HOMOSEXUALITY OF A PARENT: A NEW ISSUE IN CUSTODY DISPUTES

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Recently a number of cases have come before the Family Court of Australia, in which the custody of a child was sought by a heterosexual parent on the one side and a homosexual parent on the opposite side. Homosexuals,[1] according to two monumental studies on human sexuality carried out by Dr. A. C. Kinsey and his collaborators,[2] probably account for at least 10 per cent of the adult population. Further, Kinsey *et al* found that homosexuals come from all racial, religious, socio-economic and educational backgrounds. The mere fact of this high incidence of homosexuality does not, *per se*, explain why there should be an increase in the number of homosexual parents seeking custody of their children. Explanations to account for this phenomenon are interrelated. Firstly, in the past the possibility that a parent with a homosexual preference cohabiting with another homosexual would publicly admit to this relationship was remote. Secondly, such an admission would have automatically disqualified that parent from an award of custody. Thirdly, recent surveys indicate that public attitudes in Australia towards homosexuals are changing inasmuch as fewer persons perceive such behaviour as requiring criminal sanctions.[3] Finally, with the advent of gay liberation and feminist movements, more persons are recognizing and affirming their homosexuality. This can mean that persons who originally opted for a more socially acceptable heterosexual relationship in the hope that marriage and parenthood would prove to be satisfactory are not only acknowledging their sexual preference but are establishing homosexual households. In the event that there are children of the original household and the parents cannot come to a satisfactory agreement as to which parent should have custody, the courts may be faced with an issue rendered contentious, inter alia because the *Family Law Act* perceives the institution of marriage,

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1 The term "homosexual" is derived from the Greek adjective "homo"—"of the same kind" and not, as is often supposed, from the Latin "homo"—"a man". Hence in this article the word homosexual will refer to both male and female homosexuality.

2 A. C. Kinsey, *et al, Sexual Behaviour in the Human Male* (London and Philadelphia, Saunders, 1948). A. C. Kinsey, *et al, Sexual Behaviour in the Human Female* (London and Philadelphia, Saunders, 1953).

3 D. Chappell and P. R. Wilson, *Changing Attitudes Towards Homosexual Law Reform* (1972) 46 *A.L.J.* 22.

and therefore "family", exclusively in heterosexual terms. That this perception of "family" does not accord with reality is amply borne out not only by the existence of homosexual families but also by the existence of large numbers of "lone-parent" families.

THE ATTITUDES OF AUSTRALIAN COURTS TO HOMOSEXUAL PARENTS SEEKING CUSTODY AWARDS[4]

The first custody dispute[5] involving a homosexual parent to be heard before the Full Court of the Family Court of Australia was *In the Marriage of N*,[6] an appeal from Allen C.J. in the Supreme Court of New South Wales Family Law Division. The subjects of the dispute were a boy and two girls. In deciding the issue at first instance the trial judge stated, inter alia,

> "that a good deal must depend on the finding as to the nature of the mother's relationship with the co-respondent since she was seeking custody of two girls aged eleven and nine."[7]

Although the petitioner mother denied the existence of a homosexual relationship, Allen C.J. found on the evidence that such a relationship did exist. His Honour felt that several consequences must flow from this finding; one was that if the mother was to have continued custody she would be faced with the dilemma of either concealing the nature of her relationship with her lover, or of seeking to explain it to her two daughters.[8] His Honour continued

> "I am, of course, well aware that the judge's bench is not a pulpit for moralistic pronouncements. But the extent to which such an established relationship by the mother of young girls may affect her fitness to have their custody and upbringing must be a matter of serious concern. The grant of custody confers with it the responsibility of proper training and example. . . ."[9]

