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 12.

nation against women in all matters relating to marriage and family relations,” not only in terms of the right to enter into marriage with free and full consent and equal rights and responsibilities during marriage and its dissolution, but also in terms of equal rights with respect to reproduction, child-rearing, custody, property and protection against child marriage (art. 16)

This emphasis on “free and full consent,” in conjunction with the characteristics of family life enumerated in the *Convention on the Rights of the Child (CRC)*, provides a rich and complex basis for better addressing family issues—including those of non-traditional family forms—from a human rights perspective.

Indeed, legal systems as well as policymakers in many states have undertaken redefinitions of the family in terms both progressive and inclusive, with social-welfare agencies—which have less room to evade facing the variety of family forms in practice—often taking the lead in both the realism and the flexibility of their formulations. In **South Africa**, for instance, the Department of Social Welfare, in a 1996 White Paper, defines a “family” as: “Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security.”³²⁰ As has already been pointed out, the influence of the South African Constitution on such formulations, and in ensuring general equality, has been—and will continue to be—profound.³²¹ It deserves to be a model for other states’ action.

320. Government Gazette No. 16493, February 2, 1996; quoted in National Coalition for Gay and Lesbian Equality, “Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship,” April 20, 1999.

321. Jurisprudence based on the South African Constitution appears likely to apply equality to the family in a number of ways, not least by possibly

190 . conceiving parenthood

Definitions such as the above, which emphasize not the prescribed composition or the preferred formal structure of the family, but rather the functions of care it fulfils (and which implicitly propose that any family be judged simply by its adequacy in serving those ends) should also be taken as a general model. They should be inscribed in democratic law as well as policy.

States should work toward definitions of “family,” as well as “parenthood” and parental rights and responsibilities, which inclusively represent different forms of the family and different environments of care, so as to treat them on a basis of equality throughout all levels of family law and state policy.

extending full marriage rights to gay and lesbian couples in the near future. As one step, a groundbreaking recent decision of the Constitutional Court of South Africa instructs that the definition of “spouse,” for immigration purposes, be extended to include such couples: *National Coalition for Gay and Lesbian Equality and Others v. the Ministry of Home Affairs and Others*, unreported decision, December 2, 1999. Moreover, this decision criticizes *both* discrimination based on sexual orientation *and* discrimination on the basis of marital status in deciding the sharing of residency and citizenship under immigration law: it notes that “marriage represents but one form of life partnership.” The decision states: “A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships. A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament’s commitment to equality on the ground of sexual orientation, there is still no appropriate recognition in our law of the same-sex life partnership, *as a relationship*, to meet the legal and other needs of its partners.” In foreseeing such recognition, the decision suggests that South African law is moving in a multiple and fascinating course: not only toward redefining marriage on a more open and equal basis, but toward redefining the previously close connection between the legal concept of “marriage” and that of “family.” In a future toward which the decision possibly points, family relationships not only may no longer require the stamp and seal of marriage, but may no longer need to be *modelled or patterned* after nuclear, heterosexual marital relationships, in order for the state to see them as valid. The degree and direction of this movement in coming years will be of the highest importance for other states and other legal systems to watch.

b. families and protections against discrimination

The Committee on the Rights of the Child has explained that the Children's Convention is

. . . the most appropriate framework in which to consider, and to ensure respect for, the fundamental rights of all family members, in their individuality. Children's rights will gain autonomy, but they will be especially meaningful in the context of the rights of parents and other members of the family to be recognized, to be respected, to be promoted. And this will be the only way to promote the status of, and respect for, the family itself.³²²

This powerful statement is consistent with the aspiration of human rights approaches to perceive and promote the family not as a zone somehow magically immune from interpretation in terms of rights—but rather as a model of community and civility, a place where rights are learned, taught, lived, inculcated as a culture and a way of existence, and comprehensively respected.

