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**Outside the Law or Legal Outsiders? Lesbian Identity, Motherhood and Child
Custody in Canada.**

by

Carolyn J. Rowe

**A thesis submitted to
The Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
October 2001**

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**Outside the Law or Legal Outsiders?
Lesbian Identity, Motherhood and Child Custody in Canada**

Submitted by

Carolyn J. Rowe, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
October 2001**

Abstract

The central question in this paper is what lesbian motherhood, in the way it is constructed in law, reveals about ideologies of motherhood in family law. The lesbian mother combines a marginalized identity, lesbian, with one of the most revered mainstream identities, mother. The starting point from which this exploration takes place posits that the marginal position of lesbian mother has the potential to shed light on that which is dominant and, how that which is dominant perpetuates and creates marginality. Legal judgements reflect and contribute to popular mythologies about lesbians and motherhood. The premise upon which this thesis rests is that child custody cases concerning lesbian mothers are primarily (although not exclusively) about lesbianism. Lesbian mothers are fundamentally viewed as *un*-mother. Examining judgements regarding lesbian mothers, and exposing what the *un*-mother is, holds the potential to shed much light on what a "real" mother is perceived to be in ideological terms. The author's argument is that the outsider position of lesbian mother is capable of illuminating more than its own account of motherhood and is a useful tool in identifying the larger societal ideologies of motherhood.

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Chapter One: Introduction

"how I love is outside the law."¹

The central questions I wish to address in this thesis are what does lesbian motherhood, in the ways it is constructed in and by law, reveal about ideologies of motherhood and how has the litigation involving lesbian mothers influenced and changed the ideology of motherhood in the family law system. My argument is that the outsider position of lesbian mother may be capable of illuminating more than its own account of motherhood, that the marginal position has the potential to shed light on that which is dominant. This helps us understand the dominant position and how it perpetuates and creates marginality.² Patricia Cain argues that a marginalized position allows both a view of marginality and of dominance. Cain writes that:

... [my] "lesbian standpoint" enables me to see two versions of reality. The dominant reality, which I experience as "theirs," includes the following: lesbians are not mothers, all women are dominated by men, male relationships are valuable and female relationships are not, lesbian is a dirty word, lesbians are sick, women who live alone desire men, women who live together desire men, no one knows a lesbian, lesbians don't have families... most women are heterosexual and not lesbian... By contrast, the reality that I live, the reality I call "mine," includes the following: some mothers are lesbian, many women are lesbian, many lesbian women are not dominated by men, many women do not desire men, lesbian is a beautiful word, lesbians are love, love is intimacy, the heterosexual/lesbian dichotomy is false, all lesbians are born into families, lesbians are family... lesbians are brave³.

¹ Minnie Bruce Pratt, "Poetry in Times of War" in *Rebellion: Essays 1980 - 1991*. Ithaca: Firebrand Books, 1991, at 228.

² M. Matsuda "Looking to the bottom: Critical legal studies and reparations" *Harvard Civil Rights - Civil Liberties Law Review* 22 (1987) at 323.

³ Patricia Cain "Feminist Jurisprudence: Grounding The Theories" *Berkeley Women's Law Journal* 4 (1989) at 213-214.

I am arguing that the lesbian mother's experience in the family law system can speak not only for itself but also for what placed it there, the process of marginalization, whereas what is central does not recognise its own dominance or the existence of other versions of reality.

The ways in which lesbian motherhood has been treated as threatening while simultaneously being silenced by the legal discourse were often revealed more by judicial slips of the tongue than by reasoned arguments. For example, the scrutiny of maternal sexuality often became apparent through subtext, through the choice of certain words and the absence of others, such as references to the "discreet" lesbian mother, the lesbian mother's "lifestyle," and whether the lesbian mother was "militant" about her lesbianism. The mother's sexuality was itself emblematic of other issues, such as a lesbian mother's selfishness. These issues were not directly addressed in the judgements; rather they existed as a silent presence, often arising in the symbolic.

The foundation upon which this thesis rests is that child custody cases concerning lesbian mothers are primarily (but not exclusively) about lesbianism. Lesbianism may not always be the deciding factor in the cases but is often a pivotal factor. Lesbian is often a suspect category of identity, one often equated with being an un-womanly. Motherhood is perceived as an extension of womanly characteristics; a woman is seen to be able to be a mother because of a heterosexual union. Lesbians by biological nature cannot produce children (without the help of a male sperm donor, a "one night stand", an male ex-partner, adoption, etc...). It is often held that by claiming lesbian as identity, a woman is rejecting motherhood.

This thesis will examine how judges perceive lesbians as mothers, that is under

what conditions lesbian mothers are considered the more favourable parent than their ex-partners, under what circumstances a lesbian is considered "mother" and under what circumstances her motherhood is denied. All of this will help us further understand the ideology of motherhood and the mechanisms through which the family law system controls lesbian mothers.

Methodology

I chose to study child custody and access cases involving lesbian mothers in Canada. The cases under analysis cover a 26 year period from 1974, the year of the first reported case involving a lesbian mother, to 2000, the cut off date of my analysis.⁴ Both reported and unreported cases were included and were retrieved from published case reports and electronic retrieval services.⁵ In total there are 33 cases. Differences existed over the time period but were not significant in my opinion. The decisions, even those that found in favour of the lesbian mother, were not "better" as a whole in the 1990's in comparison to the 1970's, as my case law analysis will demonstrate. The most virulently anti-lesbian decisions are often uncomfortably recent.

The cases include a range of situations: biological mothers and fathers contesting the custody of children,⁶ cases involving lesbian biological mothers and lesbian co-mothers

⁴ The last day I searched Quicklaw was on January 5, 2001. Therefore, the case law under study is limited to the reported cases that were in the Quicklaw database to that date.

⁵ My sources ranged from published case reports to electronic retrieval systems such as Quicklaw. All unreported cases were retrieved from Quicklaw.

⁶ Re *Barkley and Barkley* (1980), 28 O.R. (2nd) 136 (Provincial Court County of Frontenac) also known as *B. v. B.* (1980), 16 R.F.L. (2nd) 7 (Ont. Prov. Ct.), *Bernhardt v. Bernhardt* (1979), 10 R.F.L. (2nd) 32 (Man. Q.B.), *Bezaire v. Bezaire* (1979), 2 Fam.L.Rev. 51 (Ont.Co.Ct.), *Bezaire v. Bezaire* (1980), 20 R.F.L. (2nd) 358 (Ont.C.A.), *Case v. Case* (1974), 18 R.F.L. 132 (Sask.Q.B.), *Cloutier c. Trudel*, [1982]

contesting for custody⁷ and two support cases,⁸ custody cases where a mother denied being a lesbian and is believed by the court,⁹ a case where a lesbian had applied to adopt a child from a third party,¹⁰ and a custody case involving a lesbian mother and her child's adoptive parents.¹¹

The fact that only a small number of family law disputes involving lesbian mothers are reported does not diminish the importance of the material and the usefulness of making such cases the focus of inquiry.¹² One reported case whose outcome is unfavourable to the lesbian mother and/or to lesbian motherhood more generally can mean that other lesbian mothers seeking legal advice may be counselled to settle rather than litigate or such mothers may choose to try to closet themselves for the purposes of litigation or may actually de-sexualize themselves in order to keep custody of their children. That is to say

C.S. 951. *Daller v. Daller* (1988), 18 R.F.L. (3rd) 53 (Ont.H.C.), *Daller v. Daller* (1989), 22 R.F.L. (3rd) 96 (Ont. C.A.), *Droit de la Famille—31* (1983), 34 R.F.L. (2nd) 127 (C.S. Que.), *Elliott v. Elliott* (1984), 25 A.C.W.S. (2nd) 304 (B.C.S.C.) (QL), *Elliott v. Elliott*, [1987] B.C.D. Civ. 1528-01 (B.C.S.C.) (QL), *Ewankin v. Ewankin* (1994), 4 Man. R. (2d) 302 (Q.B.(Fam.Div.)), *Gledhill v. Green*, [2000] B.C.J. No. 575 (B.C.S.C.) (QL), *J. v. R.* (1982), 27 R.F.L. (2nd) 380 (Quebec S.C.), *Johnston c. Rochette*, [1982] C.S. 407, *K. v. K.* (1976), 23 R.F.L. 58 (Alta. Prov. Ct), *Monette c. Sylvestre*, [1981] C.S. 731, *N. v. N.*, [1992] B.C.J. No. 1507 (QL), *N. v. N.* (1994), 3 R.F.L. (4th) 133 (B.C.C.A.), *Robertson v. Geisinger* (1991), 36 R.F.L. (3rd) 261 (Sask.Q.B.), *S. v. S.*, [1992] B.C.J. No. 1579 (B.C.S.C.) (QL).

⁷ *Buist v. Greaves*, [1997] O.J. No. 2646 DRS 97-10005 (Ont.C.J. (Gen.Div.) (QL).

⁸ *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.), *Monk v. Sjoberg*, [1996] S.J. No. 411 DRS 96-17339 (Sask.C.Q.B.(Fam.Law.Div.)) (QL).

⁹ *J.E.B. v. R.G.B.*, [1996] B.C.J. No. 2717 DRS 97-05309 (B.C.S.C.) (QL), *Korniakov v. Korniakov* [1997] O.J. No. 3152 DRS 98-06355 (Ont. C.J. (Prov. Div.) (QL), *Seselja v. Seselja*, [1994] O.J. No. 639 (Ont.C.J. (Prov. Div. Brampton, Ont. Karswick Prov. Div. J.) (QL), *Tomanek v. Tomanek*, [1993] O.J. No. 1371 DRS 94-06937 (Ont. C.J.) (QL).