Custody of the two girls was awarded to the father. From this order the mother appealed to the Full Court of the Family Court of Australia. As stated above, Allen C.J. had considered that the homosexual relationship of the mother was "a matter of serious concern". Evatt C.J. qualified this finding. Her Honour thought that a homosexual relationship was a fact for the trial judge to weigh in the balance, not because of the suggestion of immorality but because the relationship could be relevant if it were likely to affect the children adversely. Ultimately, according to Her Honour, in making a determination, the main issue was to evaluate the

[4] At the time of writing all decisions in which the homosexuality of a parent was considered have involved homosexual mothers.
[5] There is one earlier reported decision, viz. *Campbell* v. *Campbell* (1974) 9 S.A.S.R. 25.
[6] 2 Fam. L.N. No. 31.
[7] *N* v. *N & W* 2 Fam. L.R. 11,493 at 11,495.
[8] Ibid. at 11,497.
[9] Ibid.

competing situations of the two households.[10] The appeal was not allowed.[10a]

The issue of the mother's homosexual preference and the relationship with her lover were very thoroughly canvassed in *In the Marriage of Spry*.[11] The dispute before the court concerned custody of two girls aged ten and seven. In proceedings heard before Murray J., an order was made pursuant to s. 65 of the *Family Law Act* that the children be separately represented and, by the consent of the parties to the dispute, a further order was made that both the children be psychologically assessed by the Child Guidance Clinic at Adelaide to enable a report to be placed before the court. The evidence established that each parent was caring and devoted though, if anything, the mother was found to be more demonstrative in her affection towards the two girls than the father.[12]

Evidence was tendered to the court regarding the sexual orientation of the mother's friends. It was recorded by the court that 50 per cent of these friends were heterosexual and 50 per cent homosexual. Further evidence established that the mother and her lover were regular attendants at the Adelaide Metropolitan Community Church which has a congregation largely composed of homosexuals. Both parties had done counselling in this church and Murray J. did not doubt the sincerity of their devotion and faith. Indeed, His Honour felt that Mrs. Spry through her lover had found a deep and fulfilling commitment to the homosexual life-style and that her attitude in this sphere had overtones of a crusading nature.[13]

Extensive psychological evidence was presented to the court by Dr. June Donsworth. From this evidence, it was established that both the girls had seen sexual contact between the two women. It was also clear from the evidence that the seven-year old daughter showed some confusion about aspects of the relationship; for example, she referred to Mrs. Spry's lover as "her Mummy's boy-friend". As well, this lass wanted to know whether, if she married a woman when she grew up, they could both have children. However, despite these findings Dr. Donsworth stated that "it is by no means certain that a lesbian environment is likely to influence the girls towards 'deviant' behaviour". From her evidence it was established that the environmental factor is an important one although not an overriding one.[14]

[10] 2 Fam. L.N. No. 31 at 12,031.

[10a] "The children's wishes in this case appear to have been decisive as both the boy S and the older girl K expressed a strong desire to be with the father and the younger daughter stated that she wished to be with her brother and sister." Per Allen C.J. at 2 Fam. L.R. 11,493 at 11,495.

[11] 3 Fam. L.R. 11,330.

[12] Ibid. at 11,333.

[13] Ibid.

[14] Ibid. at 11,334.

In the result, Murray J. awarded custody of the two girls to the father with an order allowing liberal access to the mother. Access, however, was granted subject to the condition that Mrs. Spry and her lover undertake that there would be no display of sexual affection between them in the presence of the children. In arriving at this conclusion, Murray J. stated that

> "lesbianism *per se* does not make a mother unfit to have custody, but it is a factor which cannot be ignored and must be taken into account with the other factors that make up the total situation. Of equal if not greater importance than the question of a child's sexual orientation in a homosexual milieu, is the question as to whether, in that milieu, they may become the subject of intolerance. Community attitudes towards homosexuality have, fortunately, changed over recent years, but not, I venture to say, to such a degree as to ensure that the children will have freedom from spiteful comment from their peer group who may be influenced by the attitudes of their parents."[15]

