
NOTES

DON'T ASK, YOU MAY NOT WANT TO KNOW: CUSTODY PREFERENCES OF CHILDREN OF GAY AND LESBIAN PARENTS

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I talked to you that night. I explained that all *gay* meant was that I loved Suzie the way I used to love your dad. It was a lie. To you—and to me. I really thought that that was all it meant. As it turned out, it also meant that the neighbors would throw trash in our yard, people would stare at us when we took walks in the evenings during the summer, the neighbor's children would call us homos, your father would hire a lawyer and try to take you both away from me, your brother would go live with him, and worst of all your friends would tease you.

An Unsent Letter, by Martha Miller¹

INTRODUCTION

In December 1975, a lesbian mother lost custody of her nine-year-old son after her older, teenaged son testified against her before a jury.² Unfortunately, this heart wrenching circumstance often reaches its apex in a courtroom where many gay and lesbian parents lose custody of their

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1. Martha Miller, *An Unsent Letter*, in *LESBIANS RAISING SONS* 196, 198 (Jess Wells ed., 1997).

2. See ELLEN LEWIN, *LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE* 1 (1993).

children.³ Although the chances of a gay or lesbian parent receiving custody are substantially better today than in the 1970s,⁴ courts still deny custody awards to gay and lesbian parents because of their sexual orientation.⁵ Since trial courts are given broad discretion in custody determinations,⁶ the opportunity to make decisions motivated by anti-gay animus, rather than by an objective review of the evidence is available and convenient.⁷ The great discretion afforded lower courts combined with society's "ignorance or prejudice" about homosexuality has resulted in an abundance of decisions "which both rely on and reinforce prevailing stereotypes concerning gay and lesbian parents."⁸

Despite the depth of this problem, surprisingly little empirical evidence supporting this claim of discrimination exists. One explanation is that many gay and lesbian custody cases never go beyond the trial level.⁹ In a 1989 survey, judges reported that in custody cases involving homosexual fathers, the fathers' homosexuality alone, warranted a finding of unfitness in 34% of the cases,¹⁰ and that the mothers' lesbianism warranted a finding on the same grounds in 29% of the cases.¹¹ These percentages, however, may be under-representative as they seem to reflect decisions made under only one of the three approaches courts often use to evaluate a parent's same sex orientation in custody cases.¹² Thus, these

3. Throughout this Note, I use the terms gay and lesbian, rather than homosexual, to further the goals of the *Southern California Law Review's* strong policy of using gender neutral language.

4. See Susan Golombok & Fiona Tasker, *Children in Lesbian and Gay Families: Theories and Evidence*, in *LESBIANS RAISING SONS* 158 (Jess Wells ed., 1997).

5. See *id.*

6. See Susan Becker, *Court-Created Boundaries Between a Visible Lesbian Mother and Her Children*, 12 *WIS. WOMEN'S L.J.* 331, 332 (1997). The standard for custody determinations "is necessarily flexible, empowering the courts to make difficult decisions based largely on the trial judge's personal assessments of . . . the persons seeking custody and visitation rights." *Id.*

7. See *id.*

8. Steve Susoeff, *Assessing Children's Best Interest When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 *UCLA L. REV.* 852, 862 (1985).

9. See David S. Dooley, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 *CAL. W. L. REV.* 395 (1990). Dooley elaborates:

Although the number of child custody cases that have been determined on the basis of sexual orientation of the parent is not known, because most never go beyond the trial level, the number of published appellate cases have been numerous enough to clearly illustrate the reluctance of the courts to give custody to a gay parent.

Id. at 395 (citation omitted).

10. See Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian—An Empirical Study*, 23 *SUFFOLK U. L. REV.* 711, 736 (1989).

11. See *id.*

12. Courts use three approaches in evaluating a parent's same sex orientation in a custody determination. One approach is the per se approach which automatically excludes a gay or lesbian parent from custody based on the parent's sexual orientation alone. The second approach is the nexus

percentages do not reflect decisions of courts employing an approach that denies custody on the basis of the court's perceived, yet unsupported, harms.¹³ Nor do these percentages reflect those denials of custody to gay and lesbian parents rooted in pretext. Thus, the numbers of gay and lesbian parents who are denied custody because of their sexual orientation is probably much greater than the 1989 survey indicates.

The preferences expressed by children of gay and lesbian parents often serve to further disadvantage gay and lesbian parents in custody determinations. Prior to the parents' divorce, most children of gay and lesbian parents were born and socialized in heterosexual-led households with assumptions and privileges reserved for heterosexual people. Thus, same sex orientation is probably an unfamiliar subject usually characterized in a negative light by the media and their peers. Not surprisingly, many children initially react negatively to their parent's disclosure of a gay or lesbian orientation.¹⁴ Once the parent discloses a gay or lesbian orientation, the children are forced into a long process of coming to terms, not only with the dissolution of the marriage between the child's parents, but also with the fact that one parent previously perceived as heterosexual, is a gay man or lesbian.¹⁵ Even when disclosure occurs sometime after the parents' divorce, the child is still presented with the difficult experience of processing the parent's same sex orientation. Thus, when called upon to express a custodial preference, the reliability of her preference is inevitably compromised by the child's initial response to the disclosure.

This Note specifically addresses the role of a child's preference in custody determinations involving a gay or lesbian parent. Although consideration of a child's preference is thought generally to be a reliable and beneficial component in the custody decision,¹⁶ soliciting a child's preference in this specific context works to the distinct disadvantage of the gay or lesbian parent as well as the best interest of the child. First, due to

approach, which calls for a causal relationship between the parent's orientation and some harm to the child. The third allows the court to draw inferences of harm to the child from the parent's sexual orientation. See Dooley, *supra* note 9, at 407-14.

13. See *id.* Throughout this Note, I rest many arguments on the premise that sexual orientation alone is not a reasonable basis on which to deny a parent custody.

14. See generally Rebecca Van Voorhis & Linda McClain, *Accepting a Lesbian Mother*, FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY HUMAN SERVICES, Nov.-Dec. 1997, at 642. In this article, Van Voorhis and McClain present a model of children's reactions to their parent's shift from a heterosexual orientation to a homosexual orientation. At the end of the model, the authors present various strategies for parents (and practitioners) to help the child throughout this process.

15. See *id.*

16. See Kathleen Nemecek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Going, Where We Should Go*, 83 IOWA L. REV. 437, 440 (1998).

the timing of the custody hearing, the reliability of the child's preference is bound to be compromised by her processing of initial emotions (which are generally negative) regarding the recent disclosure. As a result, the child's preference is not entirely reliable in the sense of a true, well-developed preference. Second, children's preferences further disadvantage gay and lesbian parents in a system that discriminates against them through reliance on unfounded stereotypes. For these reasons, consideration of children's preferences in custody determinations involving a gay or lesbian parent must be treated more cautiously than in the general custody contest. Specifically, in the interest of procuring a reliable preference and protecting gay and lesbian parents from further discrimination, the court should require some delay before soliciting the child's preference that honors the child's need to sufficiently process her parent's recent disclosure of a gay or lesbian orientation.

In Part I, I discuss the procedure and controversies surrounding consideration of children's preferences in custody decisions. In Part II, I illustrate the emotional stages many children process in reaction to a parent's disclosure of homosexuality. I then explain how this process compromises the reliability of the preference. In this Part I rely on actual court cases to demonstrate how these preferences work to the disadvantage of gay and lesbian parents. I offer that within this context, children's preferences supplement the existing discriminatory treatment of gay and lesbian parents in that they work to the exclusive disadvantage of gay and lesbian parents. Next, I discuss whether or not these preferences should be given a voice in custody determinations, in light of the discriminatory effect the court's anti-gay bias coupled with children's emotionally charged preferences may impose on gay and lesbian parents. In Part III, I propose a solution that integrates my desired objective of protecting gay and lesbian parents against further discrimination as well as honoring the child's right to be a meaningful participant in this important decision. Specifically, I conclude that within this unique situation, children's preferences should be considered only after some time has passed to allow the child to process her feelings about the parent's recent disclosure of homosexuality.

