

1 of 1 DOCUMENT: Australian Journal of Family Law/(2002) 16 AJFL No 3/Articles/How is the issue of Lesbian and Gay Parenting addressed in Family Reports

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Articles

How is the issue of Lesbian and Gay Parenting addressed in Family Reports

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The research described in this article examined how Family Court Counsellors represented gay and lesbian parenting in a sample of 14 contemporary family reports. We found no examples of prejudicial statements by counsellors, nor any overt suggestions that gay and lesbian individuals would make lesser parents because of their lifestyle or sexual orientation. There was evidence, however, of a reluctance to challenge formally, statements from others that linked negative outcomes for children with homosexuality. In addition, family reports did not refer to any of the research findings that almost overwhelmingly debunk myths connecting homosexuality and negative outcomes for children. Because the research design did not include a control group, we are unable to determine whether the absence of appropriate challenges and of reference to the literature, reflect a more general norm in family reports. We note that the Family Court's Guidelines do not address these issues. This in turn opens up questions related to the scope and purpose of family reports, both generally and with respect to their response to prejudicial statements towards minority groups.

Introduction

In this article, we report on research that set out to explore how Family Court Counsellors construct reports in disputed parenting cases in which a parent has declared his or her homosexuality and may also be in a relationship with a same sex partner. We were interested in looking generally at how the issue of same-sex parenting was addressed as well as determining more specifically, the extent to which reports reflected (and perhaps specifically referred to) research that points strongly in the direction of there being no difference in outcomes for children raised by homosexual parents and parents in same sex relationships.

Before describing the research and interpreting the findings, we review the contemporary research-based evidence on gay and lesbian parenting. We then place this in the context of our knowledge of the importance for children of structural factors in the family compared with process factors. We conclude this section of the article by reviewing the Family Court's ambivalent responses to issues of parenting by gay and lesbian individuals.

We are aware that contemporary research on the attitudes of social science practitioners¹ suggest low levels of overt prejudice toward gay and lesbian people as individuals. However, as there appears to be no similar research on social science practitioners' attitudes towards gay and lesbian individuals in their roles as parents, we were curious about how Court Counsellors frame their reports -- especially in the context of a history of some judicial ambivalence towards this issue.

Gay and lesbian parenting: an overview of research findings

The impact of being the child of lesbian and gay parents, either from the outset or following the breakdown of a marriage, has been well-documented.²

The American Psychological Association³ concluded that, no studies had found 'children of gay and lesbian parents to be disadvantaged in any significant respect relative to the children of heterosexual parents'.

Tasker and Golombok's⁴ summary of research findings was more explicit. They found no discernible differences in the children of heterosexual or homosexual parents regarding children's sex role identification, level of happiness, level of social adjustment, sexual orientation, satisfaction with life or moral and cognitive development.

A year later Patterson's⁵ summary of research came to similar conclusions. She noted:

There is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents ... the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.

More recently Patterson⁶ interpreted the research findings with even greater confidence, declaring that:

... the results of existing studies, taken together, also yield a picture of families thriving, even in the midst of discrimination and oppression. Certainly, they provide no evidence that psychological adjustment among lesbians, gay men, their children, or other family members is impaired in any significant way.

A small group of commentators,⁷ have suggested evidence of negative outcomes for the children of homosexual parents. These writers also view homosexuality itself as either sinful or indicative of a mental illness. Ball and Pea⁸ have critiqued Wardle's work and found it to be conceptually and methodologically inadequate. Stacey and Biblarz⁹ have also noted that in their view, the profoundly hetero-normative convictions held by these writers about gender identity and what is healthy and moral, and about sexual orientation and family structure, 'hinders their ability to conduct or interpret research with reason, nuance, or care'.

Though no doubt it could be argued that a strongly positive gay and lesbian stance could lead to a similar conclusion, the evidence against homosexuality per se as a negative factor for children, is very strong. The evidence is further supported by other research findings concerning outcomes for children in separating families.

Outcomes for children of separation and divorce: structure and process

Attempts to understand the range of factors that impact on children after the separation of their parents, have been fraught with problems associated with sampling, choice of methodology and a priori assumptions. Kelly and Emery's¹⁰ review of these factors summarises the range and complexity of research questions that need to be asked in order to become clearer about what constitutes good post-separation parenting. From a negative perspective, they make particular mention of the impact of factors such as violence and parental absence. They make no mention of homosexuality.

In a complementary summary of research findings, Kelly¹¹ notes that it is the *quality* of the relationship processes that occur between parents and their children, combined with the presence or absence of serious inter-parental conflict, that most impacts on outcome for children. Kelly echoes the work of Vandewater and Lansford,¹² who found that family structure is important if issues of protection are to the fore. Otherwise, family structure is important only to the extent that it may be systemically associated with secondary effects such as poverty or a reduction in life opportunities.

Such findings are relevant when considering strengths and limitations of legal processes as they impact on the interests of children of separating and divorcing parents. Legal deliberations and decision-making about children in post separation families are necessarily directed more towards structure (who provides parenting and for how long) than towards process (how is parenting provided and experienced by the child). Courts can exhort but ultimately not require parents to provide quality care and to focus on children's needs. Via restrictions or exclusions, courts can play an important role in protecting children from certain people and certain experiences. But aside from a protective function brought about through such exclusions or restrictions, courts can ultimately have little influence over the quality of time

spent between children and their carers.

If no link has been established between gender orientation and *quality* of parental or caregiver engagement with children, then any formal consideration of homosexuality as a factor in parenting disputes must, in our view, stem from a sense that the child needs a level of protection from such a parent. To what extent if any, therefore, does the Family Court seek to *protect* children from parents who have declared their homosexuality? To what extent does the Court seek to restrict or exclude such parents? It is important to consider this issue because the Court provides the culture and the context for which family reports are written.