Any culture of rights must be predicated on non-discrimination. It stands as one of the core principles of democratic society, and every major human rights treaty is concerned to offer effective protection against discrimination. The International Covenant on Civil and Political Rights condemns discrimination in two separate articles. Article 2 requires equal enjoyment of all rights contained in the treaty:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

322. Committee on the Rights of the Child, Report on the Seventh Session, September-October 1994, CRC/C/34, para. 183.

192 . conceiving parenthood

Article 26 contains a more general affirmation of equality:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 thus should be understood to bar discrimination in the specific right “to found a family” (stipulated in Article 23); Article 26 affirms the necessity of equality in all other areas where family life is affected or protected by the law.

Of overriding importance to lesbian, gay, and bisexual people—and parents—is the fact that *sexual orientation is understood to be protected by these provisions*. The principle that prohibitions against discrimination include, and preclude, discrimination based on sexual orientation has been established by the United Nations Human Rights Committee, in its 1994 decision in *Toonen v. Australia*. This decision represents the most sweeping affirmation of the rights of lesbians and gay men in international law.

In reviewing a law (in the Australian state of Tasmania) which penalized consensual sexual behavior between adults of the same sex, the Committee found that the law generated unequal treatment based on sexual orientation. It then found that such treatment was banned under the discrimination provisions of the ICCPR, which implicitly included sexual orientation. The Committee observed that “that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”³²³

In invoking the sweeping language of Article 26 of the ICCPR—dealing with general unequal treatment before the law—the Committee invited sexual-orientation based discrimination to

323. *Toonen v. Australia*, CCPR/C/50/D/488/1992.

conclusion . 193

be defined and identified broadly. Other treaty-based standards regarding discrimination also invite a broad approach. Model language for defining discrimination occurs in the International Convention on the Elimination of Racial Discrimination, where it is described (Article 1) as

any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Still more broadly, the Convention on the Elimination of All Forms of Discrimination Against Women defines its mandate (Article 1) as including

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This Convention does not abjure concern with a protected zone of “privacy” separate from public life; it specifically addresses discrimination within the family, in provisions alluded to above.³²⁴

The *Toonen* decision, then—taken in the context of other international standards on discrimination—strikes against unequal treatment not just in political life narrowly conceived, but across the range of activities and spheres which comprise human exis-

324. Other Conventions also make clear the continuing relevance of discrimination protections to family life. The American Convention on Human Rights, for instance, reads: “The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, *insofar as such conditions do not affect the principle of*

194 . conceiving parenthood

tence.³²⁵ It provides a basis for opposing two kinds of discrimination in the family sphere:

- Discrimination against individuals in their access to rights and powers associated with family relationships, including their recognition as parents;
- Discrimination against particular family forms or structures in their access to recognition and rights, on the basis of the sexual orientation (or other status) of the members.

The obligation which these provisions and precedents place upon states is clear.

States should enact comprehensive anti-discrimination legislation prohibiting unequal treatment based on sexual orientation and gender identity, applying to all areas of life including the family. States should also review and revise both laws and policies which may embody such bias in subtler form, or which permit or mandate other forms of invidious treatment, including discrimination on the basis of marital status.

nondiscrimination established in this Convention" (Article 17.1, emphasis added). Also profoundly relevant, and defining a nexus between the condemnation of discrimination and the capacity for reproduction, is the language of the Platform for Action of the U.N. Fourth World Conference on Women: it states that "reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents." A/CONF.177/20, October 17, 1995, at 94.

325. Other United Nations human-rights bodies have interpreted *Toonen* to mandate work addressing sexual orientation-based discrimination. The Committee on the Rights of the Child has raised to Austria the question of persisting unequal ages of consent for homosexual and heterosexual relations in Austria; the Human Rights Committee has also found the relevant legislation discriminatory: see Austria, HRC report, CCPR/C/79/Add.103 1998, at 13.

c. returning to the interests of the child

All these themes in international law coalesce, IGLHRC contends, around the notion—sweeping, capable of diverse applications, yet indubitably authoritative—of the “best interests of the child.”