¹⁰ *Monk v. Doan and Aitken* (1991), 94 Sask. R. 315 (Sask. Q.B.).

¹¹ *Adams v. Woodbury*, [1986] B.C.J. No. 2735 (B.C.S.C.).

¹² Ellen Lewin noted in her study of single lesbian and heterosexual mothers that while 24% of heterosexual mothers had experienced or been threatened with a custody action, 41% of lesbian mothers had. See Ellen Lewin's *Lesbian Mothers: Accounts of Gender In American Culture*. Ithaca: Cornell University Press, 1993 at 284.

that reported and unreported cases influence the outcomes of future cases and tend to influence how lawyers advise their clients and in turn the choices that those clients make.¹³

On a larger scale, the outcome of these cases also influences public perceptions of how law treats lesbian mothers and therefore affects lesbian mothers' choices and perceived options when custody conflicts arise with their ex-partners.

Although I rely heavily on case law, I wish to stress that the cases presented in this thesis are but stories and not a truth. They are each an account of the trial proceedings by the judge which in no way reflects the everyday lives that they purport to represent.

However, neither can they be proven "false" by reference to some external source (we have not lived with these women, seen their houses, witnessed their daily actions, etc...).

In this regard I agree with Annamay Sheppard who was writing on lesbian mothers involved in child custody disputes in the United States when she said:

the texture of evidence as a whole is frequently obscured by the trial court's selective recitation and will almost certainly be lost in the truncated recitation of a reviewing court. Analysis through the milk glass of a written decision must, therefore, by definition, be less than fully revelatory.¹⁴

The judgements are often written by men, who view lesbian mothers as "other" and cannot understand the lived realities of these mothers. Yet they have authority over lesbian mothers both culturally and legally speaking. Interpretation and representation in such a context must be read as even more thoroughly suspect. I suspect that this study reveals

¹³ See Sibyl Frei's personal story titled "Protecting Our Lesbian Family" in Katherine Arnup's anthology *Lesbian Parenting: Living With Pride & Prejudice* Charlottetown: gynergy books, 1995 where the lawyer advised the lesbian mother "not to rock the boat for as long as possible. The longer Sarah lived with Louise and me in our new home, the better chance we would have if it came to another legal tangle over custody" at 157.

¹⁴ A. Sheppard, "Lesbian mothers II: Long nights journey into day" *Women's Rights Law Reporter* 14 (1992) at 196.

more about the process of judgement and the attitudes of those judging than about the objects of their attention. Because of the dominant ideology of motherhood, judges cannot fully understand the marginal position of the lesbian mother. She deviates dramatically from the ideal of the dominant ideology and her experiences are lost or misunderstood by judges. It is a process in which lesbians and their experiences of mothering are generally displaced.¹⁵

Theory

This thesis argues that lesbian mothers can be used to illustrate ideologies of motherhood in law and culture. Legal judgements reflect and contribute to popular mythology about lesbians. My argument is that lesbian mothers are fundamentally viewed as un-mother, and that examining judgements regarding lesbian mothers, exposing what the un-mother is, sheds much light on what a "real" mother is meant to be.

It is the discourse used in the cases and the ways in which lesbians are configured as "bad" and "good" mothers that will be the focus of my examination. Some lesbian mothers are able to win custody of their children and "fit" more readily into the dominant ideology of motherhood while others cannot or do not "fit" and are therefore deemed "bad" or "unfit" mothers by judges. It is the reasoning processes by which some mothers are granted custody while others are not that will be examined.

¹⁵ While I was researching this thesis, I realized just how easy it is to forget that real women and children went through these custody battles and that their personal lives are drawn out and put under scrutiny. I would often find myself stepping back from the case and thinking, a real woman went through this and I cannot forget that although I'm distanced from the people involved in these cases, the people in these cases are real. So, it is at this point that I would like to acknowledge the real implication that these cases have on the lives of lesbian mothers and their children, those who have been, who are, and who could be in the future, involved in custody litigation.

This thesis in no way attempts to tackle the issue of bisexuality; it is limited to a discussion and inquiry on lesbian mothers. There are endless variations in lesbian identity and endless discussions about it in lesbian, bisexual and queer literature.¹⁶ I use the term "lesbian" as a conscious choice, aware of its shortcomings. In almost all of the cases I studied, lesbian identity was assumed; the possibility of a mother's bisexual identity was not even considered. Sometimes this was done with the mother self identifying as lesbian, but more often the existence of a lesbian relationship was enough to "make" her a lesbian. In cases where judges did pay attention to the fact that the mother had heterosexual relations in the past, or admitted the possibility of having relationships with men in the future, judges most often remarked that the mother could possibly "return" to heterosexuality and not that she was bisexual all along. Bisexuality as a category and as a possibility was erased in its entirety by the case law. Case law then helps to reinforce and retain the notion that there are only two sexual identities; with heterosexuality as norm and homosexuality, lesbianism, as deviant.

Organization of Research

The next chapter sets out the theoretical framework from which I will be analysing the case law in the later chapters. In the first section, I focus on ideology and how it works to construct "common sense" notions of what is right and wrong in society. I then go on to analyse literature written by and about marginal mothers and discuss how the ideology

¹⁶ See Amber Ault, "The Dilemma of Identity: Bi Women's Negotiations." *Queer Theory/Sociology*. Ed. Steven Seidman, Cambridge: Blackwell Publishers Inc., 1996, 311-330. Paula Rust, "Sexual Identity and Bisexual Identities: The Struggle for Self-Description in a Changing Sexual Landscape." *Queer Studies: Lesbian, Gay, Bisexual, and Transgender Anthology*. Eds. Brett Beemyn and Mickey Eliason, New York: New York University Press, 1996, 64-86.

of motherhood places them on the margins of motherhood. In the final section of the chapter I review the current literature on lesbian mothers in the family law system. It is from this work and from the work on "other" marginalized mothers that I construct a framework that draws together the themes of pathology, heterosexism, labeling, assimilation, and individualism.

In Chapter Three, I closely examine lesbian mothers' experiences in custody proceedings in Canada from 1974 to 1991. I continue with this analysis in Chapter Four, in which I examine more recent case law to see what issues and categories these cases bring out. I look to see if lesbian mothers are still experiencing the same manifestations of the ideology of motherhood or whether the assumptions and expectations of and reactions to lesbian motherhood have changed over the past twenty-six years.

Chapter Five, the conclusion of this thesis, further explores the themes of labeling, pathology, assimilation, heterosexism, and individualism and how they collectively work against lesbian mothers in custody disputes to circumscribe the legal meaning of mother. From all of this I hope to provide a better understanding of how the dominant ideology of motherhood keeps lesbian mothers on the margins and whether lesbian mothers have caused a shift in the dominant ideology of motherhood.

Chapter Two: Dissident Mothers

Successful ideologies are often thought to render their beliefs natural and self evident - to identify them with the "common sense" of a society so that nobody could imagine how they might even be different. ... On this view, a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable.¹⁷

It is always the dominant group which is in full accord with the existing order that determines what is to be regarded as utopian, while the ascendant group which is in conflict with things as they are is the one that determines what is regarded as ideological.¹⁸

I am irritated now by certainties and also by the belief in progress.¹⁹

Ideology of Motherhood: Whose Idea Was It Anyway?

Lesbian mothering is often depicted as an oxymoron. The identity of lesbian mother combines a marginalized identity, lesbian, with one of the most revered mainstream identities, mother. In part, the incompatibility of the lesbian and mother identities is a consequence of positions taken by radical, second-wave feminists who initially rejected motherhood because of its association with heterosexual procreation, the patriarchal family and traditional female roles and notions of what it is to be a woman.²⁰ On the other end of this philosophical spectrum, more traditional feminists viewed lesbian rejection of

¹⁷ T. Eagleton. *Ideology: An Introduction*. London: Verso, 1991 at 58.

¹⁸ Betsy Wearing. *The Ideology of Motherhood: A Study of Sydney Suburban Mothers*. Sydney: George Allen & Unwin, 1984 at 26.

¹⁹ Carol Smart. *Law, Crime and Sexuality: Essays in Feminism*. London: Sage Publications, 1995, at 125.

²⁰ See for example, Monique Wittig in *The Straight Mind and Other Essays*. Boston Mass: Beacon Press, 1992 with Wittig's rejection of lesbian as "woman" and the inherent rejection of the patriarchal order in this move. See also, Shulamith Firestone's *The Dialectic of Sex*. New York: William Morrow and Company, Inc., 1970.

heterosexuality and its related baggage as incompatible with motherhood.

A more significant source of the disharmony caused by the identity claims of lesbian mothers stems from the linking of a culturally legitimate "natural" identity with one that is loathed and seen as "unnatural" in larger society. Lewin states:

[j]ust as motherhood is viewed as the most natural expression of women's essential being, lesbianism is associated with violations of the natural order in the popular imagination. Lesbian sexuality is transgressive both because it seems to make lesbians independent of men and because it is, by definition, nonprocreative.²¹

Women who identify as lesbian often live their lives with other women, do not have sex with men, and are largely thought to be unlikely to have children. However, lesbians do have sexual intercourse and more recently lesbians have been allowed to adopt children, have gained access to alternative insemination and retain children from previous heterosexual unions. Lesbian motherhood started to enter into mainstream Canadian society's consciousness in the early 1970's when lesbian mothers began contesting the custody of their children born into a heterosexual relationship. Because many lesbians began to publicly embrace motherhood,²² mainstream society forcibly stressed the incompatibility of the two identities. Resistance to lesbians' claims to motherhood forces lesbian mothers to negotiate an identity within a sociocultural space bounded by their claims to both a marginal identity and a mainstream identity.