I. CHILD PREFERENCE IN CUSTODY DETERMINATIONS

When custody is contested in a divorce, courts decide with whom a child will live based on which parent the court decides will serve the best interests of the child.¹⁷ Incorporation of children's preferences into the best interest determination was not introduced into the mainstream of legal discourse until quite recently. In 1970, the National Conference on State Laws promulgated the Uniform Marriage and Divorce Act (UMDA) to simplify and create some uniformity and consistency in divorce and custody proceedings.¹⁸ The UMDA provides a list of factors to guide the courts' best interest analysis in custody determinations, including "the wishes of the child as to his custodian."¹⁹ Although the UMDA does not assign a particular weight to any factor, the Act signifies the first step toward official recognition of a child's wishes in these proceedings. Since this legislation, thirty-seven states and the District of Columbia have adopted statutes that govern the solicitation and use of child preference in custody determinations.²⁰ Under the UMDA and the states' codes, judges retain tremendous discretion as to the significance they will attribute to a child's preference in the overall custody decision.²¹

17. Custody determinations are also made after a divorce and an initial custody determination. This is called a custody decree modification and requires some changed circumstance since the initial custody decree was made. The best interest standard was first adopted in the late nineteenth century to allow for a more individualized approach to determinations of child custody and to balance the child's interests with the parents' interests. *See Nemechek, supra* note 16, at 440. Although the definition of this standard has evolved significantly over time, none of the standards have included the child's preference as a factor in the determination. For further discussion of the legal history of the best interest standard, see *id.*

18. *See generally* Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its Policies*, 1991 BYU L. REV. 43.

19. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1997). The section reads in full:

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

- the wishes of the child's parent or parents as to his custody;
- the wishes of the child as to his custodian;
- the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who might significantly affect the child's interest;
- the child's adjustment to home, school community; and
- the mental and physical health of all individuals involved.

Id.

20. *See Nemechek, supra* note 16, at 445. The thirteen states that do not have child preference statutes are Alabama, Arkansas, Maryland, Massachusetts, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, West Virginia, and Wyoming. *See id.*

21. There is nothing in the statute or legislative history that proscribes how much weight should be given any one of these factors.

There is substantial variation among the jurisdictions as to the weight attributed to the child's preference. Four states make a child's preference *controlling* upon the court, barring the unfitness of a selected parent, once the child reaches statutory age.²² Twenty-nine states require that preference play *some role* in the decision if the child is deemed mature or meets some preliminary criteria.²³ Six states have statutory language that leaves the solicitation and weight of the child's preference entirely to the discretion of the judge deciding the case.²⁴

22. See Nemechek, *supra* note 16, at 445-48. The four states are Georgia, Mississippi, Tennessee, and Texas. In Georgia, the statutory age is 14. In Mississippi, Tennessee, and Texas, the age is 12. Georgia has perhaps the most liberally applied child preference statute in the United States. Georgia's statute requires that "in all cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection shall be controlling, unless the parent selected is determined to be unfit." GA. CODE ANN. § 19-9-1(2) (1994). In fact, in one such case, the court found that a child's preference to live with a parent who was previously deemed unfit was still controlling. See *Harbin v. Harbin*, 230 S.E.2d 889 (Ga. 1976). In Texas, where the statutory age is 12, the child's preference is controlling "subject to the approval of the court." TEX. FAM. CODE ANN. § 153.008 (West 1995). This language affords the judge discretion in permitting the child's preference. In an attempt to establish a safer outcome, Mississippi requires a preliminary finding that both parents are equally fit and "able to adequately provide for the care and maintenance of the children," before a 12 year-old child's preference is controlling. MISS. CODE ANN. § 93-11-65 (1994). In order to insure that the child's preference is considered, Mississippi courts require on the record findings to support the court's rejection of the child's preference, if the court disregards the stated desires of the child. See *Polk v. Polk*, 589 So. 2d 123, 130 (Miss. 1991) (deciding that when the court rejected the child's preference for custody, the court had to make on the record findings as to why the child's choice of parent failed to meet the best interest standard). In 1995, the Tennessee legislature added language calling for judicial "acquiescence to the reasonable preferences" of a child twelve years of age or older. TENN. CODE ANN. § 36-6-106(7) (1995). The statute provided that the court "may hear the preference of younger children upon request," but that "the preferences for older children should normally be given greater weight than those of younger children." *Id.* A number of jurisdictions have statutory language that instructs the courts to give more consideration to the preferences of older children. See IND. CODE ANN. § 31-14-13-2 (West 1997). Although Arkansas has no statutory language regarding age-based preferences, Arkansas courts have allowed a child's preference to count when "by reason of his years, [he] is capable of indicating a preference regarding custody." *McCullough v. McCullough*, 260 S.W.2d 463, 465 (Ark. 1953).

23. See Nemechek, *supra* note 16, at 453-55. A number of jurisdictions require consultation to determine the child's preference. Some states require preliminary findings of "age and maturity" in order for the court to consider the child's preference or even express a preference. This obviously leaves a great deal of discretion to the judge. Courts use many different subjective criteria to determine whether the child's preference is appropriate, including education level, relationship with parents, sincerity, and reasoned explanation for preference. The other jurisdictions that require consultation have adopted the statutory language from the UMDA mentioned earlier. Unlike the states requiring a preliminary finding of maturity, these states require consult in all circumstances. However, like the UMDA, these statutes do not place any particular weight on the preference of the child. Thus, the judge decides whether to include or disregard the child's preference in her final decision. See *id.*

24. See Nemechek, *supra* note 16, at 458-59. California, Florida, New Hampshire, North Dakota, and Oklahoma have statutory provisions that make any inquiry or consideration of the child's preference totally discretionary. See *id.* Some of these statutes combine language from the UMDA with permissive language. For instance, Utah adopted the UMDA language, but then added that the

Just as jurisdictions vary in the treatment given to children's preferences in custody cases, judges, attorneys, and other legal scholars hold various, often conflicting, opinions about whether a child is capable of making an informed, reasoned decision that will be in her best interest as to with whom she will live.²⁵ Despite these conflicting opinions, family law judges commonly grant considerable weight to the preferences of children 14 years or older, and little to no weight to children under 7 years old.²⁶

Although few studies have assessed the reliability of children's preferences, the existing studies tend to support the court's reliance on preferences of children who are 12 years of age and older, but also indicate that some children as young as 9 or 10 may also express a reliable and reasoned preference.²⁷ Psychologists expect that while most 14-year-olds have reached the ability to reason hypothetically and to make judgments about future events,²⁸ most children under the age of 7 are probably incapable of stating a principled custodial preference.²⁹

In one of the only studies conducted to evaluate children's competence to participate in custody decisionmaking, Ellen Greenberg Garrison assessed the potential abilities of children between 9- and 14-years-old to "present preferences and reasons for a custodial choice in response to hypothetical divorce custody situations."³⁰ Specifically,

court should not weigh the child's preference more heavily than the other factors. See UTAH CODE ANN. § 30-3-10 (1) (1996). Further, in at least one jurisdiction—Alabama—courts have consistently stated that a child's preference need not be given controlling status. See Nemecek, *supra* 16, at 445.