Gay and lesbian parenting and the Family Court

At first glance, the evidence is that in relation to same-sex parenting, Australian family law has generally adopted an inclusive and non-discriminatory position. For example the early case of *In the Marriage of Spry*¹³ is commonly used as an authority for the view that there is no presumption against homosexuality.¹⁴

However, the *application* of the legislation has at times been inconsistent, suggesting an ongoing attitude that inherent risks continue to be associated with the parenting of children by gay and lesbian parents. For example, in the case of *In the Marriage of L*,¹⁵ the judge determined that the wife was able to provide better care and arrangements for the children, except for the fact that she was living in a lesbian relationship. This was accompanied by an extensive list of questions designed to ascertain whether the mother's homosexuality should preclude her from the role of residential parent. They were:

- o whether the children raised by the homosexual parent may themselves become homosexual, or whether such an event is likely;
- o whether the child of a homosexual parent could be stigmatised by peer groups, particularly if the parent is known in the community as a homosexual;
- o whether a homosexual parent would show the same love and responsibility as a heterosexual parent;
- o whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters;
- o whether or not the children should be aware of their parent's sexual preference;
- o whether children need a parent of the same sex as a role-model;
- o whether children need both a male and female parent figure;
- o the attitude of the homosexual parent to religion, particularly if the doctrines, tenets and beliefs of the parties' respective religious affiliations are opposed to homosexuality.

The list has since been used in determining the outcome in similar cases. For instance, it was applied in *In the Marriage of Doyle*,¹⁶ as part of the process deemed necessary to reach a conclusion that the father's homosexuality 'per se'¹⁷ was not a factor against the best interests of the children. In this case, the judge awarded custody to the father after carefully considering his gay relationship and also the consequences of separating two children. According to Otlowski¹⁸ the result 'followed established Family Court authority dealing with contested cases involving a gay or lesbian parent, in particular the case of *L and L* as well as generally reinforcing the importance of the welfare of the child principle'.

Millbank¹⁹ conducted research into Australian judicial attitudes to ongoing parenting by gay men and lesbian women, as revealed in Family Court judgments. Millbank²⁰ referred to the question posed in the 1983 case of *L and L*, as to 'whether a homosexual parent would show the same love and responsibility as a heterosexual parent' as 'offensive'. She noted²¹ 'the very real fear it raises is that the humanity of lesbian and gay parents will be denied by the legal system'.

The historical context in which the Court appeared to retreat from the principle stated in *In the Marriage of Spry*, includes the fact that until 1973, homosexuality was authoritatively accepted by such publications as the American Psychiatric Association Diagnostic and Statistical Manual (DSM) as a mental illness. Indeed, as Kirby²² notes, the classification of homosexuality as a 'sexual disorder' which included conditions of 'persistent and marked distress about

one's sexuality', persisted through to the 1994 edition of DSM.

Millbank's concern about the Court's ambivalence appears to have been addressed by the Chief Justice of the Family Court of Australia, whose 1997 statement on the matter seems unequivocal. According to His Honour:²³

Sexual orientation is no basis upon which to make assumptions about the quality of an individual's relationships or the parenting capacities of a person.

That is why sexual orientation, in and of itself, has been held to be an irrelevant matter in disputes about children under the Family Law Act, unless it somehow impinges upon the best interests of the child.

It is not clear whether the Chief Judge's comments were meant as a declaration that applied from that time, whether he believed it had been the Court's position since its early days, or whether it reflected what was known and generally accepted as a result of more recent research findings. However, the suspicion with which the Court has continued to view lesbian and gay parents even after the research evidence offered little or no support for such a position, may be seen in the case of *Re K*.²⁴ In this case, guidelines for the appointment of a solicitor to act as the child's legal representative included:

- o Cases (which) involve allegations of abuse, whether physical, sexual or psychological.
- o Cases where there is an apparently intractable conflict between the parents.
- o (*Cases*) where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare (authors' italics).

Millbank²⁵ also referred to 'unspoken, unproven, unprovable assumptions' that continued to feature in the 1995 case of *In the Marriage of A and J*.²⁶ She notes in this case that:²⁷

(although) being a lesbian was not a negative factor and also that the mother's new partner had a good relationship with the child, the result was to hold the mother's relationship as a factor directly increased the merit of the father's claim. This was because the court held that it was of overriding importance for the child to have a close male influence to 'balance' the effects of the mother's lesbian relationship and granted custody to the husband apparently on those grounds.

Millbank concluded that in the case of *In the Marriage of A and J* 'the implication of harm was at all stages pervasive, unexplained and unsupported by any evidence'. She suggested there was a lack of clarity in this case regarding exactly what effect the mother's partner would have on the child and how the presence of a man would eliminate it.

Sandor²⁸ referred to the Full Court decision in *In the Marriage of A and J* when the mother unsuccessfully appealed the trial judge's decision that the father should have the custody of the four year old boy. In particular, Sandor scrutinised the court's finding that 'the importance of the father-son relationship was elevated for reasons which included the wife's continuing lesbian relationship'.²⁹ He commented that on examining the counsellor's report there was no reference to 'a magnified importance in this case of contact between the father and child *because of* (italics original) the wife's relationship with her lover'. Sandor did not suggest that the reasoning of the court was 'deliberately prejudicial'. 'Rather, it is suggested to be illustrative of implicit and presumptive barriers to fair adjudication, the capacity for preconception to unwittingly serve as a substitute for evidence, and the risk of "moulding the facts"'.³⁰

Millbank³¹ referred to another significant problem in this area in relation to the lack of systematic research being used as supporting evidence. She referred to an analysis of the use of social science data in the Family Court conducted by Justice Mullane. His Honour examined 151 contested custody decisions (which included both heterosexual and homosexual disputants) and found that a judge made 'a finding of social fact' in 30% of the cases. Millbank noted that in 65% of the cases that used 'social fact' to support the decision, no authoritative source was noted or the authority was stated as 'research' but unnamed. Millbank urged family law practitioners, and other professionals within the system,

particularly judges and counsellors, to become well acquainted with the available empirical data. She commented that:³²

Courts and judges, like counsellors, like legislators, reflect the society around them ... [and that] ... the social context still views lesbians and gays as a threat to children's well-being, including sexual abuse, conversion to sexuality, confusion of gender role, and exposure to community abuse or just general brain washing.