Similar deference was paid to the importance of community attitudes in the unreported (22/3/76) case of *Powell* v. *Powell*. Although Anderson J. granted custody to the homosexual mother, he felt compelled to express the view that

> "the community in general is still sufficiently old-fashioned to view with disfavour and even with abhorrence, unnatural sexual acts—whether between male and female, or male and male, or female and female and whether they be illegal or not."[16]

A different approach was adopted by Ferrier J. in *In the Marriage of O'Reilly*.[17] After evaluating the evidence relating to the mother's homosexual life-style, His Honour stated

> "In the result as regards the children subject of this application, I do not feel that living in the care of their mother will act to their detriment within her home."

His Honour went on to say that he did not consider that there would be any lessening of the emotional attachment between the children and their mother, nor any loss of quality in the care which she would give to them. Nor did His Honour consider that the behaviour of the mother with her homosexual partner would affect their normal development towards adulthood, in terms of being influenced towards that course of behaviour.[18] His Honour sought assistance in answering what he considered to be the real question in this case, namely whether the way of life adopted by the mother is likely to have a more detrimental effect on their welfare than the behaviour of an irresponsible father who had a predilection for the consumption of alcohol. This assistance was afforded by reports from the

[15] Ibid.
[16] Supreme Court of Victoria (22/3/76), referred to in P. E. Nygh and R. F. Turner, *The Family Law Service* Information Bulletin No. 27, p. 3 (Butterworths).
[17] 3 Fam. L.N. No. 53.
[18] Ibid.

Director of Court Counselling and a Welfare Officer. Oral evidence on behalf of the mother was given by a psychologist. In the result custody was awarded to the mother and she was not required to give any undertaking to the court with respect to her way of life.

The approach of Ferrier J. in *In the Marriage of O'Reilly* is not universally accepted. In another custody proceeding[19] involving a homosexual parent heard during the same month as the above case, before Smithers J. of the Family Court of Australia, a more cautious approach was adopted. His Honour, in contrast to other cases involving this issue, did not seek psychological evidence. And in the absence of such evidence he assumed exposure to homosexuality to be harmful to the children and possibly likely to lead them to homosexuality themselves. Custody, nevertheless, was granted to the mother. The mother offered to make an undertaking to the court that she would refrain from entering into any further homosexual relationships. This undertaking was not required, as His Honour considered that this would impose a limitation on the mother's actions that could not be regarded as reasonable or necessary. His Honour did require that the mother undertake that

> "she would refrain from any act or word which would reasonably be calculated to suggest to any of the children that she or any friend of hers was a lesbian."[20]

The most recent case in which the homosexual relationship of the mother and a third party was considered is *In the Marriage of Brook*.[21] In dispute was the custody of three children. The reason why the husband sought custody was that, since he and his wife had separated, the latter had formed an homosexual relationship with another married woman who was also living apart from her husband. The two women shared a house and cared for all five children of the two marriages. The husband believed that the environment created by the relationship of his wife with her partner would be detrimental to the normal development of his children. This environment, he feared, might influence the children to regard homosexuality as normal and therefore incline them to become homosexuals themselves.

Lindenmayer J. sought a report by the Court Counsellor. This report did not support the husband's fears. In fact, fairly eminent authorities were cited to the contrary. In particular, reference was made in the report to Dr. Marmor, Professor of Psychiatry at the University of Southern California, who was described as "an authority on homosexuality and its effects". Dr. Marmor was quoted as saying

> "I know of no scientific evidence that the children of predominantly homosexual parents are any more or any less likely to become homo-

[19] *In the Marriage of Cartwright* 3 Fam. L.N. No. 55.
[20] Ibid. at 12,064.
[21] 3 Fam. L.N. No. 81.