25. See Elizabeth S. Scott, N. Dickon Rappucci & Mark Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1040 (1988) [hereinafter *Children's Preferences*]. In a study conducted by the University of Michigan, judges ranked children's preferences near the end of a list of 40 factors considered relative to a custody determination. A second study evaluating practitioners views, indicated that attorneys felt children were not capable of long range thinking, were easily swayed by parents, would make decisions based on inappropriate reasons, and would have an unrealistic understanding about the meaning of their decision and how it would impact their lives. In a third study analyzing the attitudes of judges on this matter, the research signified that though most judges did not find the preferences of children under 6 to be relevant, while 90% of the judges found the wishes of a 14-year-old were either quite important or dispositive. See *id.* at 1046, 1050.

26. See Ellen Greenberg Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 J. CLINICAL CHILD PSYCHOL. 78, 78 (1991). This study analyzed children's "potential ability rather than the actual performance" of children to express a custodial preference in a divorce. *Id.* at 79.

27. See Garrison, *supra* note 26, at 184. See also Linda Taylor & Howard S. Adelman, *Facilitating Children's Participation in Decisions That Affect Them: From Concept to Practice*, 15 J. CLINICAL CHILD PSYCHOL. 346 (1986).

28. See Garrison, *supra* note 26, at 78.

29. See *id.*

30. *Id.* at 79. This study assessed the "potential ability rather than the actual performance of children in divorce custody disputes." *Id.* The aim of the study was to assess the competence of

Garrison's study evaluated whether the reasons children gave for a hypothetical custodial preference were rational and whether their preferences were reasonable.³¹ In assessing the rationality of the children's reasons, Garrison's study focused on the child's ability to weigh different factors since forming a custodial preference is such a subjective analysis. In scoring the rationality of children's reasons, Garrison asked forty-four domestic judges to rank the reasons children gave for their custodial preference.³² The judges rated reasons of care giving, closeness, continuity, time/attention, and parental stability first, parent's relationship second, and the parent's financial situation third in evaluating the rationality of reasons.³³ In scoring the reasonableness of the children's preferences, the judges evaluated the child's preference in light of the information presented in the hypotheticals.³⁴

Garrison's findings concluded that 14-year-olds performed as well as the 18-year-olds in the hypothetical divorce and custody situations³⁵ and that 9- and 10-year-olds proved to be as competent as the 14 to 18-year-olds according to the reasonableness of their preferences and the rationality of their reasons.³⁶ However, Garrison suggested that the rationality of children's reasons may be more important than the reasonableness of their preferences.³⁷ Even though the group of 10-year-olds scored low on the reasonableness of preference standard, Garrison concluded that some children 9-years-old and younger may be competent enough to participate to some degree in the custody determination.³⁸

Reliability, however, is not the only argument for including a child's preference in the custody decision. Optimally, involving the child in the decisionmaking process may result in an outcome that is more acceptable

children 9-14 years of age to state a custodial preference upon their parents' divorce. *See id.* at 84. Garrison presented children (whose families were not in a divorce proceeding) with hypotheticals about how they would respond to divorce and custody preferences. The Garrison study was also used to examine certain trends in the kind of factors children take into account when they are making these decisions. *See id.* at 79.

31. *See id.* at 78.

32. *See id.* at 80.

33. *See id.* at 82.

34. *See id.* at 80.

35. *See id.* at 84. This particular finding lends support to the judicial trend of attributing more importance to the preferences of children ages 14 and older.

36. *See id.*

37. *See id.* at 84. Among the different age groups studied, there was no differentiation among the age groups on the reasonableness of preferences. Also, since this kind of decision is very subjective, the child's competence may be better assessed through the child's ability to weigh different factors, rather than on a stated preference. *See id.*

38. *See id.* at 85.

and more comfortable for the child.³⁹ Also, some evidence indicates that children's participation in custody determinations can reduce anxiety, enhance parent-child communication,⁴⁰ help children adjust to the separation of their parents, and provide children with some sense of control, personal autonomy, and self-efficacy.⁴¹ Conversely, denying children the opportunity to participate in decisions that effect them may result in "substantial costs and loss of benefits" for the child.⁴² Further, when a child with strong desires about custody is ignored, the child is likely to be unhappy with the outcome and to feel helpless about the situation.⁴³

Despite Garrison's conclusions that children and adolescents are competent to and benefit from expressing a preference, other studies suggest that adolescents may not be fully capable of articulating custody preferences free from influence. In a study conducted by Elizabeth S. Scott⁴⁴ focussing on how "temporal perspective, attitude toward risk, and peer and parental pressure" influence adolescents' decisionmaking in legal contexts, adolescents' decisions were not found as reliable as adults' decisions.⁴⁵ Adolescents are generally presumed to be less independent in their process of decisionmaking than adults, and are thus subject to parent and peer influences.⁴⁶ Although adolescents have more independence and autonomy relative to their parents than younger children, Scott's study indicates that they are also more vulnerable to parental influence than are young adults.⁴⁷ Thus, their choices and behavior may be heavily influenced by their parents' opinions.⁴⁸ For instance, adolescents may have a tendency to focus more on the immediate consequences, such as "social ostracism," than the long-term consequences and thus be more inclined to

39. See *Children's Preferences*, *supra* note 25, at 1040.

40. See Garrison, *supra* note 26, at 85.

41. See *id.*

42. Taylor & Adelman, *supra* note 27, at 346.

43. See *Children's Preferences*, *supra* note 25, at 1042 (citing LEARNED HELPLESSNESS THEORY AND COMMUNITY PSYCHOLOGY: THEORETICAL AND EMPIRICAL APPROACHES 121 (M. Gibbs, J. Lachenmeyer & J. Sigal eds., 1980)).

44. Elizabeth S. Scott, N. Dickon Rappucci & Jennifer L. Woolard, *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995) [hereinafter *Evaluating Adolescent Decision-Making*].

45. *Id.*

46. See *id.* at 222.

47. See *id.* at 230.

48. See *id.* at 222.

choose against the gay or lesbian parent despite the risk of damaging the relationship.⁴⁹

In addition to questions of reliability and external influences on a child or adolescent, soliciting children's preferences may force children into a stressful role in which they are already experiencing conflicting loyalties.⁵⁰ During a divorce, many children and adolescents feel torn about supporting their mother or father. Eliciting a preference may exacerbate this kind of stress. Additionally, children may be exploited or manipulated by parents trying to influence their child's opinion.⁵¹ For instance, parents seeking custody may threaten the child or reduce discipline in order to convince the child that she is the ideal parent to live with. Further, forcing children who are not prepared to make this decision may deny them the opportunity to learn self-control and moderation "necessary to self-commitment to their own future families."⁵²

Despite the conflicts stated above, including a child's preference in most custody determinations is probably a beneficial endeavor for the court and the child in light of the reliability of the preferences and the benefits to be gained by the child's participation. However, the unique circumstances of children of gays and lesbians present an exception to the general custody determination. Many children's initial reactions to their parent's gay or lesbian orientation inevitably color their custodial preferences against the gay or lesbian parent. In the next Part, I illustrate the emotionally charged stages most children process upon their parent's disclosure of a gay or

49. See *id.* (citing Zimring, and Gardner & Herman). "In some contexts, adolescent risk preferences may be linked to other developmental factors: for example, adolescents may be *more* averse than adults to risking social ostracism." *Id.* at 230 (citing Elkind, 1967). "[T]he social and cultural contexts that shape adolescent experience may join with other developmental factors to affect decision making in a way that distinguishes among groups of adolescents or adolescents from adults." *Id.* at 232.