It is clear that in Millbank's view, the antidote to social attitudes that simply reflect old prejudices, is knowledge of and willingness to refer to empirically-based research.

With regard to the legislation itself, Millbank³³ supports the statement made at the beginning of this section, noting that the Family Court of Australia and the Australian Family Law Act is 'among the most progressive and inclusive family law regimes in the world in terms of their approach to same-sex families'. At the same time, she distinguishes between the law itself, which appears to be generally value neutral in this area, and its administration through judges, lawyers, counsellors, psychiatrists and psychologists which, in her view, remains problematic.

Among other things, Millbank's observation raises the issue of the link between Family Court judgments and input from experts. Though they are the most common form of independent expert analysis and advice on parenting disputes sought by the Court, there has been very little research on the impact of Family Reports³⁴ on judges' views and on the judgements they deliver.³⁵ Clearly judicial independence remains at the heart of the adversarial system and Family Reports remain only one piece of evidence weighed by the judge.³⁶ It is likely nonetheless, that in some cases at least, such reports provide information and views that are seen by the judge to be of considerable -- perhaps crucial -- importance.

At the end of the day, judicial expertise lies in knowledge and application of the law. The expertise of Family Court Counsellors, in their role under s 62G(2), lies in their capacity to observe closely, relevant interactions, behaviours and statements that take place outside the court room and interpret them according to a framework supplied by social science theory. How do counsellors fulfil this task when the parenting dispute involves a parent who is homosexual and possibly in a same sex relationship?

The study

In the present research,³⁷ a content analysis of Family Court Counsellors' reports was conducted in cases in which one or more of the parents or parental figures was lesbian or gay. A sample of Family Reports related to cases in which one or more of the parents had declared themselves to be homosexual, was analysed with the following initial questions in mind.

- o Is there evidence in any of the reports of counsellor ambivalence or prejudice towards gay and lesbian individuals?
- o Is there evidence in the reports that counsellors see the impact of lesbian or gay parenting on children as different to the impact on children of heterosexual parenting? If so, is there evidence that the gender of the parent further impacts on counsellors' perceptions?
- o Is there evidence in the reports of a differential expectation with respect to behavioural standards of homosexual and heterosexual individuals? Again, if so, is there evidence that this is further differentiated according to the gender of the parents?
- o What kind of knowledge of the impact of parenting by gay men and lesbian women do counsellors rely upon in their reports? Do they rely largely on their understanding of social attitudes; of 'commonsense' knowledge; of what Mullane³⁸ refers to as 'social facts';³⁹ or of a more detailed appreciation of contemporary research that might support or challenge such 'social facts'?

An important set of questions that would go to supporting or challenging Millbank's claim that counsellors 'tend to reflect social attitudes that see lesbians and gays as a threat to children's well-being', would include whether there is

evidence that in the statements within Court Counsellors' reports:

- o That they share confused, inconsistent or prejudiced attitudes towards lesbian and gay parenting;
- o That any such inconsistent or prejudiced attitudes are linked with further statements or recommendations;
- o That they demonstrate an awareness of confused, inconsistent or prejudiced attitudes in others;
- o That they fail to overtly challenge such attitudes in others.

Sampling⁴⁰

Examples of reports of cases that have involved lesbian and gay parents over the decade 1990 to 2000 were requested from Family Court Counsellors. The time frame was chosen as being relatively up to date and manageable. Because the aim was to explore attitudes towards lesbian and gay parenting, reports which contained other issues likely to attract strong views were excluded. For example, reports in which there was mention of substantiated sexual abuse, or other criminal convictions relating to sexual offences or trans-genderism, were not included in this study.

A request via email was sent to every Family Court counselling section in Australia, (except the Family Court of Western Australia) requesting copies of reports completed between 1990 and 2000, which involved lesbian or gay parents, thus providing a purposive sample. As a result, 17 reports were received from 14 Family Court counsellors. The pool of potential counsellors was 106.⁴¹ Of the 17 reports, three were discarded on the basis, previously referred to, of substantiated sexual abuse, other criminal convictions relating to sexual offences or trans-genderism.

Because no inquiry of this nature had previously been conducted, the research began from a position of open curiosity. Thus although the research was guided to some extent by questions of the sort noted above, it did not set out specifically to test any particular hypothesis. In the tradition of grounded theory,⁴² it was assumed that an open ended textual analysis of the family reports would generate themes and possible further questions that might serve as the beginning of a process of theory building.

Results⁴³

The gay or lesbian parenting issue was judged in two of the reports to have had little or no impact on the issues at stake.

In report No 2, the two children aged 16 and 14 years wanted to live with their mother but had relationship problems with her lesbian partner. There was no suggestion that the children's difficulties in this case related to the fact that the mother had a female partner. Though the father was applying for residence and the mother was asking the Court to order that the children remain with her, no issues relating to homosexuality were raised by the adults, children, or counsellor, in this report.

Report No 12 was prepared in relation to s 65G of the Family Law Act 1975 (Cth). This section allows for joint applications for the care of a child by one biological parent together with a non-biological carer. In this instance, the application related to care of a young girl by the biological mother and her lesbian partner. The father was an anonymous sperm donor and took no part in the hearing. The fact that the relationship between the carers was lesbian did not feature either in the Court's deliberations or the report. The report focused on the nature of the relationships between the child and both adults.

From the remaining reports, four sub-themes were identified after an initial content analysis. The themes, and the way those themes were identified in the reports, are described below.