The Convention of the Rights of the Child is interwoven throughout its length by this language. In the Convention, the primacy of the child’s “best interests” is affirmed:

- In defining equality of parental responsibilities: states must recognize “the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. *The best interests of the child will be their basic concern*” (Article 18.1).
- In adoption: states “which recognize and/or permit the system of adoption *shall ensure that the best interest of the child shall be the paramount consideration*” (Article 21).
- In other arrangements for children separated from their families: “A child temporarily or permanently deprived of her family environment, or *in whose own best interests* cannot be allowed to remain in that environment, shall be entitled to special protection and assistance from the State” (Article 20.1).
- In determining separation from parents: states “shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, *that such separation is necessary for the best interests of the child*” (Article 9.1).

The writers of the Convention deliberately avoided too precise, stringent, or inflexible an endeavor to define those interests. An exact definition is certainly impossible, bound as the term is by particular, local, and personal circumstances. It is at least possible,

196 · conceiving parenthood

though—based on the documentation already assembled—to lay guidelines for *how* those interests are to be determined, and safeguarded, in any individual case.

State protection of the “best interests of the child” should be limited, in a negative sense, by the demands of consistency—consistency both among the motives of protection and intervention, and with the broader aims of a free society. It should also be governed by positive compulsions rooted in the needs and values of such societies. State protection should:

- Be restrained, in its dealings with particular families, by consistently applied principles, such as the “nexus text” proposed above (p. 70), which requires evidence of specific harm, actual or potential;
- Be proportionate to its end, governed by law, carried out by authorities subject to judicial review, and consistent with other principles embodied in law, including those of non-discrimination;
- See the child’s interests in the context of an active obligation to prepare and educate the child for adult life in a free society.

As this report has already indicated, the language of the Convention itself offers a guide to interpreting and protecting the child’s interests. Their meaning consists, in part, in the very values of diversity and equality described above. Children deserve to be raised in an environment which lovingly instructs them in the meaning of human dignity. Their highest interests lie in seeing their own dignity both reflected and affirmed, in respect for the dignity of others. When their supposed security instead is exploited, by the state, as a pretext to support discrimination against difference—to justify the degradation of others—it is children themselves who suffer. The world into which they will mature is being insulted, maimed, and harmed.

The family, is then, an environment in which all will benefit from the fulfilment of all other members’ dignity. To cite again

conclusion . 197

what the Committee on the Rights of the Child has argued, children's rights "will be especially meaningful in the context of the rights of parents and other members of the family to be recognized, to be respected, to be promoted." States should respect the equality of all persons in all areas of life—and in doing so, they will best protect the family. States should ensure to all competent individuals maximal opportunities for their capacities to care.³²⁶

When, in 1998, the Constitutional Court of **South Africa** struck down so-called "sodomy laws" in that country, on the grounds that they violated constitutional protections for privacy, equality, and dignity, Justice Sachs of the court observed in a concurring opinion that

... the implications of this judgment extend well beyond the gay and lesbian community. It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled, an issue central to the present matter.

The Justice noted:

The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely

326. In studying the survivors of a carceral regime of unprecedented repressiveness—the concentrationary universe of Nazism—one historian draws attention to the connections evinced there between dignity and care. Dignity, which this commentator identifies with freedom and the capacity to remain a person with a will, was made a tool for survival by camp inmates who employed that reserve of freedom to enter into caring relationships, employing their remaining strength to nurture and to aid. In such relationships the barbarity and deprivation of imprisonment were transformed, and human existence was again rendered, however tenuously, possible. The capacity to care is an essential aspect of the personality; discrimination in relationships of care strikes at the core of being human. See Tzvetan Todorov, *Facing the Extreme: Moral Life in the Concentration Camps*, New York, 1996.