These conflicting identities are tied to society's ideologies surrounding motherhood. The dominant ideology of motherhood dictates the behaviour of those who

²¹ Ellen Lewin, "On the Outside Looking In: The Politics of Lesbian Motherhood." *Conceiving the New World Order*. Eds. F. Ginsberg and R. Rapp. Berkeley: University of California Press, 1995, at 106.

²² I'm sure that many lesbians always embraced motherhood before this, but the risks were considered too high for them to do so publicly.

are mothers. The power of the ideology lies in its ability to become the "common sense" notion of how things and people are supposed to be and what they are supposed to look like. The first section of this chapter will focus on ideology and how it works to construct these prevalent "common sense" notions of right and wrong, good and bad. After the brief introduction to what ideology is, I will explore the dominant ideology of motherhood and how feminist writers have themselves reinforced this dominant ideology by tending to marginalize "other" mothers such as black mothers, First Nations mothers, single mothers, mothers who are labelled mentally ill, and lesbian mothers. From this point, I will analyse literature written by and about these marginal mothers and discuss how the ideology of motherhood places them on the margins of motherhood, if not totally outside of the dominant motherhood domain. In the final section of this chapter, I will review the current literature on lesbian mothers in the family law system. It will be from this work on lesbian mothers, combined with the work on "other" marginalized mothers, that I will construct a framework and questions from which to analyse the case law in the next chapter.

Goffman refers to idealized, mainstream roles, such as mother, as the "general identity-values of a society." These identity-values "may be fully entrenched nowhere, and yet they can cast some kind of shadow on the encounters... in daily living."²³ Societal expectations in regard to motherhood result in "general identity-values" that portray mothers as self-sacrificing, nurturing, and feminine. Lesbianism is not generally associated with these traits, therefore lesbian-mothers must struggle to achieve the identity of "good

²³ Goffman, Erving. *Stigma: Notes on the management of spoiled identities*. Englewood Cliffs, NJ: Prentice Hall, 1963. at 128-129.

mother” or even tolerated mother within the court system.²⁴ By combining the identities of lesbian and of mother, lesbian mothers take on a “marginal mainstream” identity: marginal because lesbianism is still seen as an unconventional “lifestyle”²⁵ and mainstream because motherhood is still revered as a role vital to the maintenance of society.

What Is Ideology?

Like all women in our society, lesbian mothers are influenced by their cultural and historical surroundings, transmitted through an ideological lens. Ideology is the way a group looks at the world and the way it organizes its thinking about the world. An ideology can let us see things, but it can also turn us away from, close our eyes to, our own lived reality, our own experiences, our own bodies. It gives us a language for some things while it renders others unspeakable. The ideology of motherhood establishes expectations that limit and shape the choices women make in their lives. These expectations construct the dominant criteria of what constitute “good” and “bad” mothering, as well as non-mothering.

The ideology of motherhood has its roots deeply entrenched in society's patriarchal

²⁴ In a more general and less risk laden context, lesbian mothers may be struggling to create their own positive notion of motherhood. This notion might contain some of the general identity of motherhood values but in a more balanced, less stereotypically female way. This notion has been suggested in the anthology by Katherine Arnup, *Lesbian Parenting: Living With Pride & Prejudice*. Charlottetown, PEI: gynergy press, 1997; Jacqui Gabb's “Imag(in)ing the Queer Lesbian Family” *Journal of the Association for Research on Mothering* 1 (Fall/Winter 1999): 9-20.

²⁵ The use of the terms “lifestyle” and “choice” are problematic in that they are often used by opponents of lesbian and gay rights to argue that lesbians and gay men could simply “choose” to be heterosexual. See Douglas Saunders, “Constructing Lesbian and Gay Rights” *Canadian Journal of Law and Society* 9 (1994), at 108-10. I have chosen to use the terminology “lifestyle” because of how it plays out in perpetuating myths about lesbian mothers in the family law system. It is a term that trivializes the lesbian mother's life and places all sort of assumptions on how the lesbian acts in her daily life. I will be exploring this further in the case analysis chapter.

system. Patriarchy is a complex and convoluted set of concepts and symbols that express the notion that men are the formal holders of power within family and society. Martha Fineman states that:

[t]he ideological aspect of patriarchy presents a more elusive and resistant social and cultural product than any structure. That ideology affects us even before birth with a gendering process that shapes our future lives. It is impressed upon us in myriad ways and we adopt it, internalize it, and impose it on others. It is the ideological power of patriarchy that explains why an individual can resist or reject its structures by, for example, refusing to participate in a nuclear family but still find herself defined and ultimately controlled by the ideology underlying and supporting the structure.²⁶

The ideological maintenance of the family is pervasive and plays a significant role in maintaining and perpetuating patriarchy. The patriarchal family is an institution with a well defined, socially constructed form composed of seemingly "complementary" roles of husband or head of house, wife or homemaker and child(ren). The significant family tie is the sexual affiliation which, through marriage, gains legal significance and social acceptance. For Fineman "[t]he assumed inevitability and primacy of this form of intimate connection reinforces patriarchy in that it defines male presence as essential and dominant within the family."²⁷ Patriarchy is a shared cultural construct that affects all of us. Its core images of sexuality and intimacy define the discourses brought forward by both the proponents of the status quo and its critics.

The patriarchal ideology of motherhood is conclusively expressed and repressed in the very creation of social norms. As Susan Boyd states:

[i]deologies such as the ideology of motherhood take an idea that may ring true to

²⁶ Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*. New York: Routledge, 1995 at 23.

²⁷ *Ibid.*

most people, such as that infants need their mothers - a notion partly based on biology and partly on the social organization of reproduction - and elevate this idea to a more generalized common-sense "truth" that women should be responsible for childrearing. This ideology has developed particularly in connection to the role of women in white middle-class heterosexual families in western societies.²⁸

The ideology of motherhood defines the contours of motherhood in our culture and society. It is transmitted through everyday discourse - such as language, symbols and images and through the operation of formal institutions of power such as law. Those who have more power in a society and culture have greater ability to manipulate ideologies, including the ideology of motherhood. Ideology is created in conjunction with and in relation to the material and cultural conditions of power relations which are then rendered natural and inevitable, as part of "common sense".

Feminist writers assert that the dominant ideology of motherhood is based on elements of the experience of more "privileged" women. The ideology oppresses all women, but the relationship between a particular woman and the dominant ideology of motherhood varies according to the woman's race and class position in society, as well as her sexual orientation, and her (dis)ability status. The relationship between identity and social location and the dominant ideology of motherhood is very complex for some women. A mother is expected to operate within the context of the ideologically dominant family form, one that is "heterosexual and nuclear in form, patriarchal in content,"²⁹ and is based on assumptions of domesticity and privatized female dependence on men.

While the ideology of motherhood is conservative and oriented to maintaining

²⁸ Susan B. Boyd, "Is There an Ideology of Motherhood in (Post)Modern Child Custody Law?" *Social and Legal Studies*. 5 (1996): at 499.

²⁹ Shelley Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law." *Osgoode Hall Law Journal* 31 (1993): 587-624.

existing social relationships of power and privilege, it is not static. The dominant ideology of motherhood is a historically and culturally specific phenomenon.³⁰ The ideology of motherhood has undergone a number of shifts over time, such as in the expectations that mothers will conform to changes in the political economy of capitalism (eg. from stay at home moms to working mothers). While these changes have effects on the ideology of motherhood, they have not weakened its considerable power to control and discipline women. Any process in which "mother" is explicitly the focus of attention generates images that ultimately are significant in shaping societal attitudes towards the regulation of motherhood. The creation of rules governing such things as reproduction, child custody, and other areas of law in which the institution of mother is implicated serves the purpose of ensuring power over those women who do not "fit" the ideal mould of motherhood. Mothers who deviate from the ideals of motherhood are constructed as "bad" mothers thereby justifying the social and legal regulations imposed upon them. Feminist theorists and other writers have often attempted to understand the impact of the dominant ideology of motherhood on women in society. The following section will look at this work and how marginalized women "fit" into this work.

Feminists Marginalizing Those On The Margins

Feminists who work on the ideology of motherhood frequently note lesbian mothers, along with First Nations mothers, single mothers, and mothers labelled mentally ill, as groups of mothers who are placed as "different" and disadvantaged by the ideals

³⁰ See Constance Backhouse's "Shifting Patterns in Nineteenth-Century Canadian Custody Law." *Essays in the History of Canadian Law*. Ed. David H. Flaherty. Toronto: The Osgoode Society, 1981.

which the dominant ideologies of motherhood propagate. Ironically, feminist work on such dominant ideologies can actually serve to reinforce them, by marginalizing the "different" mothers in the same manner. This can be effected, for example, by placing the dominant ideology constantly at the centre of discussion as something that "affects us all", and then discussing those who are most marginalized by it in the "margins", that is, in the footnotes of the work. The dominant ideology of motherhood has developed based on the idealized role of women in white middle-class heterosexual families in western societies. Its "truth" is more likely to resonate for white, middle-class heterosexual mothers who "fit" more readily into the ideological model than others such as black, First Nation, lesbian, single mothers, mothers labelled mentally ill, or working-class mothers. As Boyd notes:

[t]o speak of *the* ideology of motherhood obscured the extent to which an ideology of (black) motherhood of greater relevance to the lives of women of colour also operated... Feminist scholars had not explicitly acknowledged the ideology they discussed to be predominantly a "white" ideology relating to white women's roles in the idealized private sphere.³¹

This, I would argue, is a shortcoming of some feminist scholarship.