1 Non-evaluation of serious allegations of risk linked to homosexuality -- 3 reports

Serious claims that were linked to the fact that the person was homosexual were made in three of the 14 reports analysed. None of the claims was adequately investigated. In report No 11, the heterosexual mother made serious claims against the gay father without any apparent evidence other than the risk of being exposed to a gay parent. She alleged that the children might be exposed to sexual abuse and to promiscuity, believing that the father's developing homosexuality might, of itself, expose their children to the risk of sexual abuse.

In response, the counsellor referred to a possible nexus between the mother's unresolved anger towards the father, and her allegations. The counsellor made a general statement about the mother's possible lack of knowledge about homosexuality, but did not specifically address the mother's extreme fears or place them in the context of what is known about gay parenting. Nor did the counsellor specifically challenge the negative beliefs of the mother's church with respect to its position in relation to homosexuality. The church was said to reflect the belief that 'male homosexuals abuse young children, with a preference for boys'.

It could be argued that the above concerns were adequately covered by the fact that the counsellor concluded that 'there is no concern that either child is at risk of sexual abuse'. At the same time, the counsellor gave no indication of the thinking behind this statement, leaving the following comment open to an interpretation of possible ambivalence about gay parenting. According to the counsellor: 'There seemed no reason that [the father's] homosexuality per se should preclude him from having care of the children any more than consideration of [the mother's] capacity to provide for them in shouldering the burdens of sole parenthood, given the possibility of her having an ongoing vulnerability to depression.'

An implication, even if unintended, is that like depression, homosexuality could be seen as a disadvantage or an illness, but that in this case, the two negatives balance each other out. The counsellor could have avoided the risk of being misunderstood on this point by, for example, making a more explicit statement about the lack of evidence linking homosexuality to adverse outcomes for children.

In report No 13, the mother linked homosexuality with paedophilia. She expressed anxiety about 'inappropriate behaviour' (not specified), the *possibility* (authors' italics) of cross-dressing, inappropriate display of affection between men, the possibility of sexual abuse, and the likelihood of the child being ostracised at school (as a result of having a gay father).

In response the counsellor made a general reference to the mother's ambivalence and uncertainty about the father's homosexuality while also stating that her way of thinking was not indicative of 'an underlying homophobic attitude'. The counsellor did not challenge the mother's links between homosexuality and other risk-related behaviours, including abuse, and did not justify the assessment that her comments had no connection with an underlying homophobic position. No specificity was sought around fears of 'inappropriate behaviour'.

In report No 17, the counsellor did not directly respond to the mother's concerns about the potential for illegal and immoral behaviour, sexual molestation, and homosexual promiscuity, all of which she directly associated with being a gay parent. Rather, the counsellor argued that the mother's application for residence with respect to only one of the two children, was a strong indicator that her concerns about the impact of gay parenting should not be treated seriously.

While there may be some merit in the counsellor's argument, the report leaves unanswered the alleged connection between gay parents and abusive behaviour towards children. It does not appear to raise and then deal with the possibility that the mother may have held the belief, for whatever reason, that only one of the children was at risk; or that the mother, again for whatever reason, was attempting to 'save' one child and 'sacrifice' the other.

2 Responses to non-specific lower level concerns linked to being a gay or lesbian parent -- 7 reports

In report No 13, the gay father indicated that his partner 'may or may not be present on these occasions (of contact) and he denied any suggestions made by [the mother] that [the three year old child] would be exposed to anything

"inappropriate". The counsellor's response noted that [the mother's] comments 'do not imply there is an underlying homophobic attitude, but that [she] is experiencing some uncertainty about the implications of [the father's] lifestyle for her daughter's future, both personally and socially'.

It is difficult in this case to determine whether or not the absence of an 'underlying homophobic attitude' is a hope on the part of the counsellor or something that the counsellor had determined after careful evaluation. The counsellor may well have been sympathetic to the possible shock for the mother of having her partner declare a different sexual orientation and may have made a conscious judgment about how much to say in this regard.⁴⁴ More will be said of this issue in the discussion section below. For now, it is simply noted that as it stands, the report leaves the issue of homophobia potentially open and unchallenged.

In report No 16, the counsellor noted that '... [the mother] believed that [the child's] welfare would be better served if he lived with her because at his age he needed his mother, and she would have the opportunity to inculcate socially appropriate attitudes, which she did not feel the father shared'. The counsellor added later that the mother also, 'expressed the fear that the (gay) father would not teach the boys appropriate standards and behaviours'.

Though one cannot be certain without asking the mother the specific questions, prima facie, her statements would appear to be a thinly veiled expression of her association between gay parenting and negative outcomes for the children. The counsellor did not clarify this issue, but instead stated simply that the father, 'did not think that his values were inappropriate or antisocial'.

In report No 17 (also referred to in the category of more serious allegations) the counsellor noted that: 'In extreme, they (the mother and her heterosexual partner) believe that [the gay father] is teaching the children illegal, immoral ways, explaining that on his last visit, they witnessed examples of [the father] in [the child's] behaviour, for example, being unpleasant to his mother and citing the virtues of shoplifting.'

The report leaves uncommented upon, the ambiguous link between the terms, 'illegal' and 'immoral'. The term, 'immoral' is not a term that would normally be used to describe shoplifting. It is a term more often used to describe unacceptable sexual behaviour or standards. Once again, the reader of the report is not privy to all that transpired between the counsellor and the clients. Once again, however, the counsellor chooses not to make explicit the extent to which the mother has linked homosexuality with other unacceptable behaviours.

In report No 6, one of the children was in the care of a lesbian mother. The father stated that his reasons for wanting residence of both children related to the fact that they were being exposed to a lesbian relationship, which distressed them. One of the children was reported as saying of her mother, 'I hate her; she wrecked our lives, she left, she's on drugs, she's a lesbian, she takes things to court and lies'. The counsellor reported other child comments in similar vein, but did not explore what aspects of the lesbian relationship were distressing or why this might be so.