> sexually oriented than those of heterosexuals, just as I know of no evidence that predominantly heterosexual parents are more loving, supportive or stable in their parental roles than homosexual women and men."[22]

His Honour, on the basis of this expert evidence, found that the husband's application was unsupported by any evidence. "A court of law must act upon evidence, not upon assumption or theory", he said, and continued

> "there is no basis upon which it could be suggested that the Court should judicially notice that a practising homosexual parent cannot provide as good and healthy an upbringing for his or her children as a heterosexual one."[23]

In summing up the evidence before him, the learned judge suggested that there were three ways in which the homosexual conduct of a parent could be detrimental to the welfare of the children, viz.:

(1) It could cause the wife to become incapable of caring for the children adequately.

(2) The relationship might be so unstable as to put the children at emotional risk. This fact must be weighed up against the possibility of the husband's new relationship being unstable as well.

(3) The relationship might become a topic for local gossip and the children might therefore be subjected to ostracism or hurtful comments by their peers. His Honour found that the phenomenon of two separated mothers living together with their children is not so unusual that such gossip would necessarily follow, particularly if the women exercised some discretion in public.[24]

His Honour in awarding custody of the children to the mother followed Smithers J. in *In the Marriage of Cartwright* insofar as he required the mother to undertake that there would be no overt displays of her sexual relationship with her lover in the presence of the children and that there would be no public displays of affection between the two women.[24a] More stringent undertakings such as that she discontinue her relationship with her lover were not required. His Honour was not convinced that such an undertaking would be in the best interests of the children. The imposition of such constraints resulting in the enforced deprivation of emotional support which the mother no doubt derived from her relationship with her lover could quite easily have an adverse effect upon the wife's emotional stability, with consequential adverse effects on the children.[25]

[22] Cited in court transcript but not reported.
[23] (1977) F.L.C. 90-325.
[24] Ibid.
[24a] As to the effect in children, see further infra p. 311.
[25] Ibid. 90-325-6.

ISSUES RAISED BY THE CASES—A CRITIQUE

Introduction

It is important to emphasize at the outset of any discussion of homosexuality that there is nothing inherently "abominable", "abhorrent" or "deviant" about any sexual act committed by two consenting adults which, to them, is satisfying and pleasurable. Such epithets as "deviance" or "immorality" are characterizations used by some members of a community (as a rule, the majority) to describe the behaviour of other members of that community. As has been aptly said

> "Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders . . . deviance is not a quality of the act the person commits but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has been successfully applied; deviant behaviour is behaviour that people so label."[26]

It follows that designations such as "deviant" reveal the attitude of the observer to particular behaviour—they reveal nothing about the behaviour so described other than that some members of a community regard this particular behaviour as "deviant".

Perusal of the above-cited cases reveals that homosexuality *per se* does not render a mother unfit to have custody of her child. It is the possibility of harmful consequences to the child, as a result of such an order, that is the concern of the courts. Several possible harmful consequences have been isolated. Firstly, then, what are these possible consequences?

(1) *The courts assume that there is a possibility that children reared in a homosexual environment may be adversely affected*

Custody cases, it has been said, pose the difficult question of preference between different alternatives.[27] If the alternatives being considered involve an evaluation of an environment adopted by the majority compared with a minority environment, which is the subject of community intolerance, should the courts favour the former over the latter? There are two aspects to this question: firstly, consideration of the two competing environments and, secondly, the relevance of community attitudes. With respect to the former, the Full Court of the Family Court of Australia in *In the Marriage of Sanders*[28] answered this question in the negative. In that case, the alternative environments under consideration by the court were an aboriginal tribal environment and a white suburban environment. At first instance, the child the subject of the dispute had been placed with the white father. In holding that the trial judge had been mistaken in the

[26] H. S. Becker, *Outsiders* (Free Press, 1963) p. 9.
[27] *In the Marriage of Sanders* 26 F.L.R. 474, 489.
[28] 26 F.L.R. 474.

exercise of his discretion, the Full Court stated that the judge had, inter alia, attached too much weight to the environmental issues and too little weight to the benefit to the child's emotional development which would accrue from being in the constant care of its mother, and in establishing with her a close and secure bond of affection.[29]