Feminist research which focuses primarily on the ideologies of motherhood tends to claim to look at the ideology as it affects "all" women. This type of research addresses white middle-class women, with only brief references to those at the margins. The argument is typically that the dominant ideology of motherhood marginalizes all women but that some women are more marginalized than others, based on how far one differs from the ideal white, middle-class, heterosexual, married mother at the centre. Some feminists falsely generalize women's experiences of the dominant ideology of motherhood;

³¹ Susan Boyd, *supra* note 10, at 498.

others recognize the women on the margins but without in any way disrupting the centre. Feminists who speak specifically about the experiences of the white-middle class majority tend to oversimplify and thereby miss the intricate and powerful nature of the dominant ideology of motherhood. Susan Boyd writes in her work on ideology "for those of us whose experience seems further away from the [dominant] ideology it may, then, be easier to develop discourses which counter that ideology."³² Boyd suggests an approach that begins from the margins to examine the dominant ideology of motherhood. This is the "bottom up," or "outside in" approach that will be further explored in this thesis.

With a "bottom up" approach, that which is dominant or at the centre no longer becomes the focus of investigation; instead that which is at the margins becomes the central concern of the theoretical lens. By placing the lesbian mother at the centre, I will be better able to understand the mechanisms that placed her on the margins in the first place. The experiences that differ most from the central ideological construct provide us with a better tool to understand the power that the dominant position holds and utilises to control those mothers at the margins and the tools available to the dominant to punish those mothers. I posit that by understanding the complicated position of a marginalized group of mothers, in the case of this thesis lesbian mothers, it may be easier to understand, and thereby construct discourses to counter, the dominant ideology.

In the following section I will be reviewing some works by women writing about marginalized mothers in society. I will be exploring how these works can help enlighten my analysis of lesbian mothers as presented in case law. I will explore how, by looking at

³² Susan Boyd, "Some Postmodernist Challenges to Feminist Analysis of Law, Family and the State Ideology and Discourses." *Canadian Journal of Family Law* 10 (1991) at 95.

the perspectives of other marginalized groups in family law, I can build a greater understanding of, not only how lesbian mothers are categorized as mothers and as un-mothers but how a voice from the margins can educate and expand the "dominant" feminist discourse.

From the Margins: Ideology of Motherhood

Writers such as Patricia Monture-Angus, Marlee Kline, Martha Fineman, and Judith Mosoff have researched and written about the ideologies of motherhood and how they affect marginalized mothers.³³ Specifically these scholars look at First Nations mothers, single mothers, and mothers with psychiatric disabilities. Their studies unpack the various social components that affect these women and their ability to "fit" into the ideological type of mother. These theorists all began their research from the "bottom up", looking at how these "different" mothers are constructed as mothers or as un-mothers within the dominant ideological system as it plays out in law.

Feminists generally begin from the premise that being male has historically been, and continues to be, a source of power enabling men to define women's position in society as "natural" and "inevitable" due to her physiological characteristics and to rely on gender based ideology which presents biology as destiny for women. Feminist theories often centre the category "mother" that is constructed through gendered structures and ideologies. Feminist writers writing from the margins, such as those listed above, portray a more specific picture of women's oppression through the experiences of marginalized

³³ These are a few of many writers who have researched and written in this area. I have chosen to focus specifically on these works because they are addressing Canadian experience, with the exception of Martha Fineman whose work rings true in Canada.

mothers and the different compounding factors that affect their lives. They offer more complex insights into the dominant ideology of motherhood and how it permeates our social consciousness and works to "domesticate" mothers into such categories as "good" and "bad" mothers. These writings are a useful tool in understanding how other writers centre the concerns and experiences of marginalized mothers. The insights into the dominant ideology of motherhood provided by these writers/theorists/academics are an extremely helpful starting point for my exploration of lesbian motherhood.

Marlee Kline's work on First Nations women in the context of child welfare law³⁴ highlights and expands the ongoing discussion of intersectionality in feminist legal theory in relation to the complexity of the dominant ideology of motherhood. Kline focuses on race, class and gender and the specificity of their form, content, operation and effects on First Nations women. Utilizing this groundwork, she advances the understanding of the oppressive operation of child welfare systems on First Nations women and their children. Kline demonstrates that First Nations mothers in Canada are often viewed as falling short of the "ideal mother" type and are then blamed for having done so, without any appropriate consideration of the historical and material conditions of their lives. Kline explores two ways in which the dominant ideology of motherhood works to devalue the experiences of First Nations women within the child welfare system. First, she describes the framework through which individual First Nations women are blamed for the difficulties that they experience in child rearing which, in turn, turns the dominant system away from understanding the intricate historical effects that colonialism and racial

³⁴ Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women." *Queen's Law Journal* 18 (1993): 306-342.

discrimination have on First Nations perspectives. As an example, Kline notes the tendency of the child welfare system to blame the mother for being involved with a violent male partner, alcoholism or drug use. The court system tends to refer to these activities as part of the First Nations mother's "lifestyle", as a "personal problem." Hers is described as a "chaotic lifestyle" and it is posited that "the children should be free of the detrimental consequences which flow from care being provided by someone whose life is consumed and subsumed by personal problems."³⁵ By blaming the individual First Nations mother for her difficulty dealing with substance abuse or her pattern of getting involved with an abusive partner, the family welfare system is able to ignore the larger historically based inequalities that affect almost all First Nations people.

Secondly, Kline explains how the dominant ideology of motherhood imposes dominant cultural values and practices onto First Nations women and their children. A prime example of this is the child welfare system's ability to utilise what Kline refers to as the "proper home requirement" on First Nations mothers. In this, the difficult life circumstances of many First Nations mothers are regarded by judges as indicators of inadequate mothering. For Kline "[t]his is particularly apparent in cases which manifest ideological expectations that a home be an established if not permanent one, and that it be 'clean and tidy'."³⁶ Failure to meet the proper home requirement is taken as evidence of the quality of the mother's care, whether or not there is any evidence of actual neglect of the children. This process in effect perpetuates the devaluation of the different value and

³⁵ *Ibid.* at 321-322.

³⁶ *Ibid.* at 324.

cultural systems practised by the First Nations people. The combined effect of these two factors places First Nations women in a vulnerable position when faced with the child welfare system. From this perspective, they are likely to be labelled "bad" mothers often resulting in the loss of their children.

Patricia Monture-Angus is a First Nations legal scholar and activist. In her book, *Thunder In My Soul: A Mohawk Woman Speaks*,³⁷ Monture-Angus discusses the tensions between First Nations women and the family welfare system. She begins this section by stating that First Nations children are over-represented within the child welfare system. The child welfare system in effect removes and then secludes First Nations children from their cultural identity and their cultural heritage. This process is one of continued legislative attempts to assimilate First Nations children into Canadian society, a society based on colonialist ideals and western European historically based politics. Monture-Angus argues that by disregarding the "indigenous factor"³⁸ within the child welfare system, Canadian institutions are merely reflecting the dominant ideological position which places First Nations people as subordinate individuals within Canadian society. This action of removing children out of their culture and into a foreign culture is an act of genocide against Canada's First Nations people and their traditions.³⁹ This has a devastating effect on the cultural and spiritual growth of the individual and damages the traditional social structures of family and community in First Nations communities. It is useful to quote

³⁷Patricia Monture-Angus. *Thunder In My Soul: A Mohawk Woman Speaks*. Halifax, Fernwood, 1995.

³⁸ The "indigenous factor" is a soft way of referring to the inherent racism in Canadian laws and the child welfare structures, laws, and case law.

³⁹ Monture-Angus, *supra* note 38 at 193.

Monture-Angus's description of First Nations society at length:

[t]he structure of First Nation's society is based on co-operation and consensus. When difficulties arise within a community, the community responds by attempting to bring the person who is the source of the difficulty back into the community. This process naturally involves all parties - the parents, the child, the relations and the Elders... The aim and the result is to restore balance in the community, which includes balance in the relationships among the individuals involved. In the case of child welfare, no parent is left believing he or she is a "bad" parent - nor is any child alienated from the family or community. In a community which operates on norms of consensus and co-operation, the collective's rights are the focus... By contrast, the structures of the dominant society, where the philosophy of punishment is paramount and force and coercion are validated, there are winners and losers. As the dispossessed people of this land, First Nations citizens will continue to be the losers.⁴⁰

The standards and tests applied during child welfare interventions are based on a structure that is not culturally relevant to First Nations' citizens and is one that reinforces the "status quo" within "white" society.⁴¹ Judges cannot truly understand the real harm that is being done by this forced assimilation. In dominant society, the philosophy of the child welfare system is one of punishment and coercion, one where there are winners and losers. First Nations people who do not fit the "status quo" mould will be the losers and continue facing the loss of their future citizens to the child "welfare" system.

What is clear from the works of both Monture-Angus and Kline is that the child welfare system in practice works to assimilate First Nations children into dominant Canadian culture. In effect, the child welfare system threatens First Nations women and their communities with the explicit message that if they do not adhere to the dominant white ideology of motherhood, as well as other interrelated ideologies such as patriarchy and family, they risk losing or will lose custody of their children. This assimilationist

⁴⁰ *Ibid.* at 194-95.

⁴¹ *Ibid.* at 199.

approach works in two distinct ways to control First Nations women. The first is by pressuring First Nations mothers to adopt the dominant ideologies in order to avoid losing their children; and second, by taking the children out of the First Nations communities, these children lose contact with their heritage and their families thereby slowly eroding First Nations cultural identities and cultural heritage. Therefore, the system is designed not only to control First Nations women but also to control their communities. In addition, these writers note how the dominant system ignores the lived realities of the First Nations mothers and their communities' large scale needs by focusing solely on individual cases. This is the process of individualism, whereby the child welfare system is able to disregard the historical effects of colonialism and racial discrimination, blame the mothers and justify labelling them "bad" mothers. In a system that focuses solely on the individual in conflict with the family welfare system, it makes it easier for those involved in the family welfare system to blame the individual and ignore the inherent and compounding inequalities that exist in the present social system.