In report No 7 the mother of three teenage children had left the family and pursued a relationship with another woman. Though many of the comments seemed to relate to the overall family breakdown, there was also reference to the 'special circumstances relating to the mother's partner's sexuality'. The 'special circumstances' were not commented on or explored by the counsellor.

Report No 15 involved complex family relationships. The father claimed that the mother's lesbian partner was victimising his son and giving preferential treatment to his daughter because she was a 'man hater'. The counsellor simply allowed the statement to stand.

In each of the above reports, the counsellors did not adequately explore what the parent's understanding of 'appropriate' or 'inappropriate' standards of behaviour might be. In effect, the counsellors left it to the judge to decide by means of other evidence, what was in the minds of the parents and what consequences should flow from this.

3 Reference to research -- 2 reports

In report No 8, written in 1999, it was clear that the counsellor was unaware of the availability of extensive social science research about the impact on children of living with same-sex parents. Instead, the counsellor referred to the limited information available about the issues that may confront children who are raised within a same-sex relationship, and commented that one could therefore only speculate on its likely impact.

In report No 9, the counsellor made the only accurate reference to research found in the study. It referred to the lack of evidence supporting the relationship between homosexuality and paedophilia. However, the report contained no specific citation(s).

4 Reference to 'social truths' -- 4 reports

In report No 1 the counsellor noted that, 'He (the father/ sperm donor) told the counsellor that he wanted more contact time with [the child] in order to develop a relationship with him in his own environment, and to offer him a male influence'. Later in the same report, the counsellor added that, 'He (the father) ended the interview by saying that his concern is that "they (the lesbian parents) don't want me to be a huge part of [the child's] life and little boys need their fathers"'. In this case, the counsellor recommended that it would be in a young boy's best interests to see more of his father, 'given that he has a good relationship [with his father who] provides him with a male role-model'.

In report No14 -- (the case of *A and J*, previously referred to by Millbank and Sandor), the counsellor concluded, 'This (the mother's maintaining a flexible approach to the child's contact with his father), as well as ensuring regular communication between herself and [the father] in relation to [the child's] welfare, would be essential for [the child], whose need for a nurturing and constant male figure will grow as he develops'.⁴⁵

In report No 4, the counsellor comments that: 'Given that the father has been the sole male role model in [the child's] life) ... it is imperative that he retains a substantial portion of time in parenting [him].

In report No 8, the counsellor comments that 'While this writer acknowledges that for children, to some degree what people are called is really just a name and it is the relationship that is of critical importance, it is suggested that to minimise potential confusion for the children, the children be discouraged from calling any other woman other than the person who gave birth to them "Mum"'.

This is admittedly a difficult and sometimes controversial issue in many post-separation families. Some re-partnered couples and their children are comfortable with the idea of there being two mothers and two fathers. Some are not. Some step-parents, for example, may take care in defining themselves as significant but different, perhaps by the use of their first names, or by agreeing on a name that implies a special relationship. There is no evidence that we are aware of that would caution against a children having more than one person who they might call 'mum' or 'dad'. Indeed the anthropological evidence⁴⁶ is that in other cultures, this has traditionally been quite common. A question (which cannot be answered on the material available) is whether the counsellor's sensitivity in this case was in any way linked with the fact that the women were in a lesbian relationship.

Summary of counsellors' representation of gay and lesbian parenting

There is no evidence that counsellors made explicit links between parenting capacities and being of gay or lesbian orientation. When serious allegations were made linking homosexuality with abuse or poor outcomes for children, there is no evidence that these allegations were supported. At the same time, the serious allegations appear to have been ignored rather than formally investigated.

It is interesting to compare the absence of attention to the more serious allegations made in this sample of reports, with what would be expected if similarly serious risks were linked with allegations of family violence or abuse. In the latter

case, in the experience of the principal author, the court would expect counsellors to make a formal assessment of the likely risk. For example, the counsellors would be expected to consider the question of an unacceptable risk⁴⁷ and offer what assistance they could in weighing this against claims for an ongoing parenting role.⁴⁸

Why did counsellors not attempt to evaluate the risks articulated in some of the present sample of cases? Did they simply assume that these allegations were coming from a prejudicial starting point? If they had evidence of this, why was it not stated explicitly? If they did not have such evidence, then why treat the case differently to other cases in which serious allegations are made? It is important in our view to tease out the question of confronting prejudicial statements on the one hand and responding seriously to serious allegations on the other. The alternative would appear to be that in the name of not overtly supporting prejudice, children could remain at risk.

Counsellors also reported less serious but generally vague statements by heterosexual parents that appeared to link homosexuality with negative outcomes for children. These comments were dismissed by default. That is, they were not explicitly investigated or commented upon. Nor did counsellors take a formal position or link such a position in any way to our contemporary knowledge-base on the issue of homosexuality and its impact on the children.

Again, in the cases in which it was raised as problematic, counsellors made no explicit comment on the issue of the display of affection between gay partners. In one case, the counsellor did not separate the issues of affectionate behaviour and cross-dressing.

With respect to whether there was evidence that counsellors' responses might differ according to whether the parent was lesbian or gay, the limited evidence in this sample of reports suggests no difference. In view of the near total absence of explicit responses to discriminatory and potentially discriminatory claims, however, the 'no difference' finding is limited in its explanatory power.

Finally, there was a complete absence in the reports of explicit accurate reference to research findings that might support counsellors' assessments or challenge assumptions and allegations made by heterosexual partners.

Discussion

Sandor⁴⁹ has observed that:

... initiatives which confront and challenge perceptions about gay men and lesbians would complement and extend the court's current pro-active efforts in aiming to treat other historically disadvantaged groups, such as women, and indigenous peoples, with more than just fairness and formal equality.

Among the questions raised by the research are the following. To what extent is it expected of counsellors that they overtly 'confront and challenge' potentially discriminatory allegations? To what extent are counsellors expected to investigate serious allegations in a formal way even if, *prima facie*, they appear to be based on a prejudicial outlook? In an adversary culture in which exaggerations and ambit claims are not uncommon, is it useful for a counsellor to confront prejudice or to leave such observations to the Court itself? Is mere absence of support for prejudicial statements enough?