198 · conceiving parenthood

formal sense of enjoying a common citizenship depends on recognising and accepting people as they are. . . . What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.³²⁷

The Justice's delineation of a fully open society surely applies to the institution, the family, where that society lies as it were in readiness and gestation: where individuals are raised to join a world that must welcome difference or suffer violent division. His words recall the arguments of the court in the **United States** case of *MP v. SP*—already cited above. To discriminate against a mother on the basis of her sexual orientation, that court held, would create a stigma more deeply deleterious to the child than any damage sustained by staying with her to endure society's prejudices. Remaining with his mother, the child would see her human worth affirmed; separated from her, the child would witness a world in which prejudice drove the engines of power. Hope for the future depends on not abdicating the present to the dominion of hatred. Justice Sachs, like the New Jersey court, finds the "acceptance of the principle of difference itself" to be a social value worth elevating into a norm, worth promoting across the spectrum of relationships. Like the New Jersey

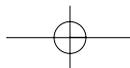
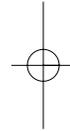
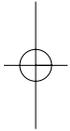
327. National Coalition for Gay and Lesbian Equality v Minister of Justice 1998(6) BCLR 726 / 1999(1) SA 6 (CC). at 131, 134.

conclusion . 199

court, he discovers in the denial of difference the most ominous possibility of harm.

The best interests of children lie in love, inclusiveness, and understanding. Ordinary experience affirms here what international standards adumbrate. It is the responsibility of national legal systems to recognize this truth, and turn it into practical action.

States should revise laws on child care and family policy in order to comply with the standards and provisions of the Convention on the Rights of the Child, as well as other relevant international standards. State regulation of parent-child relationships should be rendered predictable and uniform, operating according to principles embodied in law (and consistent with other legislation including anti-discrimination legislation), and directed at and proportionate to the aims of a democratic society.



X. Recommendations

Family law is and should be a leader in the legal system because it matters so much to so many. And that is why it is worth spending the time and energy on getting it as right as reality permits.

—The Honourable Madame Justice
R. S. Abella (Canada)³²⁸

these recommendations are grounded in the provisions of international law described in the previous chapter. They are not meant to be exhaustive, or to offer complete and conclusive means of ensuring the rights of LGBT people to, and in, parenthood. Rather, they are explicitly designed to include both long-term, broader solutions, and immediate and partial measures—recognizing that the comprehensiveness of discrimination in family law means that inequity can most likely only be limited by slow, gradual, and irregular stages.

At the same time, the extensive range of these recommendations indicates forcefully that *justice within, and to, families depends upon and cannot be separated from achieving justice in society as a whole.*

The International Gay and Lesbian Human Rights Commission calls on all states to:

1. Enact anti-discrimination legislation offering comprehensive protections against unequal treatment based on sexual orientation and gender identity. Such legislation should include:

328. Unpublished keynote address to the Federation of Law Societies—Canadian Bar Association, 1994, quoted in Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, p. 11.

202 . conceiving parenthood

- Protections involving all areas of life, including but not restricted to housing, employment, and the family;³²⁹
- The removal of employment loopholes designed to enable discrimination in employment that involves contact with children;
- Explicit prohibition of all discrimination in family matters based on parents' legitimate exercise of their rights, including rights to association, expression, or belief;
- Protections for children against harassment or discrimination based on their parents' identities (including gender identity or sexual orientation), expressions, opinion or beliefs, or other status;
- Positive steps to address LGBT issues, and to prevent discrimination based on sexual orientation and gender identity, in schools and other institutions serving children and their families.

329. See the Convention on the Elimination of All Forms of Discrimination Against Women, Art. 1 (cited above) for an enumeration of areas of discrimination. Model language for non-discrimination provisions to be included in family and child-care legislation has been proposed by South Africa's National Coalition for Gay and Lesbian Equality; the language would add family status (relating to discrimination on the basis of family relationships) to rosters of protected statuses, as well as addressing discrimination *in* family relationships:

"No person shall unfairly discriminate, whether directly or indirectly, against any *child, parent* or *family member* who is identified by one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family status, nationality or socio-economic status.

"This prohibition on unfair discrimination includes unfair discrimination on the basis of—a characteristic or perceived characteristic that appertains generally to persons identified by one or more grounds; or—a characteristic or perceived characteristic that is generally attributed to persons identified by one or more grounds. . .