Martha Fineman has written significant works on single mothers and poverty discourses in society and law.⁴² Fineman states:

I have reached a number of conclusions about the role of ideology in constructing and perpetuating the images of single mothers in poverty discourses. The representation of single motherhood as pathological is inextricably linked to patriarchal ideology - a constellation of symbols and beliefs about the "natural" or "normal" family that is widely shared in our culture and through which all motherhood discourses are processed.⁴³

⁴² Martha Fineman, "Images of Mothers in Poverty Discourses" *Duke Law Journal* (1991): 274-295 and *supra* note 26.

⁴³ *Ibid.* at 289.

The single mother, as she is constructed and located within poverty discourses, is differentiated by race and class from her divorced middle and upper class white sisters who often tend not to be referred to as single mothers. Yet despite these differences, the core and common "problem" faced by "single" mothers is identified as the missing male. The solution to the "problem" for single mothers lies in the (re)establishment of the paternal presence. The outsider would thus (re)establish the hetero-nuclear family structure. The absence of a formal legal tie to a male has powerful ideological implications. Our cultural rhetoric constructs single motherhood as dangerous not only to the single mother and their children but to society as a whole.

A mother's choice to birth and raise children without the biological father or any other male is viewed as a practice of resistance to patriarchal ideology, precisely because it represents a "choice" in a society with available birth control and abortion. Such a choice has to be stigmatized; the existence of an unstigmatized mother mothering outside of the traditional hetero- nuclear family would call into question some of the basic proponents of the ideology of patriarchy, particularly that of the male as the centre of the family unit. The fact that these women are single is central to the construction of them as deviant mothers because they are raising children outside of male control. This is a clear instance when heterosexism works to limit women's abilities to mother outside of direct male control. That is, the single woman responsible for child(ren) on her own threatens the centrality of the heterosexual bond and male influence in the family.

Fineman points out how language is used as an agent of control through the use of the label "single" mother. It works to "separate some practices of motherhood from the

institution of 'Mother' by reference to the mother's marital status."⁴⁴ This exemplifies Fineman's point that "Mother", as defined and constructed in this discourse, is modified by the mother's (legal) relationship to the father. No one speaks of a "married" mother because the "primary" connection between the mother and the father is assumed. It is only the deviant forms of motherhood that need to be qualified.⁴⁵ The dominant ideology of motherhood works to label the "deviant" mother, thereby highlighting the ways in which the mother deviates from the centre, that which is dominant.

Another way in which labels are used to marginalize mothers is in cases involving mothers who are labelled as mentally ill. Judith Mosoff writes about the processes that lead to the state's removal of children from mothers who are labelled mentally ill and how the ideology of motherhood is entrenched in the legal system as well as within the psychiatric paradigm.⁴⁶ Mosoff analyses how ideas of who is an "unfit" mother are made even more powerful with the addition of the ideology of science.

[t]he ideology of motherhood is further reinforced by the 'common sense' scientific 'truths' brought through psychology and psychiatry. These systems assert that the physical health, psychological well-being, and moral development of children is a direct result of child bearing and child rearing. These duties are viewed as being the primary responsibility of the mother."⁴⁷

⁴⁴ *Ibid.* at 291.

⁴⁵ *Ibid.*

⁴⁶ Judith Mosoff, "Motherhood, Madness and the Law." *University of Toronto Law Journal* 45 (1995): 107-142.

⁴⁷ *Ibid.* at 109.

Mosoff contends that because mothers with mental health histories are often portrayed as dangerous or potentially dangerous to their children, the state relies upon the psychology and psychiatry establishments to assess the risk or potential risk that these mothers pose to their children. The women most vulnerable to a process that undermines their fitness as mothers are those who are already marginalized in society. The vulnerability for women with mental health histories lies in the scope of power that the health system has over them and its ability to question whether their perceptions, feelings, and experiences are "normal". Because of the medical and scientific assertion about the "mentally ill" mother that creates and names her difference, these women have very little claim to privacy. Mosoff goes on to state that "[o]nce articulated, the label raises immediate concerns that her children are in jeopardy, not because of what she has done but what she might do in the future, based on who she is as defined by an expert."⁴⁸ Mosoff asserts that mothers with a mental health diagnosis are not necessarily unfit and questions whether psychiatrists and psychologists are the best-suited to assess "good" or "bad" mothering.⁴⁹

Mosoff examines a number of cases involving mothers with mental health histories. In exploring cases in which the mother lost custody of her child(ren), Mosoff reflects on the unfair interpretation of mental capacity and the inherent assumption that women with mental disabilities are intrinsically deficient mothers. In such cases, where "a person is deemed to be mentally disordered, both her own body and her children become legitimate objects of state protection because perceived incompetence in one area results in

⁴⁸ *Ibid.* at 110.

⁴⁹ *Ibid.* at 111.

presumed incompetence in all."⁵⁰ Even in cases where the mothers are "victorious," there is often a judicial endorsement of the need for a psychiatrist to monitor the mother and there are often prescriptive mandates for this monitoring to continue. Mosoff states that:

[i]mplicit in this trend is a message to a woman that she must conform to the ideology of motherhood as incorporated in psychiatry or psychology to retain her privilege as a mother, or face further processes to remove her as the guardian/custodian of her child.⁵¹

In effect, judges share their decision-making with psychiatrists by largely accepting psychiatric opinion on the substance and retaining the power to rule on breaches of procedure. Where the mother retains or regains custody, the order almost always includes the condition of the ongoing watchful eye of a psychiatrist.⁵²

In trying to maintain or to regain custody of their children, women with a psychiatric diagnosis are faced with an implicit presumption against their fitness as mothers. Psychology and psychiatry offer the court a scientific approach that often reinforces the presumption that people with mental illnesses are incomprehensible, unpredictable, and dangerous. Women with mental health histories tend to lose their children to the state through some combination of moral/legal process and threat, woven together by the opinions of mental health professionals.

The experiences of First Nations mothers, single mothers and mothers labelled mentally ill reveal different problems as multiple ideologies are at play within the social and legal spheres. These multiple ideologies relate to race, class, and (dis)ability and they

⁵⁰ *Ibid.* at 125.

⁵¹ *Ibid.* at 139.

⁵² *Ibid.* at 142.

work in tandem to create a dominant ideology of motherhood that has different impacts depending on the race, class and (dis)ability of the mother in question. While the authors above point to different rationales utilized by the Canadian legal and welfare systems to control women who do not "fit" within the narrow parameters of "good" motherhood, there are a number of common threads that can be pulled from these writings. The most prevalent perspective that surfaced from all of these writings is that a goal of the family law system is to assimilate children from "unconventional" family forms into "normal" Canadian society. This is done by placing the "deviant" mother's child(ren) into the "White" middle class, heterosexual, nuclear family form through adoption, foster parenting, or placing them with the biological/relational father or through attempts to reconstitute the mother. If the mother remains "deviant," her children may be taken away from her influence and their culture and communities, thereby severing or limiting the contact those children have with their "deviant" mother.

Another common thread lies in the courts' tendency to pathologise First Nations mothers, single mothers and mothers who are labelled mentally ill. In the process of pathologising "deviant" mothers, the court system and the family welfare system are substantiating their power to take children away from their mothers. Dominant middle-class white ideals of cleanliness and tidiness are central to the ideological constructs of "good" motherhood. This has oppressive effects for many First Nations women confronted with the child welfare system and sets precedents for other women in similar situations. In the case of single motherhood, pathologization of the mother is linked to patriarchal ideology where, from the dominant perspective, there is something wrong with mothers who do not want their children to have a father. Patriarchal ideology constructs

the dominant family form as a male headed reproductive unit with defined gender roles. This ideology, that places men in the driver's seat, casts single mothers as "deviant" because they raise children outside of direct male control.

Labels attach so as to render some mothers almost automatically outside of the ideology of motherhood due to assumptions about their fitness. The single mother label can have this impact, and even more so the label of mental illness. Women who are labelled mentally ill are assumed to be unable to be mothers or at least not "good" ones. In order to be found "fit", the mother facing such assumptions must prove her worth. In order for them to be granted or allowed to retain custody of their children they must prove themselves against the underlying myths and assumptions surrounding their labels. This holds true for all suspect groups of mothers.

First Nations mothers, single mothers and mothers who are labelled mentally ill are all suspect categories within the dominant ideology of motherhood. They all deviate from the "ideal type," "status quo" or "normal" hetero-nuclear family type and are punished and controlled accordingly. This control is executed in different fashions but the end result is the same, some "deviant" mothers retain custody, under certain conditions/restrictions, others lose custody because they cannot or will not properly "fit" into the "white" western European Canadian legal and social tradition of motherhood. The dominant ideology of motherhood is reinforced through the child welfare system, the family law system and the psychiatric establishment. These powerful tools perpetuate the patriarchal system, idealize the hetero-nuclear family form and provide the mechanisms by which to penalize those mothers who do not properly "fit" within the dominant system. We see these same tools at

work with regard to the experiences of lesbian mothers within the family law system, as discussed in the next section.

Lesbian Feminist Perspectives

In what follows I review the work of Katherine Arnup, Nancy Polikoff and Ruthann Robson who have all written significant work on lesbian motherhood and lesbian legal theory. I chose to study these three authors because their work crosses the board on what theorists have been saying regarding lesbian mothers within the family law system. Each author has engaged in important research and developed significant theoretical conclusions that will ultimately aid me in constructing a lens through which to analyse the case law in the following chapters.