50. See *Children's Preferences*, *supra* note 25, at 1041. Courts have expressed a concern over the risk of psychological damage to a child called upon to express a preference for one parent over the other. See *id.* at 1041-42. In *Parker v. Parker*, the court stated, "The principles of humanitarianism are so strongly against the placing of a child between his parents that we feel the trial court should have a wide latitude in protecting the child." 467 S.W.2d 595, 597 (Ky. 1971).

51. See Jessica Cherry, *The Child as Apprentice: Enhancing the Child's Ability to Participate in Custody Decisionmaking By Providing Scaffolded Instruction*, 72 S. CAL. L. REV. 811, 816 (1999) (citing Susan Scott Meeham, *Child Custody Disputes: The Experiences of Children and the Importance for Social Policy* 87 (1992) (unpublished Ed.D dissertation, Stanford University School of Education) (on file with author)). See also Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. L. 35, 41 (1995).

52. Daniel C. Schuman, *The Unreliability of Children's Expression of Preference in Domestic Relations Litigation: A Psychiatric Approach*, 69 MASS. L. REV. 14, 18-19 (1984).

lesbian identity. I then explain why children entangled in this process are not capable of expressing a reliable custodial preference.

II. PREFERENCES OF CHILDREN OF LESBIAN AND GAY PARENTS

Custody cases involving a gay or lesbian parent present entirely different concerns about the reliability of the child's custodial preference. In addition to the emotional hardship a child experiences upon her parent's separation and divorce, the child is also confronting difficult feelings about her parent's transition from a once, at least outwardly visible heterosexual orientation, to a gay or lesbian orientation.⁵³ Even when a parent does not disclose lesbian or gay orientation until some time after the divorce, the child is still faced with the difficult task of processing volatile emotions related to the disclosure. When a child is urged to state a custodial preference either upon divorce or sometime after, the reliability of the preference is undoubtedly compromised. In this Part, I first explain how the timing of this litigation affects the reliability of the preferences. Next, I present a model of children's responses to a parent's disclosure of gay or lesbian orientation. Last, I explain why children in this process are incapable of providing reliable custodial preferences.

A. THE TIMING OF THE LITIGATION HAMPERS RELIABILITY OF THE CHILD'S PREFERENCE

In many cases involving a gay or lesbian parent, the custody determination is made soon after a parent has disclosed a gay or lesbian orientation. Generally, this litigation arises in one of two ways. In the first situation, either prior to or upon divorce, one parent discloses his or her same sex orientation to the other parent. When this is the case, the court will take the parent's orientation into account when making its initial best interest determination according to the state's custody laws and approaches regarding same sex orientation.⁵⁴ In the second situation, a parent discloses same sex orientation *after* the divorce and initial custody determination have been made. In fact, the most common scenario occurs when a parent who has been denied custody in the original divorce and custody award later tries to change the court's order upon discovery that the custodial

53. See generally Van Voorhis & McClain, *supra* note 14.

54. See Part I *infra*.

parent is gay or lesbian.⁵⁵ This type of determination is evaluated under the “changed circumstances doctrine.”⁵⁶ This doctrine requires a change of circumstance that has impacted the child since the initial custody determination. If the court finds that a changed circumstance has indeed occurred, then the court returns to the best interest analysis with the changed circumstance in mind.⁵⁷

In each of these circumstances, the disclosure or discovery of one parent’s gay or lesbian orientation is either the precipitating event of the litigation, or at least a significant reason for the litigation. Thus, the child has probably been informed of the gay or lesbian parent’s orientation within a few weeks or months of the litigation, depending upon the circumstances.⁵⁸ In the cases where the child is called upon to state a custodial preference, she will most likely be deeply involved in an emotional process of responding to her parent’s disclosure of a gay or lesbian orientation.

B. A MODEL OF CHILDREN’S RESPONSES TO A PARENT’S DISCLOSURE OF GAY OR LESBIAN ORIENTATION

In addition to the timing of this litigation, the most significant means by which the reliability of the preference is compromised is the volatility of the child’s emotional state after the parent’s disclosure; which is also the time in which a custodial preference is usually formed. The volatile emotions a child experiences following her parent’s disclosure of a gay or lesbian orientation significantly affects the child’s perception of her parent and herself.⁵⁹ As a result, the preference the child expresses is colored significantly by these perceptions, rather than by reasons such as care giving, closeness, continuity, time/attention, and parental stability, that are more relevant to the development of a rational custodial preference.

55. See Susoeff, *supra* note 8, at 866. There are a number of other situations in which gay and lesbian parents litigate custody matters including adoption, foster care, and custody between two gay or lesbian parents who adopted a child and are separating.

56. Nancy Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691, 700-03 (1976).

57. *See id.*

58. The gay or lesbian parent may have told the child about her orientation before telling the other parent. Additionally, the child may be the one who tells the other parent. Or, the heterosexual parent discovers the gay or lesbian parent’s orientation and then tells the child or just proceeds with the litigation. Although not all children find out about their parent’s same sex orientation before a lawsuit involving a custody suit, it seems that many do. This Note deals specifically with this group of children, as their preferences are most impacted by their reactions to their parent’s recently disclosed same sex orientation.

59. See generally Van Voorhis & McClain, *supra* note 14.

Significantly, relatively little has been written on the child's perception of a gay or lesbian parent's homosexuality.⁶⁰ However, the existing literature on child development and gay and lesbian parenting does indicate a general pattern of responses to a parent's disclosure of a lesbian or gay orientation. Although many children and adolescents initially experience negative emotions stemming from internalized homophobia upon disclosure,⁶¹ many emerge supportive of, well adjusted to, and comfortable with their parent's same sex orientation once they process their feelings and concerns.⁶² A child's perception of her gay or lesbian parent will likely evolve with age, development, and sophistication, as well as with the child's developing relationship with the parent.⁶³

1. *Parent's Fears of Rejection*

At this point in the discussion, it is important to mention the tremendous anxiety and fear many parents experience prior to disclosing their orientation to their children. Gay and lesbian parents often fear their children will turn against them upon disclosure or as their children grow older.⁶⁴ Second, many gay and lesbian parents worry about possible effects their same sex orientation will impose on their children.⁶⁵ One lesbian author explained, "The threat of exposing our children to the profound homophobia that still permeates our society hovers over us. . . . Whether they want us to or not, we come out for them, forcing them to cope with the reactions of their peers."⁶⁶ As difficult and courageous as it is for gay and lesbian parents to disclose their sexual orientation to their children, once the disclosure is made, their children are inevitably left to struggle with the

60. See Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY AND HUM. DEV. 237 (1993). Javaid's study compared children raised by heterosexual single mothers with children raised by lesbian mothers, specifically looking at the children's "attitudes towards marriage, procreation, and homosexuality." *Id.* at 235.

61. See *id.* at 235. Most children raised in the homes of a lesbian parent "expressed reservations about having a homosexual mother." *Id.* at 235.

62. See generally Van Voorhis & McClain, *supra* note 14.

63. See MARTHA KIRKPATRICK, CLINICAL IMPLICATIONS OF LESBIAN MOTHER STUDIES 208 (1987).

64. See Martha Kirkpatrick, *Lesbians as Parents*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 353, 356 (Robert P. Cabaj & Terry S. Stein eds., 1996). See, e.g., JMG, *Changing Images: Lesbian Parenting*, THE CREATIVE WOMAN, Oct. 1991, at 11:3:9. On the verge of disclosing her lesbianism to her two adolescent sons, one woman expressed doubt about the upcoming disclosure; "How can I help my children cope with the homophobia they will experience both within themselves and externally, when (and if) I am the one to tell them? What if they reject me? How will I feel if they turn away from me and take as their own the most negative societal view of me?" *Id.* at 9.