"The best interests of the child must be determined according to the average level of social goods available in the community in which the child is ordinarily resident, and on the basis of the child's constitutionally recognised rights." NCGLE submission, "South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship," April 20, 1999.

recommendations . 203

2. Ensure the legal recognition of lesbian and gay couples through one or more of a variety of mechanisms:
 - Inclusion of lesbian and gay couples in existing legislation regarding “common-law” or de-facto partners;
 - Partnership legislation creating a special civil status;
 - Preferably, full civil marriage for lesbian and gay couples on a basis of equality with heterosexuals.

3. Ensure that the status of civil marriage—as well as other comparable recognitions accorded to relationships—serves exclusively as a way for the state to certify and guarantee the rights and responsibilities partners within a contractual relationship have towards and against one another. It should not serve as a basis for discriminating against, or curtailing or abrogating any rights of, persons who do not wish to enter into such a contractual relationship—including their right to found a family.

4. Eliminate any remaining laws which criminalize consensual sexual behavior between adults, including so-called “sodomy laws” penalizing same-sex conduct or “unnatural acts,” as well as laws against adultery or pre- or extramarital sexual relations.

5. Amend, develop, and enact legal provisions so as to make family law reflect actual families, treating their diverse forms so far as possible on a basis of full equality; and further develop those areas in which existing family law does indeed protect more recently visible (or previously censured) forms of the family. This may include (but is not exhausted by):
 - Ratifying the Convention on the Rights of the Child (if the state in question is, like the **United States**, one of those few which have not done so), and enacting its provisions and protections for children’s rights into national law;
 - Ratifying the Convention on the Elimination of All Forms of Discrimination Against Women, and enacting legal provisions to ensure equality to women in all areas of life, including the family in all its forms;

204 · conceiving parenthood

- Developing new and more flexible definitions of family in law, explicitly recognizing and accomodating “non-traditional” family forms, as well as new definitions of “family member”;³³⁰
- Developing new definitions of “parent,” and new enumerations of (or other approaches to identifying) parental rights and responsibilities, as well as new ways of defining those rights and responsibilities in terms built upon the rights of the child;³³¹
- Recognizing the possibility—and the consequent advantages that may accrue—for a child to have all available persons occupying parental relationships (not simply a biological mother

330. The NCGLE notes that “The concept of respect for and protection of diversity suggests that a definition of family should be based on the roles that families fulfil, and not on the particular forms that they may take. Such a definition would not be a *functional* definition in the narrow sense of the term: it would be based on the performance of certain functions rather than on the basis of whether or not the particular family shares the essential characteristics of a traditionally accepted family. It is important to define family to facilitate a) broader access to services which are either reserved for families, or to which families have priority. Access to such services has historically been limited to traditionally defined families; b) the prevention of the removal of a child and his or her placement in foster care with strangers, or in institution. By failing to acknowledge and recognise diverse forms of family, children have historically been removed from the care of non-traditional and extended family structures.” The NCGLE has proposed the following definitions: “A family means a collection of individuals who, by contract, agreement or kinship, choose to function, or in fact function, as a unit in a social and economic system. In relation to a child, a family member means any member of that unit a) with whom the child or young person has a biological or legal relationship; b) with whom the child or young person has developed a relationship based on a significant psychological or emotional attachment; or c) who acts as a caregiver to the child, has acted as a caregiver to the child, or has indicated an express intention to act as a caregiver.” NCGLE submission, “South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship,” April 20, 1999.

331. The NCGLE notes that “It is important to link the concepts of parental responsibility and parents’ rights so as to ensure that whatever rights a parent has in relation to a child are limited by respect for and protection of the child’s best interests. Without such an express relation between the two concepts, the shift from parental power to parental responsibility would be difficult

and/or father) recognized in law, possibly with different, specified aspects of parental rights and responsibilities allotted to each.