Katherine Arnup focuses primarily on lesbian mothers rather than on the ideology of motherhood. Focusing exclusively on women on the margins, her work by implication tells us a lot about the ideology of motherhood. Arnup discusses a number of reported Canadian cases involving lesbian mothers within the historical context of the legal treatment of lesbians in family law. Arnup sets the groundwork by connecting lesbian mothers to both discourses, of "lesbian" and of "mother."⁵³

According to Arnup, the system of law preserves and supports the present social system, including the institutions of private property, the nuclear family form, and

⁵³ Katherine Arnup, "Lesbian Mothers and Child Custody." *Gender and Society: Creating a Canadian Women's Sociology*. Ed. Arlene Tigar McLaren. Toronto: Copp Clark Pitman Ltd., 1988. 245-256, *Lesbian Parenting: Living with Pride & Prejudice*. Charlottetown, P.E.I.: gynergy books, 1997, and "Mothers Just Like Others": Lesbians, Divorce, and Child Custody in Canada." *Canadian Journal of Women and the Law* 3 (1989): 18-32.

heterosexuality. From this perspective, family law can be seen as a system of rules or as a mechanism used to control women and children. Arnup and Boyd states:

[m]uch of the body of laws called family law can be read as a history of the regulation and reinforcement of heterosexual familial relations. Marriage, the centre point of family law, is clearly heterosexual in its "opposite sex" requirement.⁵⁴

The denial of custody to a lesbian mother flows from the system of rules set in place to bolster and promote a particular family form - the hetero-nuclear family. The judicial decision to take custody from a lesbian mother is rooted in the fabric of society. It is an example of how if a woman does not fulfil the prescribed role of "woman," severe sanctions will be imposed against her. According to Arnup, all judges must function within a set of rules and laws. These laws are not neutral but operate in accordance with a higher order of right and wrong "engineered to preserve a set of relationships within a given society".⁵⁵

Arnup points to the notion that "the lesbian mother poses a visible alternative to the traditional division of labour within the family."⁵⁶ This is so because women's role in the family centres on her ability to produce children and to provide unpaid domestic work. In choosing not to live with a man, the lesbian does not service the needs of a man. In seeking to raise children without a man, lesbian mothers live outside the traditional notion of woman and mother and eschew the traditional division of labour between the sexes.

⁵⁴ Katherine Arnup and Susan Boyd, "Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood." *Legal Inversions: Lesbians, Gay Men, and the Politics of Law*. Eds. Didi Herman and Carl Stychin. Philadelphia: Temple University Press, 1995 at 78.

⁵⁵ Katherine Arnup, "Lesbian Mothers and Child Custody." *Gender and Society: Creating a Canadian Women's Sociology*. Ed. Arlene Tigar McLaren. Toronto: Copp Clark Pitman Ltd., 1988 at 251.

⁵⁶ *Ibid.* at 252.

However, given that she still performs domestic tasks in the home, she cares for her child(ren) and "continues to perform the function of producing the future labour force, then, the lesbian mother continues to fulfil a major component of the role that has been assigned to women in society."⁵⁷ Arnup is pointing to an irony intrinsically involved in the legal system's idea of the threats that the lesbian mother poses to society. The only evident threat to the patriarchal social system is the lesbian mother's unwillingness to sexually service and look after a man in her home.

Arnup points out that "[a] significant factor in determining the extent to which a lesbian mother represents a threat to society concerns the socialization process that she provides for her children."⁵⁸ A lesbian mother's ability to provide the "proper" socialisation to her child(ren) is determined not so much by her sexual orientation but by "her overall view of society," that is, her ability to properly prepare her child(ren) to adopt acceptable roles in society, especially as a well disciplined gendered worker in a capitalist society. A lesbian may feel that her lesbianism is just a question of sexual preference that in no way hinders her ability to transmit traditional values to her child(ren) or she may feel that her lesbianism may be one aspect of her challenge of the existing social order. For Arnup, the "lesbian feminist... poses a 'double threat.' She represents a refusal to abide by traditional sex roles, as well as a rejection of heterosexual nuclear family life."⁵⁹ The lesbian feminist provides an alternative to marriage and to the male - female gendered relationship. In

⁵⁷ *Ibid.* at 253.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 254.

refusing to accept the traditional role of "women" in marriage and in the family, the lesbian mother represents a fundamental threat to capitalism's control over the labour, and to patriarchal control over the reproductive capacities, of all women. Examination of the ways in which the legal system has dealt with lesbian mothers reveals a profound resistance to parenting outside of the hetero-nuclear and patriarchal family form. The antagonism which these women have faced in their efforts to establish a family form independent of men reveals the strength of heterosexual hegemony and patriarchal power.⁶⁰

Nancy Polikoff approaches lesbian motherhood and family law matters from a lawyer's perspective.⁶¹ From this vantage point, Polikoff explores lesbian mothers' experiences in the family law system and discusses her own experience as a lesbian mother and the difficulties faced by lesbian communities more generally. She states that "we have constructed courtroom scenarios that deny our differences from heterosexual society, we quickly forget that our strength and our promise are rooted in that very difference."⁶² However, it is hard to be committed to celebrating sexual diversity while adopting a courtroom strategy. The courtroom forces lesbian mothers to "essentially concede that it is preferable to be heterosexual, thereby foreclosing an assertion of pride and of the

⁶⁰ Katherine Arnup, *Lesbian Parenting: Living with Pride & Prejudice*. Charlottetown, P.E.I.: gynergy books, 1997 at 83.

⁶¹ Nancy Polikoff, "Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges." *Lesbians and Child Custody: A Case Book*. Ed. Dolores J. Maggiore. New York: Garland Publishing Inc., 1992. 229-237 & "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families." *Georgetown Law Journal* 78 (1990): 459-575.

⁶² Nancy Polikoff's "Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges" *Review of Law and Social Change* 14 (1986) at 908.

positive value in homosexuality."⁶³ In furtherance of this point, the following statement by Polikoff has been quoted by a number of authors exploring lesbian custody issues:

[w]hile no formula will guarantee victory in courtroom custody disputes involving lesbian mothers or gay fathers, one thing is clear: the more we appear to be part of the mainstream with middle-class values, middle-of-the-road political beliefs, repressed sexuality, and sex-role stereotyped behavior, the more likely we are to keep custody of our children. On the other hand, communal childrearing arrangements, radical feminist activism, sexual experimentation - these choices are all predictably fatal to any custody action. The courtroom is no place in which to affirm our pride in our lesbian sexuality or to advocate alternative childrearing designed to produce strong, independent women.⁶⁴

The family law system is a limiting and controlling agent in the lives of lesbian mothers. It determines which kinds of lesbian mothers best "fit" the motherhood model and which do not, thereby effectively placing restrictions on which "type" of lesbian mothers obtain and retain custody of their children.

From the opposite standpoint, Ruthann Robson views the label "Mother" as a legal category that, like all legal categories, has the potential to "domesticate" lesbian existence and thus interfere with lesbian survival.⁶⁵ By "lesbian survival" Robson means two things:

[f]irst, I mean a daily individual survival that depends on food, shelter, and love - including, for some of us, love relationships with children. Second, I mean an

⁶³ *Ibid.* at 909.

⁶⁴ Nancy Polikoff, "Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges," *Lesbians and Child Custody: A Case Book*. Ed. Dolores J. Maggiore. New York: Garland Publishing Inc., 1992 at 229.

⁶⁵ Ruthann Robson, "Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernism and Feminisms," *Law & Sexuality* 2 (1992): 37-80, "Legal Scholarship on Lesbianism and Other Minority Sexualities - Part of Feminist Jurisprudence?" *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography*. Ed. Betty Taylor, Sharon Rush and Robert J. Munro. Littleton, Colorado: Munro Rothman and Co., 1999. 665-675, *Lesbian (Out)Law: Survival Under the Rule of Law*. Ithaca, N.Y.: Firebrand Books, 1992, "Mother: The Legal Domestication of Lesbian Existence," *Hypatia* 7 (Fall 1992): 172-185, "Resisting the Family: Repositioning Lesbians in Legal Theory," *Signs* (Summer 1994): 975-995, and "Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory," *Connecticut Law Review* 26 (1994): 1377-1414.

individual and collective survival that depends on some sort of identity as lesbians.⁶⁶

Robson came to use the term "domestication" to connote the law's hegemony over lesbian survival. Domestication is implicitly gendered and refers to women's relegation to the domestic sphere, which is the private place to which women have historically been relegated and within which women have historically been subordinated and from which it is difficult for women to engage in collective action.⁶⁷ The ideology of motherhood is key to the domestication of lesbians as they attempt to adhere to or understand the "common sense" notions of what constitutes "mother" and "family." Robson seeks to centre lesbian concerns rather than legal ones in her examination of the ways in which the rule of law utilizes the legal category of "mother" with reference to lesbians and uses its power to "domesticate" lesbian mothers.

Robson explores the rule of law as it is applied to lesbian mothers and examines cases where the law has domesticated individual lesbians. She claims that the very category of "mother" domesticates not only lesbian mothers within the court system but domesticates lesbian thinking about lesbians' relationships with their children. As lesbians and as women, we tend to argue ourselves into legal categories so that we can be protected and in so doing obscure the restrictions thereby placed on us as lesbians because the categories were not constructed to include lesbians. An example of this is the situation where two lesbians have a baby together and the law recognizes only the biological mother as the legal mother. The other lesbian mother is profoundly "other": she is a legal stranger

⁶⁶ Robson's , "Mother: The Legal Domestication of Lesbian Existence." *Hypatia* 7 Fall (1992) at 172.