65. See Van Voorhis & McClain, *supra* note 14, at 643.

66. *Id.* at 646.

ways in which their parents' outward transition of orientation will affect their own lives as well as their family as a whole. Understandably, the emotions children experience throughout this struggle are complex and varied.

2. *Children's Reactions to Disclosure*⁶⁷

a. *Intellectual acceptance*

Although many children are outwardly supportive and protective of their gay or lesbian parent,⁶⁸ they often simultaneously fear ridicule, feel ashamed, and question their own sexuality.⁶⁹ Thus, some children of gays and lesbians initially respond to their parents' disclosure with "intellectual acceptance" not only from their desire to love and support their parent, but also from a wish to preserve their own self-image.⁷⁰ Children interviewed in studies evaluating children's attitudes about their parents' same sex orientation expressed a sincere desire to accept their mother's lesbianism, even though some were currently incapable of that acceptance.⁷¹ Although some children may respond with this sort of intellectual acceptance, a child's "genuine acceptance" of a gay parent often takes time as the child processes the fact that she is no longer privileged with the heterosexual-led household she has thus far known and envisioned for her future.⁷² For instance, depending on the child's comfort level with her parent's gay or lesbian orientation, she now will have to introduce the parent's partner to friends, respond to taunts and jeers by peers, and negotiate her own homophobia with her love for her parent. None of these circumstances existed when the child's parents were married. Coming to terms with the

67. See Van Voorhis & McClain, *supra* note 14, at 642. These specific stages are taken from Rebecca Van Voorhis and Linda McClain's model of responses presented in *Accepting a Lesbian Mother*, in THE JOURNAL OF CONTEMPORARY HUMAN SERVICES (1997). Van Voorhis is an assistant professor at the School of Social Work at Indiana University. McClain is a psychiatric social worker in Behavior Care Services in Indianapolis, Indiana.

68. See Ann O'Connell, *Voices From The Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, SMITH COLLEGE STUDIES IN SOCIAL WORK SPECIAL ISSUE LESBIANS AND LESBIAN FAMILIES: MULTIPLE REFLECTIONS 281, 283 (1993). In O'Connell's 1993 study, children of lesbian mothers related feelings of loyalty and protectiveness towards their gay parent.

69. See KIRKPATRICK, *supra* note 63, at 209. See also O'Connell, *supra* note 68, at 281. O'Connell's study reported findings of loyalty, sadness, anger, worry, and vulnerability. See *id.*

70. See Karen Gail Lewis, *Children of Lesbians: Their Point of View*, SOC. WORK, May 1980, at 201.

71. See *id.* at 203.

72. See Van Voorhis & McClain, *supra* note 14, at 644.

revelation of a parent's same sex orientation and the loss of privileges associated with having a heterosexual parent may take years.⁷³

b. *Denial*

The most typical initial response to a gay or lesbian parent's disclosure of orientation is, "this cannot be true about my [parent]."⁷⁴ Sometimes the child's denial will take the form of silence and the child will provide no response.⁷⁵ This may be attributed partially to the child's realization of a significant loss of part of her reality, which comes with the parent's disclosure.⁷⁶ Specifically, the child realizes that she will no longer enjoy the privileges that accompany having a heterosexual parent. For instance, if the child's father has a male partner, the child may have to find ways to explain the relationship to friends, friends' parents, and teachers. Additionally, when classmates joke about gays and lesbians, the children may feel they are betraying their parent if they remain silent. Denial may also be attributed to the fact that avoidance and silence are typical coping mechanisms related to emotions and opinions about homosexuality in our culture. However, it is this very problem—"society's deep desire to deny that lesbians [and gay men] exist"—that contributes to children's inability to accept a gay or lesbian parent's sexuality.⁷⁷

Fortunately, this stage is usually temporary and is eventually supplanted with "partial acceptance."⁷⁸ As the child overcomes his denial, the parent should not push or prompt the child into discussion, but rather be available and attentive when the child brings the general subject of homosexuality or the parent's orientation into a discussion.⁷⁹

c. *Anger*

Other children respond to a gay or lesbian parent's disclosure with anger, rather than denial. However, many children who initially respond with denial later experience anger after suppressing the information and emotions related to the disclosure.⁸⁰ Often, children express their anger through remarks they have heard from their peers in schools, churches, or other family members that reflect society's condemnation of gay and

73. *See id.*

74. *Id.*

75. *See id.* at 645. One mother described discovering her 12-year-old son curled on his side, crying, "Please, Mom, tell me that what the kids at school are saying about you isn't true." *Id.*

76. *See id.*

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id.*

lesbian lifestyles.⁸¹ Children also manifest their anger at their parent's disclosure through hostility toward the parent's partner. In one study, older teenagers exhibited "gross maladaptive behavior" and conveyed the hope that if they caused enough trouble, the mother's partner might leave.⁸²

Many children and adolescents react angrily because they fear that their parent's gay or lesbian orientation will affect their own lives.⁸³ A common concern expressed by children in the interviews was that their parent's same sex orientation would influence their own orientation. Older children and adolescents may be most concerned with whether they too will become lesbians or gay men. In one study, older boys confirmed their fears of being "converted" into homosexuals by their gay fathers.⁸⁴ Other studies have indicated that younger children also worry about whether they will be gay when they grow up.⁸⁵ Thus, when a child or adolescent reacts to a gay or lesbian parent with anger, this may be the child's attempt to show the community and herself that "I'm not like my [lesbian] mother" (or gay father).⁸⁶

During this phase, a child's anger may seriously damage, and even sever, the relationship between the gay or lesbian parent and the child. Often, children of lesbian and gay parents experience feelings of discomfort, anxiety, and resentment regarding their parent's sexuality. These feelings may be so overwhelming that the child or adolescent feels she must alter her living arrangements. In one study, sons of gay and lesbian parents were so uncomfortable with the gay parent's orientation that they chose to live with their heterosexual parent rather than process and adjust to the gay or lesbian parent's lifestyle.⁸⁷ One lesbian mother explained that when her 10-year-old and 11-year-old children found out she was a lesbian, "they angrily moved out to live with their father."⁸⁸ Another lesbian mother recalls her son's reaction to her lesbianism and the subsequent dissolution of their relationship:

Jonah had been unhappy ever since I came out as a lesbian. . . . [One day he said,] "I don't want to live here. I want to go live with Dad, and if you don't let me, I'll tell the judge and he'll make you let me. I hate it

81. See *id.* For example, "This is immoral," "You're sick," "You're going to hell." *Id.*

82. Lewis, *supra* note 70, at 201.

83. See Van Voorhis & McClain, *supra* note 14, at 646.

84. See Javaid, *supra* note 60, at 242.

85. See Lewis, *supra* note 70, at 199. One child saying, "Will I or won't I be gay when I grow up?" *Id.*

86. Van Voorhis & McClain, *supra* note 14, at 646.

87. See Javaid, *supra* note 60, at 243.

88. Van Voorhis & McClain, *supra* note 14, at 645.

here. I'm going to leave. . . ." How did Jonah know about judges and courts? My husband must have been priming him, pushing him, putting words into his mouth, encouraging him to leave. Why didn't I know that then?⁸⁹

During this phase it is critical that a gay or lesbian parent remain connected in some way to her child, despite the child's anger and resentment. As will be discussed in the latter part of this Section, a child entrenched in these hostile emotions can work to the distinct disadvantage of the gay or lesbian parent when called upon to state a custodial preference.

d. *Bargaining for secrecy*

When children begin to understand that slurs and acting out will probably not succeed in pressuring their gay or lesbian parent back to a heterosexual identity, they often attempt to limit the gay or lesbian parent's behavior⁹⁰ and to minimize the ways in which the parent's gay or lesbian identity is disclosed.⁹¹ Bargaining is how children attempt to limit their gay or lesbian parent's expression of sexual identity and pressure the parent to engage in behavior that is more typical of a heterosexual lifestyle rather than a gay or lesbian lifestyle.⁹² Examples of bargaining are a child asking her lesbian mother who normally does not wear make-up to wear lipstick to a school event and asking a gay father to remove gay pride stickers from his car.