As we examined the reports and pondered these questions, we became aware that we did not have a baseline of reports addressing disputes between heterosexual couples, with which we might compare those that featured gay and lesbian parents or same-sex relationships. This represents a clear limitation of the study. At the same time, it is surprising that after more than 25 years and the production of thousands of family reports in the Family Court of Australia, there appears to have been no systematic analysis of their general contents and no systematic analysis of their impact on judges' decisions.

The document, *Guidelines for the Ordering and Preparation of Family Reports in Contested Children's Matters*⁵⁰ offers

specific advice about the construction of reports but leaves much to the discretion of the counsellor. It notes, for example:⁵¹

... if the counsellor believes there are other matters which are not included in the order of the Court but which nonetheless are relevant to the proceedings, inasmuch as they may assist the Court in the determination of that course which best promotes the welfare of the child (the paramount consideration), then the Act by s 62G(4) recognises the counsellor's privilege if not obligation to include these matter in the report.

The Guidelines document also considers⁵² that a valid assessment:

... entails exploration which is broad enough to cover all significant aspects of the child's life in relation to the dispute, including: the child as an individual; the child in the family setting and the child in the broader social environment.

The evidence that ongoing parental conflict and denigration of one parent by another can 'violate children's core developmental needs [and represent] a serious threat to their psychological growth' is now overwhelming.⁵³ Perhaps the fine grain judgment being made by counsellors in these and other cases is whether the discriminatory and denigrating statements are likely to extend beyond the adversarial proceedings. Thus if the stance of some individuals is judged to be primarily related to the adversarial processes in which they are engaged, it could be argued that it is better not to give them emphasis.

Section B of the Guidelines entitled, 'Areas to be Covered',⁵⁴ lists eight domains of inquiry,⁵⁵ with each domain having between 4 and 14 issues (65 issues in all) that should be addressed if judged by the counsellor to be relevant to the problem before the Court. At the same time, the counsellor is enjoined to focus on reporting and interpreting observations that are not normally available or directly available to the Court.

It is no exaggeration to suggest that the task for counsellors in their reporting role can be a daunting one -- and one that differs in many important respects from therapeutic or mediation roles they may play with other clients.⁵⁶ Counsellors must work directly with clients, children and other relevant individuals who are not infrequently anxious and distressed. They must have the skills to establish rapport with both adults and children from a wide range of experiences and backgrounds. As the Guidelines note, they need to ask both structured and unstructured questions and be aware of the different type of information each form of questioning will yield. They must simultaneously remain open to possibilities, make judgments on the quality of relationships and interpret human behaviour. In gathering information, the Guidelines are clear that the role of the counsellor is not that of therapist or even facilitator. On the other hand, counsellors know that a sensitive and well-handled assessment process can itself have therapeutic consequences and may well facilitate full or partial resolution of the issues.

Because there are no systematic studies of how court counsellors manage this in an Australian context and no formal studies of reports produced in 'uncontroversial' contested matters, we do not know if the reports in the present sample differ significantly from reports generally. We do not know, therefore, if counsellors are *generally* reluctant to challenge ideas that are likely to hinder children's development. Counsellors may generally see their role as reporting upon these ideas without necessarily engaging parents and carers further about them. They may not normally see their assessment role as a formally educative one either for the clients or for the Court. Finally, they may not normally see it as necessary or desirable to link more general research findings with issues raised in a particular case.

Many issues in family law contain a moral as well as a social science dimension. Thus according to Kelley,⁵⁷ 48% of the Australian population continue to believe that homosexuality is 'always wrong'. How does a counsellor respond to such a belief system? In the past, great damage has been done to minority groups in the name of moral righteousness. When do moral beliefs become discrimination? And in the light of what we know about its very negative impact on children, what level of denigration of another parent's lifestyle should be permitted to go unchallenged?

Though there are no simple answers to questions such as this, it is clear that the reports sampled are some considerable

distance away from the hopes of Millbank⁵⁸ whose view is that:

... in addressing the longstanding myths, suspicion and misapprehension about lesbian and gay parents, [it is important that] family law practitioners start to make use of such systematic data, and that professionals within the system, especially counsellors and psychologists, but also judges and registrars become well acquainted with it.

In conclusion, the research reported on was intended to shed light on how Family Court Counsellors represented gay and lesbian parenting in Family Reports. We saw no examples of overt prejudice towards gay and lesbian parents and no overt suggestions in the reports that they would make lesser parents *because* of their sexual orientation.

On the other hand, we saw a considerable number of examples of reluctance to seek explicit information from those who did wish to link negative outcomes for children with homosexuality. And we saw no evidence of the application of hard won social science knowledge to these issues.

Because of the limitations of our research design, we are left wondering whether our observations represent a norm in the structure of Family Reports generally. We believe that though the Guidelines for the production of reports are helpful, there is a need for further research into the question of how those guidelines might be best applied.

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1 For example, F Baum, 'Gay and Lesbian Lifestyles: Implications for Social Workers' (1983) 36 *Australian Social Work* 1; J Rudolph, 'Counsellors' Attitudes towards Homosexuality: A Selective Review of the Literature' (1988) 67 *Journal of Counselling and Development* 165-8; K L J Hardman, 'Social Workers' Attitudes to Lesbian Clients' (1997) 27 *British Social Work* 545-63; I Crawford, A McLeod, B D Zamboni and M B Jordan, 'Psychologists' Attitudes towards Gay and Lesbian Parenting' (1999) 30 *Professional Psychology: Research and Practice* 394-401.