⁶⁷ *Ibid.* at 172.

to her child, just as she is a legal stranger to her lover.⁶⁸ If the lesbians separate and turn to the legal system to settle their custody dispute, the biological mother's position will be reinforced by the rule of law and the non-biological mother will be likely to lose. For Robson, the extent to which the biological mother denies visitation to her ex-partner, and uses the superior position granted to her through the rule of law is the extent to which she is domesticated by the legal regime. In addition, to the extent that the non-biological mother believes she is entitled to visitation because she can "fit" herself into legal theories that support the inclusion of lesbian mothers into the legal realm of family law, she is also domesticated by law. Robson further states that "to the extent that both lesbians appeal to the legalism inherent in categories like "parent" and "family" as they attempt to settle their problems, they import the law into their lesbianism. Lesbianism is limited by legalism."⁶⁹

Robson does not think that as lesbians, "we" can enter the state-defined mother role and transform it. Ultimately,

I think that the legal category of mother (or even parent or family) is too stifling for our lesbian imaginations and relationships. The category of mother domesticates us. We have difficulty thinking in other than its terms... If we are ever to move beyond our domestication and ensure lesbian survival on lesbian terms, we must theorize against the dominant discourse of the legal regime, including the legal regime that codifies the category mother.⁷⁰

When lesbian mothers enter into the legal system to use the law against each other, the law is ultimately using them in order to sustain its own power. Lesbian mothers reinforce law's

⁶⁸ *Ibid.* at 180. However, the non-biological mother has gained some legal recognition over the past few years in adoption cases, in Federal and Provincial common-law definitions, and in some of the inter-lesbian disputes discussed in the case law chapters.

⁶⁹ *Ibid.* at 182.

⁷⁰ *Ibid.* at 183.

power when they appeal to its categories rather than empower themselves by formulating and applying lesbian categories.

Questions from the Margins

The power and control that the family law system executes over First Nations mothers, single mothers and mothers labelled mentally ill are similarly evident in the history of custody cases involving lesbian mothers. The first mechanism of control is the distinction between "good" and "bad" lesbian mothers. "Good" lesbian mothers are those who conform most closely with the dominant ideals of motherhood. These lesbian mothers are the only ones who have a chance of retaining custody of their children. "Bad" lesbian mothers are those who view their lesbianism as part of their challenge to the established order. They pose, as Arnup points out, a "double threat" to the present social system by refusing to abide by traditional sex role stereotypes and rejecting the hetero-nuclear family form. Because these women are a threat to the fundamental components of patriarchal culture, they are not likely to gain custody of their children. It is in order to avoid their clients being perceived as a "threat" that lesbian and gay lawyers construct their lesbian clients in ways that make their lives look as consistent as possible with the dominant "status quo" model of mother. It is because of these factors that I find myself pondering Robson's theory of domestication and whether it holds true in present case law. Do the family law system and the label "mother" necessarily domesticate lesbians into a mould that would ultimately deny lesbians their inherent difference from the "status quo"? Is it even possible to break down these barriers and if so how: by rejecting the label mother as Robson suggests or can we challenge the dominant construct of mother and push the

boundaries of the dominant ideology of motherhood? In turning to the family law system to reconcile their custody dispute are biological and non-biological lesbian mothers not only reinforcing the power of the legal system, but also perpetuating negative beliefs that the dominant social system has about lesbian motherhood? Is it because lesbians are forced to comply with the "status quo" ideals of "motherhood" in the legal system that lesbians are "domesticated" by the very label "Mother"? In this sense law is used as a tool to "domesticate" lesbian mothers into or to demarcate them as outside the dominant ideology of motherhood. If this holds true, I am interested in exploring what that boundary is, that is, the boundary that allows some lesbian mothers to retain custody of their children with conditions attached while other lesbian mothers lose custody altogether. What pushes these lesbian mothers over the line of "fitness"? Are these mothers pushing the law or being domesticated by it?

Conclusion

Feminist theory has the potential to account for lesbian motherhood in its analysis of the dominant ideologies of motherhood. In order to do this lesbians must be central. If lesbian mothers are central within a feminist framework and their experiences are examined in a concrete and detailed fashion, it may be possible to develop a fuller and more complex understanding of the dominant ideology of motherhood, including its impact on, similarities and differences in relation to, various other groups of women. This "bottom up" approach begins at the margins, from the experiences of lesbian mothers within the Canadian family law system, to examine the tools which the dominant ideology of motherhood provides to enable the law to punish those mothers who do not or cannot

"fit" within the narrow parameters of the dominant ideology of motherhood. The issue is the control and coercion exercised by family law to force women and lesbians into line with the law's restrictive notion of motherhood.

There were a number of themes raised in the literature review in regards to the ways in which the law works to further marginalize some mothers, while it forces others back in line. The themes that arose were assimilation, heterosexism, labelling, individualism, and pathologizing. These themes, as they play out in case law, all reinforce that which is dominant. Although they work differently for different groups of marginal mothers, they are key components in the extensive power exercised by the dominant ideology of motherhood against those who do not "fit" the "normal" model of motherhood. In the next chapter, I will explore how these themes affect lesbian mothers in the family law system by looking at the treatment of lesbian mothers within case law.

Chapter Three: The Case Law: From 1974 to 1991

Lesbian Mothers in Custody Disputes

In the next two chapters I discuss the relevant case law in which lesbian mothers have been in conflict with their ex-partners over custody of their children. I have chosen to analyze all of the reported cases in Canada, from 1974, the date of the first reported case involving a lesbian mother, to 2000, which was the cut off date of my research⁷¹. In order to fully understand the implications of the identities "lesbian" and "mother" in our society, I found it useful to extend my analysis to include cases where the mother was "accused" of being a lesbian by her male ex-partner even though the court did not accept the assertion.⁷² I found the inclusion of these cases helpful in unearthing what constitutes a "good" and "bad" mother and to further explore the antithetical relationship between the labels "lesbian" and "mother".

There has been considerable work done on lesbian mothers and custody in Canada over the past 20 years. The reason why I wanted to write on the subject is two fold. The first reason is that there has been little Canadian research looking at inter-lesbian custody disputes (this is most likely because there have only been 3 reported cases and the first one was only reported in 1986). I think that this is going to be a growing area of study because

⁷¹ The last date at which I searched Quick Law was January 5, 2001.

⁷² Lesbian is a term that is often used against women. It is a tool used by others, mostly men, to push a woman back into the "boundary of her sex role." It was invented "by the man to throw at any woman who dares to be his equal, who dares to challenge his prerogatives, who dares to assert the primacy of her own needs" and who dares challenge him for custody of her child(ren). See the Radicalesbians. "The Woman Identified Woman, 1960." *For Lesbians Only: A Separatist Anthology*. Eds. Sarah Lucia Hoagland and Julia Penelope. London: Onlywomen Press, Ltd., 1988 at 18 for a further exploration of this.

of what many authors have termed the "lesbian baby boom."⁷³ The second reason is because there has been relatively little analysis in the past 5 years on lesbian mothers in conflict with their ex-partners. While considerable work was done in this area in the nineteen eighties and early nineteen nineties, it is a matter which needs to be monitored for the sake of lawyers, judges, the women involved in these disputes and for lesbians mothers more generally.

One issue I wish to tackle before entering into the case law analysis is the seemingly colourlessness of the cases. In only two of the cases was ethnicity referred to. In *Tomanec v. Tomanec*,⁷⁴ the father's status as a foreign national was noted because he had threatened to kidnap the children at some stage in the proceedings and the judge responded by ordering him to surrender his passport. In *Korniakov v. Korniakov*,⁷⁵ the parent's nationality was mentioned in the context of the judge noting the father's strict approach towards discipline and that the couple married in Moscow, USSR and emigrated to Canada.

There are a number of possible explanations as to why these cases were "colourless". One reason is that all of the parties, with the exception of the two cases above, were white Anglo-Saxons. A more likely explanation is that in most cases the parties were of the same or similar racial or cultural group, and so race or culture was not

⁷³ To find out more on the "lesbian baby boom" see Katherine Arnup, "We Are Family" Lesbian Mothers In Canada (1991); S. Slater, *The Lesbian Family Life Cycle*. New York: The Free Press, 1995, 89-118; N. Mandell and A. Duffy, *Canadian Families: Diversity, Conflict and Change*. Toronto: Harcourt Brace & Company, Canada, 127-130. I posit that there will be a greater number of lesbian mothers entering into formal custody battles in the years to come.

⁷⁴ *Tomanec v. Tomanec*, [1993] O.J. No. 1371 DRS 94-06937 (Ont. C.J.) (QL).

⁷⁵ *Korniakov v. Korniakov*, [1997] O.J. No. 3152 DRS 98-06355 (Ont. C.J. (Prov. Div.)) (QL).

perceived by the judge as an "issue" which needed to be addressed as it would if there had to be a "choice" between race or cultures (eg. choosing between placing the child either in an Aboriginal or an Anglo-Canadian home.) Another possible explanation is that whatever the race or ethnicity of the parties, the judge focused upon the lesbian "factor" as being of overriding importance.⁷⁶ However, these are only speculations; the fact remains that race and ethnicity as "factors" remain largely absent from these judgements, whereas lesbianism continues to remain at the centre.

The Cases

The cases under discussion cover a 26 year period from 1974 to 2000. Reported and unreported cases, numbering 32 in total, were included and were retrieved from published case reports and electronic retrieval services. The cases include a range of situations: biological mothers and fathers contesting the custody of children,⁷⁷ cases involving lesbian biological mothers and lesbian co-mothers,⁷⁸ cases where the mother

⁷⁶ See the work of Nitya Duclos. "Disappearing Women: Racial Minority Women in Human Rights Cases" *Canadian Journal of Women and the Law* 6 (1992): 25.