6. Affirm the right of persons to define their own gender identity and to have that identity recognized in all documents issued by, and all interactions with, the state, as well as in other areas of life including employment and housing.
7. Ensure the recognition of the full legal rights of transgender people to marry, adopting as their gender identity that in which they are living, and to be recognized as parents of children in situations in which a non-transgender person of the same gender would be recognized.

to maintain or indeed achieve.” A shift from the historical idea of parental power over children to the notion of parental responsibility to provide care for children is consonant with increasing recognition of the rights of the child, and the necessity of integrating this recognition into national law. To this end—as noted earlier—the NCGLE has proposed the following definition of “parent,” one of many which might be (and have been) put forward around the world:

“A *parent* is any *family member* who has *parental responsibility*.

“*Parental responsibility* means the responsibility a *parent* has in relation to a *child*, including—a) safeguarding and promoting the *child’s* health, development and welfare; b) providing direction or guidance in a manner appropriate to the stage of development of the *child*; c) providing an appropriate environment to foster respect for diversity, community and the environment; d) maintaining personal relations and regular, direct contact with the *child* if he or she is not living with the *parent*; and e) acting as the *child’s* legal representative, but only insofar as compliance is practicable and based on the best interests of the *child*.

“A *parent* has those rights which are necessary to fulfil his or her *parental responsibility*, including the right—a) to have the *child* living with him or her or otherwise to regulate the *child’s* residence; b) to direct or guide the *child’s* upbringing in a manner appropriate to the *child’s* stage of development; c) if the *child* is not living with him or her, to maintain personal relations and regular, direct contact; and d) to act as the *child’s* legal representative, but only insofar as those rights are exercised in a manner consistent with the constitutionally recognised rights of the *child*.” NCGLE submission, “South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship,” April 20, 1999.

206 · conceiving parenthood

8. Enact legislation or policies stating clearly that the sexual orientation or gender identity of a parent is not in and of itself a barrier to custody of or access to children.
9. Eliminate explicit legal bans or implicit forms of legal or institutional bias which serve to prevent otherwise competent and qualified LGBT people from adopting or fostering children. This would include:
 - Eliminating explicit legal bans on unmarried people adopting or fostering children, along with other forms of discrimination on the basis of marital status;
 - Appropriate oversight to address discrimination in practice and in the enforcement of policies;
 - Recognizing the right of adopted children to obtain some information about their biological parents.
10. Eliminate legal provisions and other policy instruments which prevent LGBT people from accessing reproductive technologies on a basis of full equality with heterosexual persons. This would include:
 - Eliminating explicit legal bans on people accessing reproductive technology on the basis of their sexual orientation;
 - Eliminating explicit legal bans on people accessing reproductive technology on the basis of their marital/partnership status;
 - Eliminating policies (e.g., in accessing reproductive technologies through state clinics, or through health insurance policies) which discriminate against individuals in this realm on the basis of their sexual orientation or marital/partnership status;
 - Consistent efforts to examine and address other inequities suffered by LGBT people in access to health care, and to ensure supportive health care environments for lesbian women, lesbian/bisexual mothers, surrogate mothers, etc.;
 - Protection of the rights of medical personnel providing reproductive-technology services to LGBT people;
 - Eliminating all legal disadvantages suffered by children born outside of civil marriage;

recommendations . 207

- Recognizing the rights of children conceived by assisted reproductive technology to some information about the gamete donors/surrogates.
- 11.** Eliminate all sterility requirements imposed as conditions for authorizing gender-reassignment surgery, or for legal recognition of change of gender.
- 12.** Recognize and make available the possibility of joint parental rights for the same-sex partners of people who already have children previous to the relationship, on a basis of equality with the availability of those rights heterosexual partners (facilitated by legal recognition of civil marriage for same-sex couples, or by registered partnership or other legal affirmation of status made available to same-sex partners).
- 13.** Develop and enact legal instruments (independent of marital/partnership status) to enable same-sex couples in:
 - joint adoption;
 - joint fostering;
 - joint engagement in the project of having a child by reproductive technology.
- 14.** Ensure full access to justice throughout the legal system for LGBT people who are or seek to become parents. This includes:
 - Developing legal education so as to include LGBT issues generally, and in the context of family law;
 - Ensuring that LGBT people have full access to competent representation at all levels and stages of the legal system.