2 P Cameron, K Cameron, and T Landess, 'Errors by the American Psychiatric Association, the American Psychological Association, and the National Educational Association in Representing Homosexuality in Amicus Briefs about Amendment 2 to the US Supreme Court' (1996) 79 *Psychological Reports* 383-404; P Cameron and K Cameron, 'Homosexual Parents' (1996) 31 *Adolescence* 757-6; J Patterson and R Chan, 'Gay Fathers' in M E Lamb (ed), *The Role of the Father in Child Development*, 3rd ed, Wiley, New York, 1996; S Golombok and F Tasker, *Growing up in a Lesbian Family: Effects on Child Development*, The Guilford Press, New York and London, 1997; S Golombok, F Tasker and C Murray, 'Children raised in Fatherless Families from Infancy: Family Relationships and Socio-Economic development of Children of Lesbian and Single Heterosexual' (1997) 38 *Mothers' Child Psychol Psychiat* 782-91; C Patterson, *Lesbian and Gay Parenting* <http://www.milepost1.com/gayda/FAQ/Les.and.Gay.Parenting.html> dated: 12/1/1997 (Hereafter, Patterson 1997a); C Patterson, 'Children of Lesbian and Gay Parents' in Thomas H Ollendick and Ronald J Prinz (eds), *Advances in Clinical Child Psychology*, Plenum Press, New York, 1997 (Hereafter, Patterson 1997b); C Patterson, 'Family Relationships of Lesbians and Gay Men' (2000) 66 *Journal of Marriage and the Family* 1052-64 (Hereafter, Patterson, 2000); L Wardle, 'The potential impact of homosexual parenting on children' (1997) *University of Illinois Law Review* 833-920; L Wardle, 'Fighting with phantoms: a reply to Warring with Wardle' (1998) 2 *University of Illinois Law Review* 629-41; C A Ball and J Pea, 'Warring with Wardle' (1998) 2 *University of Illinois Law Review* 253-339; A Buxton, 'The Best Interest of Children of Gay and Lesbian Parents', in R Galatzer-Levy and L Kraus (Eds), *The Scientific Basis of Child Custody Decisions*, Wiley and Sons, New York, 1999; R Chan, B Rayboy and C Patterson, 'Psychological adjustment among children conceived via donor insemination by lesbian and heterosexual mothers'. (1998) 69 *Child Development* 443-57; F Tasker, 'Children in Lesbian-led Families: A Review' (1999) 4 *Clinical Child Psychology and Psychiatry* 153-66; J Stacey and T Biblarz, '(How) Does the Sexual Orientation of Parents Matter?' (2001) 66 *American Sociological Review* 159-83; J Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families* New South Wales, Gay and Lesbian Rights Lobby Inc 2002.

3 (1995) (cited in M S Wald, 'Same-Sex Couples: Marriage, Families and Children: An Analysis of Proposition'. Available at <http://www.buddybuddy.com/-demian/wald-1.html>.)

4 Tasker and Golombok, above n 2 at p 6.

5 Patterson 1997a, above n 2 at p 7.

6 Patterson 2000, above n 2 at p 37.

7 Cameron and Cameron 1996; Cameron, Cameron, and Landess 1996, Wardle 1997, 1998, above n 2.

8 Ball and Pea, above n 2.

9 Stacey and Biblarz, above n 2 at p 162.

10 R E Emery, 'Postdivorce family life for children: An overview of research and some implications for Policy', in R A Thompson and P R Amato (Eds), *The post-divorce family: Children, parenting and society*, 1999, pp 3-27.

11 J Kelly, 'The impact of ongoing on resolved parental conflict on children' Keynote address to Children in Focus Symposium, Melbourne 2002. Accepted for publication, *Journal of Family Studies*, March 2003.

12 E Vandewater and J Lansford, 'Influences of Family Structure and Parental Conflict on Children's Wellbeing' (1998) 47 *Family Relations* 323-30.

13 *In the Marriage of Spry* (1977) 30 FLR 537; FLC 90-271.

14 T Reeve, 'Assessing the Legal Position of Gay and Lesbian Parents and Their Children' 9th Annual Family Law Masterclass. Papers delivered at Business Law Education Centre Conference in March 2000.

15 *In the Marriage of L* (1983) FLC 91-353.

16 *In the Marriage of Doyle* (1992) 106 FLR 125; 15 Fam LR 274.

17 For discussion contrasting the 'per se' and the 'nexus' approach in relation to homosexual parenting, see C Baggett, 'Sexual Orientation. Should it Affect Child Custody Rulings?' (1992) 16 *Law and Psychology Review* 189-200.

18 M Otlowski, 'Doyle and Doyle; Family Court Awards Custody to Homosexual Fathers' (1992) 11 *University of Tasmania Law Review* 2 at 267.

19 J Millbank, 'Same Sex Couples and Family Law' Third National Family Court Conference, Melbourne, October 1998 (Hereafter, Millbank 1998a); J Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *Australian Journal of Family Law* 2 at 99 (Hereafter, Millbank 1998b).

20 Millbank 1998a, above n 19.

21 At p 4.

22 The Hon Justice Michael Kirby, 'Psychiatry, Psychology and Homosexuality -- Uncomfortable Bedfellows' Monash University (2000) R G Memorial Lecture, Melbourne 27 April 2000.

23 The Hon Chief Justice Alistair Nicholson AO RFD, 'The Changing Concept of Family -- The Significance of recognition and Protection' (1997) 11 *Australian Journal of Family Law* 13.

24 *Re K* (1994) 17 Fam LR 537; FLC 92-461.

25 Millbank 1998a, above n 19 at p 5.

26 *In the Marriage of A and J* (1995) 19 Fam LR 260; 127 FLR 79.

27 D Sandor, 'Same-Sex Couples Can Adopt in Ontario: The Canadian Case of *Re K*' (1997) 11 *Australian Journal of Family Law* 23.