Children seem to engage in bargaining to maintain secrecy about their parent's orientation. During early adolescence, "children of gay or lesbian parents are most likely to feel stigmatized and isolated" as a result of their non-traditional family structures.⁹³ Thus, they may be more inclined to hide their parent's orientation from their peers and the outside community. Reports from support groups for children of lesbian mothers suggest that younger children also have anxiety and concern over issues of secrecy about their parent's sexuality.⁹⁴ In one study, younger children stressed the need to keep their mother's lesbianism a secret and how this need for

89. Tryna Hope, *Choices*, in *LESBIANS RAISING SONS* 202, 202-03 (Jess Wells ed., 1997). Jonah was 6 during this episode. He left to live with his father a week later. *See id.*

90. *See* Van Voorhis & McClain, *supra* note 14, at 644.

91. *See id.* at 646.

92. *See id.*

93. Melanie A. Gold, Ellen C. Perrin, Donna Futterman & Stanford B. Friedman, *Children of Gay or Lesbian Parents*, 15 *PEDIATRICS IN REV.* 354, 357 (Sept. 1994).

94. *See* Kirkpatrick, *supra* note 64, at 359. *See generally* Javaid, *supra* note 60; Lewis, *supra* note 70.

secrecy isolated them from their friends.⁹⁵ They felt they could not tell anyone about their mother's lesbianism because their friends would call them names and/or ostracize them.⁹⁶ Specific concerns that children volunteered related to people discovering their gay or lesbian parent's sexuality. These concerns included fearfulness of the straight parent getting custody, choosing to live with Dad because "I couldn't cope with it"; losing friends, name-calling and teasing; and wishing that Mom was not a lesbian and that her partner was not there.⁹⁷ In one study, the older boys related embarrassment by the stereotypical "butch-femme" relationship their mothers had with their partners.⁹⁸ One child, explaining his reasons for secrecy, said, "Mom, it embarrasses me. I've lost friends. I don't want to bring them home."⁹⁹

Although this kind of bargaining may not be acceptable to some gay and lesbian parents and their partners, many gay and lesbian parents feel that it is a small concession to make in exchange for their children's sense of pride, safety, and comfort.¹⁰⁰ Further, bargaining is considered a healthy coping mechanism for children still adjusting to the news.

e. *Sadness and depression*

Although children rarely respond immediately with sadness or depression when they learn their parent is gay or lesbian, it is nonetheless an additional, critical step in the child's processing of this revelation. First, as previously discussed, once a parent discloses same sex orientation, the child's reality is altered and the child suffers a significant loss. Second, children who are really invested in keeping their parent's same sex orientation a secret often withdraw from their immediate community in fear of their friends, friends' parents, and teachers finding out.¹⁰¹ Children experience this "self-imposed isolation" very intensely.¹⁰² Once these children are so removed from social contact, depression inevitably sets in.

The fact that children feel such an urgency to keep this information a secret suggests that they are acutely aware of anti-gay norms ingrained in

95. See Lewis, *supra* note 70, at 199.

96. See *id.* Children were scared of being called "lesie" or "fag." Also, they expressed a fear that their friends' parents would not let them play together anymore. See *id.*

97. Javaid, *supra* note 60, at 243.

98. Lewis, *supra* note 70, at 200.

99. Miller, *supra* note 1, at 200.

100. See Van Voorhis & McClain, *supra* note 14, at 646.

101. See *id.* at 647.

102. David A. Baptiste, Jr., *The Gay and Lesbian Stepparent Family*, in GAY AND LESBIAN PARENTS 112, 117 (Frederick W. Bozett ed., 1987).

our society and their local communities. Not only are these children fearful of disclosure, but they are also afraid of “anticipated losses,” that they and their gay and lesbian parent may experience as a result of the community discovering the parent’s homosexuality.¹⁰³

f. *Acceptance*

In light of the difficulty inherent in this process, the ultimate question for a lesbian or gay parent becomes, “How much time must pass before my child can accept this aspect of my life?” Unfortunately, the temporal dimension of this process has not been established. Although it is not clear how long it generally takes children to process their feelings about their parent’s disclosure,¹⁰⁴ factors such as geography,¹⁰⁵ age and maturity of the child,¹⁰⁶ the child’s relationship with her parents, and the parents’ respect for one another seem to be major contributors either to the aggravation or the nurturing of this emotional process. If children are given time and help in resolving the issues associated with the above-described stages, most will come to accept their parent’s gay or lesbian orientation. Although the child may not be happy about her parent’s same sex orientation, she is able to accept the parent as she is. Once these children have generally moved beyond their own internalized homophobia, they are usually open about their parent’s same sex orientation.¹⁰⁷

In addition to acceptance, many children of lesbians and gays have reaped other benefits from their parents’ homosexuality, including a heightened sensitivity and understanding of prejudice.¹⁰⁸ These children commonly state that they derive their own personal growth out of the stigma they sometimes experience as a result of their parent’s

103. Van Voorhis & McClain, *supra* note 14, at 647. *See also* Miller, *supra* note 1, at 197.

104. *See* Van Voorhis & McClain, *supra* note 14, at 644 (citing LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 198-99 (1994)). “As noted by Benkov . . . for children born into a heterosexual marriage, ‘the revelation of a parent’s homosexuality requires a total shift in perspective. Coming to terms with this shift can . . . take years.’” *Id.*

105. From my own experience, I can say with certainty that growing up in Mississippi influenced my ability to process the disclosure of my mother’s lesbianism. For instance, there was not a large gay and lesbian community and there were only one or two lesbian households with children in my age group. Thus, shared experience or discussion with others was scarce. As a result, it took some time before I felt comfortable within myself.

106. *See* Javaid, *supra* note 60, at 244. Javaid’s study indicated that children closer to the age of 13 years may be prejudiced against their gay parents while children closer to 15-years-old may be more accepting. *See id.*

107. *See* Van Voorhis & McClain, *supra* note 14, at 648.

108. *See* O’Connell, *supra* note 68, at 292-93.

orientation.¹⁰⁹ One child with a lesbian mother stated, "I experienced a lot of prejudice toward my mother and myself and I want to never make judgements about people."¹¹⁰ Other benefits children of gay and lesbian parents expressed were an understanding and appreciation of an individual's freedom to make choices, an increased openness with their gay or lesbian parent, and enjoyment of having a parent who was more "open" and "tolerant" than other parents.¹¹¹

In summary, children of gays and lesbians experience different emotions upon a parent's disclosure of gay or lesbian orientation, including shock, denial, anger, sadness, protectiveness, and the need for secrecy and isolation.¹¹² Upon first discovering that a parent is gay or lesbian, some children act out, especially towards a gay or lesbian parent's partner. Others express rage, try to destroy or sever the bond with the gay or lesbian parent, or choose instead to bond with the heterosexual parent. Later, many children become protective and supportive of their parent's same-sex orientation. However, they experience some sadness and isolation, probably as a result of the need to be secretive about their parent's orientation. These initial feelings usually evolve with time, exposure, and understanding of the gay or lesbian parent's lifestyle.