This decision clearly recognizes the importance of considering a custody dispute on its particular facts and circumstances rather than on generalizations which presuppose that one environment is inherently superior to an alternative environment. Applying this reasoning it follows that, in evaluating on the one hand a homosexual household and on the other a heterosexual household, it is not the nature of the household that should be the determinative factor. Rather, it is how a particular child responds to these competing households that stands to be determined. Homosexual parents, no less than heterosexual parents, come from diverse backgrounds. Equally, they exhibit a wide range of personality, intellectual and artistic traits. Given that they represent a considerable proportion of the population and that they exhibit a variety of personality characteristics similar to the rest of the population, it follows that generalized knowledge and theoretical formulations are not relevant to the very specific question as to whether a particular child could or should not live in a particular environment.

Some members of the judiciary have expressed concern that the "gossip" or "spiteful comments"[30] of members of the community towards children reared in a homosexual household may affect them adversely. If one takes such an approach to its logical conclusion, then whenever the court has to choose between the socially acceptable and the socially less acceptable, be this an unusual religious affiliation, a minority racial affiliation or any other minority life-style, then reference will be made to the possibility of the child being adversely affected by ostracism, ridicule, gossip, spiteful comments and so on. Leaving aside the fact that this would penalize any parent not part of the dominant culture who is competing with a parent who is part of this dominant culture, such an approach cannot necessarily be justified from the perspective of the child. There are, for many, positive aspects in being reared in a minority group. Take, for example, the evidence in *In the Marriage of Spry*.[31] This evidence describes the milieu of a particular homosexual family—a milieu seemingly characterized by a commitment to others; a sense of communality and a willingness to participate in the activities of a distinct group of people.

Unless the evidence clearly establishes that the particular child the subject of the dispute feels uncomfortable in such an environment, it would be preferable (it is submitted) for the courts to refrain from

[29] Ibid. at 495.
[30] See *In the Marriage of Spry* and *In the Marriage of Brook* supra 308.
[31] Supra p. 307.

drawing attention to manifestations of intolerance and then, on the basis of such a finding, proceed to suggest that the solution to the problem lies in an award of custody to the more conforming parent.

(2) *The courts are concerned that a child reared in a homosexual environment will develop a homosexual preference in adulthood*

The basis for this assumption is frequently founded on conventional wisdom. However, in some of the reported cases psychological evidence has been called by the competing parents, with the result that the court is faced with one "expert" witness proclaiming that the adoption of a homosexual life-style is more likely in the event of the child being reared in a homosexual household compared with being reared in the heterosexual household, and the opposing "expert" witness refuting such a claim.

It is important to appreciate that evidence from the behavioural sciences can be and is utilized by the courts on two quite distinct levels of generality. Firstly, on a high level of generality—here such evidence posits generalizations purportedly applicable to all comparable situations. Secondly, the courts seek more specific guidance from behavioural scientists by focusing the inquiry only on the child who is subject of the dispute. With respect to evidence on the former level, it must be clearly recognized that the behavioural sciences, unlike the biological sciences, are not exact; rather they must be understood to be in the nature of a series of hypotheses. At best such evidence derived from the behavioural sciences

> "is measured by the probability that what [the psychiatrist] has to say offers more information and better comprehension of the human behaviour which the law wishes to understand."[32]

It is a fact that there is no specific evidence to support or refute the claim that children generally are likely to be adversely affected by being members of homosexual households. It is a fallacy to believe that science in general and the behavioural sciences in particular can assist the court by providing clear-cut answers to this controversial question. Psychological evidence, no less than the moral predilection of the judiciary, is influenced by the subjective bias of the observer. Given the complexity of human behaviour, it may well be that precise, quantitative, experimentally verified data will never be available to guide the court in custody adjudication involving a homosexual parent, or for that matter any other form of custody adjudication. Thus it seems an undesirable practice for the competing parents each to call their own "expert" from the behavioural sciences to assert generalizations on the subject of homosexuality. As Lindenmayer J. has said, "a court of law must act upon evidence, not