The International Gay and Lesbian Human Rights Commission also calls on the international community, particularly intergovernmental organizations such as the United Nations and comparable regional bodies, to:

- 1.** Create fora in which states and legal establishments can exchange information, and share examples, in the realm of fam-

208 · conceiving parenthood

ily law so as to ensure an even and equal development in its principles, as well as increase its capacity to address situations in a variety of social, cultural, and economic contexts.

2. In all programs addressing family, parenting, and reproductive issues, ensure that due attention is given to their impact in terms of sexual orientation and gender identity, and on populations affected or made vulnerable in those contexts: and that those issues are addressed in a fair and non-discriminatory manner.
3. Ensure that all programs in the areas of (among others) legal and human rights education, technical assistance, and socio-economic development and aid—whether carried out at the state level or in civil society—be devised with due attention to their impact on issues of sexual orientation and gender identity, as well as gender equity: and that such programs address those issues in the context of guaranteeing equality to all human beings.
4. Work to guarantee all populations worldwide the full enjoyment of the right to the highest attainable standard of physical and mental health, addressing socioeconomic inequities, denials of civil and political rights, and patterns of discrimination which prevent the attainment of this end, and seeing the enjoyment of reproductive rights as integral to it;
5. Affirm, and act upon, the relevance and urgency of rendering protections against discrimination fully meaningful in the realm of family life.

Country Index

Argentina, 61–62, 121–123, 142–143
 Australia, 6 *note*, 55–56, 68, 76–77, 118, 125–126, 139–141, 143,
 146, 163, 175, 192
 Austria, 67, 114, 124, 134, 165
 Belgium, 85, 94, 108, 137–138, 165, 174
 Brazil, 62
 Canada, 7, 26, 29, 69, 91, 108, 115, 129, 130, 139, 146, 153,
 161–162, 174–175
 Costa Rica, 56, 57–58, 115–116, 135–136
 Czech Republic, 71, 134
 Denmark, 134, 135, 159
 Finland, 62–63, 107, 121, 162
 France, 5, 6, 32 *note*, 43, 67–68, 72–76, 91, 93 109–114, 134,
 143, 146, 179–180, 181
 Germany, 6–7, 47–48, 63–64, 76, 81–82, 119–120, 123, 124,
 129, 136–137, 146, 153, 165–167
 Greece, 67, 114
 Guatemala, 39ff.
 Hungary, 46, 106
 Iceland, 106, 134, 159
 India, 14
 Ireland, 30 *note*, 64, 117
 Israel, 30 *note*, 141, 163–165
 Italy, 64, 117, 123, 124, 137
 Jamaica, 64
 Latvia, 114–115
 Mexico, 51
 Namibia, 1, 3, 52
 Netherlands, 31, 107, 139, 153, 159–161, 182
 New Zealand, 127, 174, 176–177, 181–182

210 . conceivingparenthood

Nicaragua, 15, 65
Norway, 30, 124, 134
Philippines, 47, 50–51, 63, 66
Poland, 114, 166
Portugal, 32, 65–66, 86–87, 88, 95 *note*
Romania, 53ff, 92 *note*
Russia, 28, 29 *note*, 63
Serbia, 30 *note*, 64–65, 117
South Africa, 50, 96–98, 127–128, 142, 171–172, 181, 189–190,
197–199, 204–205 *note*
Spain, 51, 101–102, 128, 142, 166
Sweden, 28, 106, 107, 134, 153, 161
Thailand, 57
Turkey, 71
United Kingdom, 28, 29, 31, 56–57, 89, 90, 94–95, 100–101,
107–108, 116, 120, 123, 124, 129, 130, 138–139, 142, 143,
144, 146–147, 148–153, 154, 162, 167–170, 180, 182
United States, 6, 28, 52, 69, 70, 82–85, 89, 90, 93, 96–98,
99–100, 124, 126, 130, 142, 145, 146, 153, 163, 173, 174,
182
Vatican, 51
Zimbabwe, 136

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212 · conceiving parenthood

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Resources

Below are a few resources, generally of broad or specifically international interest, dealing with LGBT parenting and family issues. This list is by no means exhaustive, but many of these organizations can provide further resources.