The process described above illustrates the conflicted nature of the child's feelings toward her gay or lesbian parent following the disclosure of the parent's same-sex orientation. This process creates a host of concerns in the custody context because, as the next Section illustrates, the child's statements regarding her preference have more to do with the parent's orientation than with the care-giving and parenting skills of the gay or lesbian parent.

3. *This Process Compromises the Reliability of Children's Preferences*

No study has ever documented or evaluated the custodial preferences of the children of lesbian and gay parents. As such, beyond the model of responses to a parent's disclosure, much more information is needed before a complete assessment can be made of the effect this emotional process has on the reliability of a child's custodial preference. However, even without this information, some initial assessment and conclusions may still be drawn. In order to gain some understanding of the preferences children

109. See Lisa Saffron, *Raising Children in an Age of Diversity—Advantages of Having a Lesbian Mother*, J. LESBIAN STUD., Dec. 12, 1998, at 35.

110. O'Connell, *supra* note 69, at 293.

111. See *id.*

112. See generally Van Voorhis & McClain, *supra* note 14.

have expressed in these situations, I surveyed a sample of Appellate Court and Supreme Court cases from the 1970s through the present to search for an indication of whether these emotions visibly influenced the children's preferences.¹¹³

In cases where children expressed a preference not to live with the gay or lesbian parent (a majority of preferences in the sample), the preferences reflected different stages from the model of responses to the parent's disclosure.¹¹⁴ For instance, in a 1986 case, a twelve-year-old boy stated a strong desire to live with his mother because his father's homosexuality "embarrassed" him and made him "uncomfortable."¹¹⁵ In another case, two girls stating a preference to live with their father expressed concern and discomfort about lesbian women visiting their mother's house while they were present.¹¹⁶ In another case, the children of a lesbian mother told the court that they did not want their friends to see their mother and partner display affection for one another and that they blame their mother's lesbian partner for their parents' divorce (and perhaps their mother's lesbianism).¹¹⁷ In a case seeking a change in custody from a gay father, his 9-year-old daughter said that she was unhappy and that she "hated" her father's partner.¹¹⁸

The statements made by the children in the above cases reflect several themes from the model discussed above. The twelve-year-old boy's feelings of embarrassment about his mother's lesbianism are somewhat reflective of stages of bargaining and needs for secrecy. As mentioned earlier, many children in this stage attempt to alter their living

113. Note on Methodology: I surveyed over 190 custody cases involving a gay or lesbian parent. Although not all of these cases included discussion of the child's custodial preference, nearly 40 cases included some discussion about the child's preference. I recognize that in light of the higher court's level of review, there are problems with the methodology. Specifically, not all facts presented at trial are included in the opinion. Although the sample includes all cases from the 50 states that went to the Appellate or Supreme Court level, it is not an exhaustive sample. I intend the conclusions drawn from this study to be a necessary first step in studying the custodial preferences of children of gay and lesbian parents. Further, although not exhaustive, this sample allows some reasonable and reliable conclusions to be drawn. This survey was provided to me by the National Center for Lesbian Rights. See *A State By State Guide to Child Custody* (1996) (on file with author).

114. See *Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988); *In re Marriage of Martins*, 645 N.E.2d 567, 569 (Ill. Ct. App. 1995); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 961 (Sup. Ct. 1986); *Roe v. Roe*, 324 S.E.2d 691, 692 (Va. 1985).

115. See *M.A.B.*, 510 N.Y.S.2d at 961.

116. See *In re Marriage of Martins*, 645 N.E.2d at 569 (awarding custody to the father in light of the children's expressed preference to live with father, the harmful impact of the mother's lesbianism on the children, and the fact that children required counseling to deal with their mother's lesbianism).

117. See *Charpentier*, 536 A.2d at 950 (granting custody of the children to the husband).

118. See *Roe*, 324 S.E.2d at 692.

arrangements in order to avoid further disclosure to the community.¹¹⁹ Similarly, the girls who did not want their mother and their mother's partner to display affection in front of their friends seemed to be bargaining and negotiating their needs for secrecy about their mother's lesbianism. Additionally, they appear to be trying to limit their mother's lesbian-identified behavior and pressure her toward heterosexual-identified behavior. These girls also seemed to be dealing with some anger from their mother's disclosure and very possibly, residual anger from their parents' divorce. The case involving the girl's discomfort at being around other lesbians in her mother's home indicates some denial she may have about her mother's emerging sexual identity and her mother's need to build community with other lesbians and gay men. The girl in the last case also seemed to be processing some anger, possibly from her parent's divorce as well as her father's disclosure of his same sex orientation.

Several conclusions may be drawn about the impact of this emotional process on the reliability of children's stated preferences from the model presented earlier and the representative responses from the children above. First, the children's preferences not to live with their gay or lesbian parent appear to be significantly influenced by anger, denial, and bargaining surrounding the disclosure, rather than on reasons reflective of parenting abilities. The reasons behind these preferences are not even remotely similar to the kinds of reasons Garrison's study relied upon in assessing the rationality of children's preferences. Recall that in Garrison's study, the highest ranked reasons for children's preferences were care-giving, closeness, continuity, and time/attention.¹²⁰ The second ranked reason was parental stability; financial security was rated third.¹²¹ While some of the children's reasons not to live with their gay or lesbian parent may touch upon closeness or parental stability, the bases of the children's preferences seem too entangled with their emotional reaction to their parent's disclosure of a same sex orientation and accompanying lifestyle, rather than on the parent's care-giving abilities. Thus, if the standard for reliability of children's preferences is rationality, as Garrison suggests, these children's preferences fail to meet that standard.

Second, the intensity of children's emotional responses to the disclosure can be profound. In fact, some authors equate this emotional process with the same grieving process many people experience after the death of a loved one or with a patient coming to terms with a terminal

119. See discussion *infra* Part II.B.

120. See Garrison, *supra* note 26, at 82.

121. See *id.*

illness.¹²² Generally, we do not expect people who are grieving to make important decisions, especially ones that effect their welfare. Similarly, we should not expect children to articulate a reliable custodial preference, a decision that has a tremendous impact on the child's welfare as well as the parents, during this difficult period.

Although more information is needed to thoroughly assess the impact of this process on the reliability of the child's preference, evidence provided from the children themselves indicates that the volatility of children's reactions significantly impair the reliability of the preferences they express. Specifically, since the child has conflicting feelings regarding the parent's recent disclosure, she may be incapable of separating the above-described emotions from her feelings about the general parenting abilities of her mother and father. In few, if any, of the cases where a child expressed a preference against living with the gay or lesbian parent, did the child mention anything other than the parent's orientation as the reason for her preference. Thus, it appears that children's preferences are not based on rational reasons, such as the ones from Garrison's study, but rather on emotionally-charged, sometimes internalized, homophobic sentiments based on the parent's recent disclosure.

III. CONSTRUCTING A MODEL: DELAY AND ASSESS

A. DIFFICULT PROBLEMS PRESENT DIFFICULT SOLUTIONS

On balance, the custodial preferences of children of gays and lesbians have such serious consequences that they cannot be treated identically to the preferences of children with heterosexual parents. In some cases, not only is the child basing her preference not to live with her gay or lesbian parent on unreliable reasons, she is contributing to a system in which gay and lesbian parents are at a distinct disadvantage. Namely, the child is reinforcing the overriding notion that gays and lesbians cannot be good parents. In contrast, heterosexual parents do not have the burden of deflecting this kind of discrimination in the custody determination. Further, their children are not dealing with the volatile emotions associated with the stigma of homosexuality. Thus, although the children of heterosexual parents may be dealing with the same difficulties of divorce, their preferences are indeed more firmly rooted in care-giving and relationship concerns, rather than internal homophobia. The most tenable solution would be a compromise that reaches both objectives of protecting

122. See generally Van Voorhis & McClain, *supra* note 14.

gay and lesbian parents from discrimination, as well as respecting children's right to be heard and to actively participate in the decision making process.