[32] B. L. Diamond and D. W. Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations" (1965) 63 *Mich. L.R.* 1335, 1342.

upon assumption or theory".[33] Since the best evidence available at a substantive level is "assumption" or "theory", it is submitted that a more useful procedure would be to appoint counsel for the child so that the child has the benefit of independent representation. The independent representative should aim to present the court with evidence, including evidence by behavioural scientists, which focuses specifically on the child. Only in this way is it possible to consider realistically the actual needs of the child, how the child responds to each of the competing parents, and the weight that should be attached to all other factors making up the total situation.

THE AWARDING OF CUSTODY TO A HOMOSEXUAL PARENT SUBJECT TO AN UNDERTAKING BY THAT PARENT

In several of the cases, an order for custody or access to a homosexual mother has been made subject to the mother undertaking that she refrain from any display of sexual affection in the presence of her children.[34] This trend appears to have originated with Bright J., of the Supreme Court of South Australia. In *Campbell* v. *Campbell*,[35] custody of two children was awarded to a homosexual mother on condition that "she undertake not to sleep in her lover's bedroom overnight or that her lover did not sleep in her bedroom overnight, and that she will not engage in or permit any acts of a sexual nature with her lover in the presence of her children or of other persons who might report those acts to the children".[36]

Such undertakings appear to be predicated on the belief that any show of affection of a sexual nature (which is not defined by the court) may adversely affect a child who is witness to the display. Reference is made by Finlay and Gold[37] to this assumption. They assert that from a theoretical point of view it could be argued that children may be more damaged psychologically by viewing sexual intercourse with its attendant fantasies of an aggressive nature.[38] In practice, however, the courts do not place constraints with respect to sexual displays on heterosexual couples even when they may occur between parties where only one is a parent of a child. For example, in *Barker* v. *Barker*[39] a mother was awarded custody of a four-year old boy. In evidence, the mother stated that she had formed an association with a man whom she did not intend to marry and that she proposed to continue to bring the child into contact with this man. With respect to this relationship Hutley J.A., on appeal, stated that the "mother was going to maintain a relationship which is conventionally

[33] *In the Marriage of Brook*—cited from court transcript but not reported.
[34] See *In the Marriage of Spry* and *In the Marriage of Cartwright* supra.
[35] (1974) 9 S.A.S.R. 25.
[36] Ibid. at 29.
[37] H. A. Finlay and S. Gold, *The Paramount Interest of the Child in Law and Psychiatry* (1971) 45 *A.L.J.* 82.
[38] Ibid. at 87.
[39] 1 Fam. L.R. 11,199.

immoral and bring the child into contact with her lover".[40] His Honour did not upset the decision of the trial judge, nor did he suggest that the mother make any undertaking to the court despite what he considered the mother's "unconventional habits".

It is submitted with respect that the approach of Ferrier J. in *In the Marriage of O'Reilly* is the preferred approach. In this case custody was awarded to the mother in the absence of any undertakings by the mother.[41] Arguments to support the proposition that this is the better approach include the following: firstly, insofar as undertakings with respect to sexual behaviour are not universally imposed, they can be discriminatory. Secondly, such undertakings are unenforceable. Thirdly, since custody awards are never final, the parent who is not awarded custody is provided with the potential to base further claims for custody by acquiring evidence suggesting that infringements of the undertaking have occurred.

CONCLUSION

Cases involving custody awards to a homosexual parent have been reviewed. A diversity of approaches by the courts is revealed. While it is conceded that evidence with respect to a parent's sexual preference is a relevant factor, it has been suggested that some of the assumptions relied upon by the courts are of dubious validity.

[40] Ibid. at 11,200.
[41] Supra p. 309.