Alternative Family Magazine

International parenting magazine for gay, lesbian, bisexual, transgendered parents and their children.

<http://www.altfammag.com/>

American Psychological Association

<http://www.apa.org/>

Association des parents et futurs parents gays et lesbiens (APGL)

French parenting association; includes extensive resources in French and English

<http://apgl.asso.fr>

Children of Lesbians and Gays Everywhere (COLAGE)

International organization providing support, resources, and advocacy for children of LGBT parents

3543 18th St., Suite: 17
San Francisco, CA 94110 USA
Tel: +1-415-861-5437
Email: kidsogays@aol.com
<http://www.colage.org>

214 . conceivingparenthood

Family Diversity Projects/Love Makes a Family

Organization which has a book and traveling exhibits on LGBT families

Peggy Gillespie and Gigi Kaeser
P.O. Box 1209
Amherst, MA 01004-1209 USA
Phone: +1-413-256-0502 (9 AM to 5 PM EST)
Fax: +1-413-253-3977
Email: famphoto@aol.com & famphoto@javanet.com
<http://www.lovemakesafamily.org/>

Family Pride Coalition (formerly Gay and Lesbian Parenting Coalition International)

International support organization for LGBT parents
P.O. Box 34337
San Diego, CA 92163 USA
Tel: +1-619-296-0199
Fax: +1-619-296-0699
Email: Pride@FamilyPride.org
<http://www.familypride.org>

Family Q

Web site with some international resources
<http://www.studio8prod.com/familyq/>

Gay Lesbian Straight Education Network (GLSEN)

US-based organization working on issues of homophobia in schools; lots of resources

National Office
121 West 27th St., Ste. 804
New York, NY 10001 USA
Tel: +1-212-727-0135
Fax: +1-212-727-0254
Email: glsen@glsen.org
<http://www.glsen.org>

International Lesbian and Gay Association (ILGA)

International information, including a world legal survey

<http://www.ilga.org>

National Center for Lesbian Rights (NCLR) (US)

US-based advocacy group with extensive experience in custody cases

870 Market Street, Ste. 570
San Francisco, CA 94102 USA
Tel: +1-415-392-6257
Fax: +1-415-392-8442
<http://www.nclrights.org>

**National Coalition for Gay and Lesbian Equality (NCGLE)
(South Africa)**

P.O. Box 1984
Joubert Park
2044
South Africa
Tel: +27-11-403-3835
Fax: +27-11-339-7762
Email: coalgr@aztec.co.za

National Gay and Lesbian Task Force (NGLTF) (US)

1700 Kalorama Road, NW
Washington, DC 20009-2624
Tel: +1-202-332-6483
Fax: +1-202-332-0207
<http://www.nglhf.org>

Parents, Families, and Friends of Lesbians and Gays (PFLAG)

1726 M Street, NW Suite 400
Washington, DC 20036 USA
Tel: +1-202-467-8180
Fax: +1-202-467-8194
<http://www.pflag.org>

216 . conceivingparenthood

Press for Change

UK-based transgender resource and advocacy organization with lots of information on their web site

<http://www.pfc.org.uk>

Straight Spouse Network (SSN)

An international support network of heterosexual spouses and partners, current or former, of gay, lesbian, bisexual, and transgender mates

Amity Pierce Buxton, Ph.D.

8215 Terrace Drive

El Cerrito, CA 94530-3058 USA

Telephone +1-510-525-0200

Email: dir@ssnetwk.org

<http://www.ssnetwk.org>

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16 Clerkenwell Close

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Fax: +44-0171-336-8864

Email: info@stonewall.org.uk

<http://www.stonewall.org.uk>