Although there are several possible means to solve this problem, none presents a flawless solution. One possible solution is to silence the child's preference altogether. By silencing children's voices, preferences that work to the detriment of gay and lesbian parents and strip the court of one of the mechanisms by which it discriminates against gay and lesbian parents are eliminated. However, this solution presents several problems. First, it may be impractical in light of the numerous states that consider or mandate the child's preference as one of the factors in deciding custody contests. Second, children who have processed their parent's disclosure and still prefer to live with their gay or lesbian parent serve the very important function of educating the court. Silencing their voices may work a disservice to the gay and lesbian community's struggle for recognition as good and capable parents since good kids are often good proof of good parenting. Third, children of gay and lesbian parents should not be afforded less rights than children of heterosexual parents. Denying them a voice in the discussion only serves to further isolate and disempower children whose experience is already predicated on these emotions in a variety of contexts.

A second solution is to allow children's preferences into evidence only when children express a wish to live with their gay or lesbian parent. Although this solution promotes our dedication to anti-discrimination norms, it does so at the expense of our dedication to equality. Primarily, this asymmetric approach treats children of gay and lesbian parents differently. One child's voice would be heard while another child's voice would be disregarded, simply on the grounds of with whom the child wished to live. This solution also might potentially prevent courts from receiving other important information from the child about the parents. However, the most problematic aspect of this solution is that it silences reliable preferences. Certainly there are children who have come to terms with their parent's disclosure but still prefer to live with their heterosexual parent. If the child has come to terms with the parent's disclosure to such an extent that she can at least separate her feelings about the parent's orientation from the parent's care-giving or relationship skills, the child's preference probably rests on quite rational, reliable reasons. However, since the preference is to live with the heterosexual parent, the preference is not considered within this solution.

B. A VIABLE COMPROMISE: ASSESS AND DELAY OR AT THE VERY LEAST,
ASSESS AND INFORM

This solution requires that a professional¹²³ assess the child's progress in resolving her emotions about her parent's recent disclosure. In making this assessment, the professional probably will want to pay close attention to the child's feelings about the parent's gay or lesbian orientation as well as the child's reasons for choosing to live with the heterosexual parent. If the child's feelings about the parent's gay or lesbian orientation are reflective of the responses mentioned in Part II, then the child may not be able to fully appreciate or evaluate the gay or lesbian parent's abilities to parent. Further, if the child's reasons to live with the heterosexual parent simply reiterate the child's hostility about the parent's orientation, the child is probably not engaged in a rational weighing of each parent's abilities, but rather is still fixated on the issue of the other parent's same-sex orientation. Thus, if the assessment reveals that the child is experiencing emotions which seem to potentially compromise the reliability of a custodial preference, the gay or lesbian parent's attorney must recommend that the court delay soliciting the child's preference until the child is better able to state a rational preference. Follow-up assessments will need to be made both to assist the child through the process as well as to determine when she is capable of stating a reliable custodial preference.

Whether delaying litigation is or is not a viable option, the court must be informed about the model of responses children have subsequent to this disclosure as well as the risk of compromised reliability of the child's preference. Specifically, advocates must urge the court to recognize that the child's preference is not based on reasons related to parenting, closeness of relationship, continuity, or time and attention, but rather is based on the child's anger, denial, or sadness in response to her parent's disclosure of a gay or lesbian orientation. Also, the gay or lesbian parent's attorney should ensure that the court understands that according to Garrison's study (as well as other psychologists), the child's reasons supporting her preference to live with the heterosexual parent are not reasons that constitute rational custodial preferences. Thus, even if the court refuses to delay the litigation, the court should be informed that the child's preference will not be reliable and should not be relied upon by the court in making its decision.

123. An appropriate professional may be a child psychologist or social worker familiar with this process, or at least familiar with the concerns and emotional reactions of children of divorce and children of gay and lesbian parents.

There are several advantages to this solution. Optimally, courts will allow the child enough time to process her parent's disclosure so she will provide a thought-out, rational preference. In the circumstance where such a delay is not an option, this solution shields gay and lesbian parents against blind, unfettered inferences that courts may draw from unfavorable preferences, while still allowing the child's participation. In either circumstance, this solution educates the court about a unique and delicate situation in many children's experiences. As such, courts should be reluctant to consider a child's preference when the child is entangled in this highly emotional process that would render the preference unreliable.

The disadvantages of this approach are 1) it is difficult to ascertain how long it will take a child to process her initial feelings regarding the disclosure, 2) delaying the preference may give the heterosexual parent or siblings more time to exert or aggravate a homophobic influence on the child, 3) some children may never fully contemplate and settle their rage over the loss of their heterosexual-identified parent, and 4) the longer a child remains with one parent, the more harm a change in custody will cause to the child.

Although these are serious problems and are in need of further research and discussion, there seems to be some room for resolution. First, the amount of time this process takes is case specific and could probably be dealt with through regular therapy and evaluation. Once a time frame is established, the court can decide if a delay would be feasible given the circumstances of each case, as well as the court's calendar.

The second problem presents a very difficult and sensitive issue. In this case, temporary removal from the heterosexual parent's home may be the only option. Certainly, in previous cases, the court has removed a child from the custody of a parent who has tried to sever or damage the relationship between a child and the other parent. In light of the effect this behavior has on the child, removal may be the most appropriate option.

Third, while it is true that a child may never want to have a meaningful relationship with her gay or lesbian parent, and thus her best interest would probably be better served by placing her in the heterosexual parent's custody, her preference still needs to be tempered with the disclaimer described above.

Fourth, although the child will experience some harm in the re-arrangement of custody which this solution contemplates, the objective of insulating gay and lesbian parents from further disadvantage in this context probably constitutes a worthwhile sacrifice. For example, upon the

parents' divorce, a child is placed in her mother's custody. One year later, the mother discloses her lesbian identity to the child and the child's father. The father files for a custody modification. Assuming that the father will not exert a homophobic influence on the child, the child could live with her father while processing the disclosure. (In the alternative, the child could stay with her mother while processing the disclosure.) After she has processed her emotions such that she could articulate a reliable preference, the child could state a preference before the court. While the re-arrangement of living circumstances may be difficult, those issues seem curative and worthy of the outcome: a reliable preference. Additionally, at some point, our dedication to children's best interests comes into direct conflict with our goals of preventing the proliferation of discrimination against gays and lesbians.

Despite the disadvantages this option presents, the strategy to assess and delay seems to be the most realistic and sensible solution for gay and lesbian parents and their children. It gives time for the parent to work with the child in processing her disclosure, and it hopefully provides parents a shield from the harmful blows an angry child can land with an unreliable preference. Further, therapy and encouragement may help children come to terms with their parent's disclosure. Also, this solution may be the least disruptive to integrate into the current family law practice and system. While it certainly presents some interesting complexities and challenges for the practitioner and the gay or lesbian parent, it is probably the most helpful for both parent and child in the long run.

CONCLUSION

Allowing children to participate in decisions that effect their lives is a worthwhile endeavor. However, the studies on the reliability of children's preferences do not take into account the unique situation of children of gay and lesbian parents, especially regarding the timing of these lawsuits and the intensity of children's emotions while processing their parent's disclosure. In order to shield gay and lesbian parents from further discrimination and disadvantage in custody litigation, the solicitation of preferences from these children must be delayed until they have processed their parent's disclosure of same sex orientation. In the alternative of delay, the court must be informed of the impact this process has on the reliability of the child's preference and urged not to take the preference into consideration when making its ultimate decision.