28 Sandor, above n 27 at p 45.

29 Interestingly, though, in looking at the same case (via the Appeal in the Full Court of the Family Court) Millbank 1998b attributed the ... 'over-riding importance that the child have a "balancing" male influence to counter the effects of the mother's lesbian relationship' to statements made in the family report. She concluded that 'the judge accepted that evidence and granted custody to the husband on those grounds' (p 11). In reviewing gender issues raised in this case, Moloney came to the same conclusion (L Moloney, 'Do fathers "win" or do mothers "lose"? A preliminary analysis of closely contested parenting judgments in the Family Court of Australia' (2001) 15 *International Journal of Law, Policy and the Family* 363-96). Neither Millbank or Moloney, however, had access to the Family Report, but relied instead

on statements made by the trial judge (reported in the appeal judgment) *about* the contents of the Family Report.

30 Millbank 1998a, above n 19.

31 At p 2.

32 Millbank 1998a, above n 19 at p 1.

33 Family Court Counsellors, who provide Family Reports under s 62G(2) of the Family Law Act 1975, are required to be qualified social workers or psychologists with a minimum of 5 years' experience of clinical work with children and families.

34 A report by F Horwill and S Bordow, *The outcome of defended custody cases in the Family Court of Australia* Research Report No 4, Family Court of Australia Principal Registry Library, 1983 which concentrated on the outcome of defended custody cases, noted, almost as an aside (p 42), that of the 92 cases in the sample in which Family Reports had been written, 62% made recommendations that substantially coincided with the final judicial outcome.

35 *In the Marriage of Hall* (1979) 5 Fam LR 411; FLC 90-679 at pp 78.619-820, the Court noted, inter alia, 'There is no magic in a Family Report. A judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court or that the judge is abdicating his [sic] responsibilities'.

36 This paper summarises research completed as part fulfilment of the requirements of a Master of Family Therapy degree (see E Tauber, *Attitudes of Family Court counsellors towards same-sex parents*, Thesis for Masters Degree in Family Therapy, Latrobe University Library.

37 G Mullane, 'Evidence of Social Science Research: Law, Practice, And Options in the Family Court of Australia' (1998) *The Australian Law Journal* 72.

38 Mullane, above n 37 at p 434 refers to 'social facts' as 'facts concerning human behaviour ... (as) revealed by the disciplines of history, psychology, sociology, anthropology, political science and related fields. They are not facts concerning only the particular litigants or their litigation. Evidence of social science research is useful to prove issues of social fact'.

39 Further details with respect to sampling are addressed in detail in Tauber, above n 36.

40 It is not possible to say with certainty how representative this sample was, of the total population of such reports. The principal author has written only one such report in 18 years employment as a Family Court counsellor, suggesting that litigation in such cases may be relatively rare. Nor is it possible to determine whether or not counsellors were selective, on some idiosyncratic criteria, in their decision to send *these* particular reports. However, to the extent that there may be bias in the sample, it is more likely to be in the direction of reports that the counsellors thought were acceptable representations of their work.

41 B Glaser and A Strauss, 'The Constant Comparative Method of Qualitative Analysis', Ch 5 in *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Chicago, Aldine Publishing Co, 1967.

42 The contents of the reports are described more fully in Tauber, above n 36 . Further details with respect to methodology, plus questions relating to reliability and validity, can also be found in this document. The principal author's capacity to analyse the reports from an informed perspective was enhanced by 18 years experience as a Family Court counsellor. The second author, who acted as one of the 'devil's advocates' with respect to the analysis, is a former Director of the Family Court Counselling Service.

43 This issue goes to the heart of a dilemma for counsellors providing independent reports under this section of the Act. In 'Guidelines for the Ordering and Preparation of Family Reports in Contested Children's Matters' (Family Court of Australia 2000) (Hereafter, the Guidelines) counsellors are reminded (p 27) that what they write can have a lasting effect on the families concerned. It is acknowledged (p 28) that, 'Reporters may wish to understate adverse characteristics of clients [but that] it is essential that protection of children and exposure of material relevant to their welfare should take priority over protection of clients and/or the counsellor'. The document also cites C Brown, 'Custody evaluations. Presenting the data' (1995) 33 *Family and Conciliation Courts Review* 446-61 who notes that a report 'should be complete in that it should not leave questions unanswered or omit important data'.

44 It would appear that in this case, the trial judge (The Honourable Justice Butler, Reasons For Judgment, 13 October 1994) also used this 'social truth' as a major part of his rationale for giving residence to the father as evidenced below:

As to the factor of the lesbian relationship, the Counsellor sees no concerns at this time in [the child's] life. But her proviso is the importance of having adequate communication with the husband as a balancing figure in [the child's] emotional development. The importance of the husband's contact with [the child] is one of the most, if not the most important of the factors that weigh into the balance.

45 M Mead, *Male and female. A study of the sexes in a changing world*, Hammondsouth, Penguin, 1971.

46 See High Court case of *In the Marriage of P M and K M* (1988) 12 Fam LR 249; FLC 91-958.

47 See *In the Marriage of Koutalis and Bartlett* (1994) 17 Fam LR 722; FLC 92-478.

48 Sandor, above n 27 at p 54.

49 The Guidelines, above n 43.

50 At p 4.

51 The Guidelines, above n 43 at p 8.

52 J McIntosh, *Entrenched conflict in parental separation. Pathways of impact on child development. A synopsis of recent research*, Melbourne, 'Children in Focus', Australian Institute for Primary Care, La Trobe University 2002. Accepted for publication, *Journal of Family Studies*, April 2003.

53 The Guidelines, above n 43 at pp 19-29.

54 These are:

- o Background and issues.
- o Present family groupings and localities.
- o The parents' present relationship.
- o The parents' relationship with the children.
- o The children's attachments and perceptions.
- o Siblings and peer relationships.
- o The extended family and significant others.
- o All parties' plans for residence and/or contact.

55 Moloney, above n 29.

56 J Kelley, 'Attitudes towards Homosexuality in 29 Nations' (2001) 1 *International Social Monitor* 15-22, Melbourne Institute of Applied Economic and Social Research, University of Melbourne.

57 Millbank 1998a, above n 19 at p 20.