⁷⁷ *Re Barkley and Barkley* (1980), 28 O.R. (2nd) 136 (Provincial Court County of Frontenac) also known as *B. v. B.* (1980), 16 R.F.L. (2nd) 7 (Ont. Prov. Ct.), *Bernhardt v. Bernhardt* (1979), 10 R.F.L. (2nd) 32 (Man. Q.B.), *Bezaire v. Bezaire* (1979), 2 Fam.L.Rev. 51 (Ont.Co.Ct.), *Bezaire v. Bezaire* (1980), 20 R.F.L. (2nd) 358 (Ont.C.A.), *Case v. Case* (1974), 18 R.F.L. 132 (Sask.Q.B.), *Cloutier c. Trudel*, [1982] C.S. 951, *Daller v. Daller* (1988), 18 R.F.L. (3rd) 53 (Ont.H.C.), *Daller v. Daller* (1989), 22 R.F.L. (3rd) 96 (Ont. C.A.), *Droit de la Famille—31* (1983), 34 R.F.L. (2nd) 127 (C.S. Que.), *Elliott v. Elliott* (1984), 25 A.C.W.S. (2nd) 304 (B.C.S.C.) (QL), *Elliott v. Elliott*, [1987] B.C.D. Civ. 1528-01 (B.C.S.C.) (QL), *Ewankin v. Ewankin* (1994), 4 Man. R. (2d) 302 (Q.B.(Fam.Div.)), *Gledhill v. Green*, [2000] B.C.J. No. 575 (B.C.S.C.) (QL), *J. v. R.* (1982), 27 R.F.L. (2nd) 380 (Quebec S.C.), *Johnston c. Rochette*, [1982] C.S. 407, *K. v. K.* (1976), 23 R.F.L. 58 (Alta. Prov. Ct), *Monette c. Sylvestre* [1981] C.S. 731, *N. v. N.*, [1992] B.C.J. No. 1507 (QL), *N. v. N.* (1994), 3 R.F.L. (4th) 133 (B.C.C.A.), *Robertson v. Geisinger* (1991), 36 R.F.L. (3rd) 261 (Sask.Q.B.), *S. v. S.*, [1992] B.C.J. No. 1579 (B.C.S.C.) (QL).

⁷⁸ *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.), *Buist v. Greaves*, [1997] O.J. No. 2646 DRS 97-10005 (Ont.C.J. (Gen.Div.) (QL), *Monk v. Sjoberg*, [1996] S.J. No. 411 DRS 96-17339 (Sask.C.Q.B.(Fam.Law.Div.) (QL).

denied being a lesbian and was believed by the court,⁷⁹ and a case where a lesbian had applied to adopt a child from a third party.⁸⁰

This thesis argues that the decisions in custody cases of lesbian mothers in conflict with their ex-partners can be used to explore ideologies of motherhood in law and culture. Legal judgements reflect and contribute to popular mythology about lesbians. In the legal process, lesbian mothers are individualized, labelled, pathologized, seen as challenging heterosexuality, and when assessed as incapable of assimilation, they are made into non-mothers. The next two chapters will look at how these themes work to inhibit lesbian mothers from being considered mothers and how they work to promote the "good" lesbians as mothers, while presenting others as non-mothers. Ultimately, I want to move beyond this dichotomy to explore how the ideology of motherhood works to constrain the lives of women more generally.

The Case Law from 1974 to 1991

In this chapter I focus on the earlier case law, from approximately 1974 to 1991. Those cases, for the most part, have been extensively scrutinized and analysed by other authors and I will be using this literature to discuss the cases. This chapter will focus on what has already been said and done in the analysis of lesbian mothers in custody disputes

⁷⁹ *J.E.B. v. R.G.B.*, [1996] B.C.J. No. 2717 DRS 97-05309 (B.C.S.C.) (QL), *Korniakov v. Korniakov*, [1997] O.J. No. 3152 DRS 98-06355 (Ont. C.J. (Prov. Div.) (QL), *Seselja v. Seselja*, [1994] O.J. No. 639 (Ont. C.J. (Prov. Div. Brampton, Ont. Karswick Prov. Div. J.) (QL), *Tomanek v. Tomanek*, [1993] O.J. No. 1371 DRS 94-06937 (Ont. C.J.) (QL).

⁸⁰ *Monk v. Doan and Aitken* (1991), 94 Sask. R. 315 (Sask. Q.B.).

in Canada with the exception of a few Quebec cases that have been generally overlooked by Anglophone legal scholars."⁸¹

In reading through the literature on lesbian mothers in conflict with their ex-partners, I was able to pull out a number of terms that tended to repeat themselves through the case law, both in the terminology used by the courts, and within my survey of the case law analysis. These terms helped me to better understand the different ways in which lesbian mothers are categorized and are denied or granted custody of their children. As I explore the application of these terms in the cases, I will connect them with the themes of pathology, assimilation, labeling, heterosexism and individualism, which were identified and discussed in the preceding chapter. I will pull together and expand on these connections in the final chapter.

The recurring terms that I will use to organize my discussion of the cases are: the presumption of unfitness, the sexual lesbian, lesbian "lifestyle", the indiscreet lesbian, lesbian relationships as unstable, conditions, and homosexuality is not a bar to custody... but. These terms are used to perpetuate the myths and stereotypes that place lesbian mothers on the margins of motherhood and are then used to divide the tolerably "good" from the "bad" mothers. This chapter will set the stage for the following chapter in which I will look at and analyze the case law that has, to date, undergone little to no scrutiny by other authors. From there I will look at how these terms, or sub-categories play into the larger themes of pathology, heterosexism, labeling, individualism and

⁸¹ This is perhaps due to the fact that the cases are reported in French and many Anglophone scholars are not bilingual.

assimilation and how they collectively work against lesbian mothers in custody disputes to circumscribe the legal meaning of mother.

Presumption of Unfitness

The determination of who is awarded custody of a child(ren) is to be based on the "best interests of the child."⁸² The best interests principle is the overriding legal criterion employed in custody trials. It is within the assessment of the "child's best interests" that the judge's biases surface. Allegations that one parent is an unfit parent are clearly serious and can be determinative. A finding that a parent is unfit, or even a lingering suspicion that a parent is unfit, is devastating to that parent. Placing a child with an unfit parent would clearly not be in that child's best interests. Thus fitness as a parent is a sub-text, sometimes explicit, sometime only implicit, in all custody cases. The key is to look at the terminology of the decision. In determining the "fitness" of each parent, there are inherent presumptions of what a mother is meant to be. The ideology of motherhood plays out strongly at this point of the decision making process. Judges rely on such factors as the sexual conduct of the parents, the quality of the home, the wishes of the children and the parents. In effect what this amounts to is that the parent who can best adhere to and transmit the dominant values and ideologies of society is more likely to be granted custody of the children.

The spectre of the lesbian as an unfit mother haunts the lesbian custody cases. I contend that there is an unarticulated onus on the lesbian mother to dispel the various myths and stereotypes about lesbians and lesbians as mothers placed on her by the

⁸² See for example the *Children's Law Reform Act*, R.S.O. 1990 c. C. 12 as amended.

judiciary and by her ex-partner. This is all played out in the context of the assessment of the best interests of the child. However, as Katherine Arnup has pointed out:

[t]here exists... no rule or formula for determining which arrangement is in fact in the child's best interests. The courts are afforded fairly wide discretion in arriving at a decision and as long as this decision is premised on the principle of the child's best interests, it is unlikely that the decision will be overturned on appeal.⁸³

Some lesbian custody cases effectively start with the presumption of her as an unfit mother. This puts an onus on her to introduce expert evidence to try to rebut the unstated presumption and prove her motherly "fitness."⁸⁴

Testimony on behalf of the lesbian mother must dispel the numerous "common sense" assumptions that categorise her as being "unfit" because of her lesbianism. This testimony was almost always used to demonstrate that the children of lesbians have been shown time and time again to grow up heterosexual and unharmed by their mother's sexual orientation. Lawyers have needed to rely on expert evidence in the court room in order to dispel the long held view that lesbian mothers will produce lesbian and gay male children, through gender role confusion, encouragement, molestation or by modelling. The underlying assumption is that, if the child(ren) were to grow up to be homosexual, this "harm" would have been caused by the award of custody to the lesbian mother, that is, it was because of her that they became homosexual and that this situation could have been

⁸³ Katherine Arnup, *supra* note 56 at 247 - 249.

⁸⁴ For a more in-depth look at the role that expert testimony plays in custody disputes involving a lesbian mother see Wendy Gross's article "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent." *Canadian Journal of Women and the Law* 2 (1986): 505-531; Harvey Brownstone's "The Homosexual Parent in Custody Disputes." *Queen's Law Journal* 5 (1979-80): 199-240; David S. Dooley's "Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes." *California Western Law Review* 26 (1990): 395-424; and S. Golombok and F. Tasker's "Children in Lesbian and Gay Families: Theories and Evidence." *Lesbians Raising Sons*. Ed. Jess Wells. Los Angeles: Alyson Books, 1997.

avoided. Therefore, evidence presented on behalf of the lesbian mother must make a vigorous assertion that her children are and will be heterosexual, in effect that they have not been and will not be harmed by the mother's lesbianism.⁸⁵

In the first documented case concerning a lesbian mother, *Case v. Case*⁸⁶, the judge relied on "conventional wisdom" and not on psychiatric or psychological evidence in making his decision. Mr. Justice MacPherson ruled that homosexuality was not *per se* a bar to custody, but at the end of the judgement, he expressed his unsubstantiated fear of the children being exposed to homosexuals: "[t]here is another factor and that is that I greatly fear that if these children are raised by the mother who is a lesbian they will be too much in contact with people of abnormal tastes and proclivities."⁸⁷ According to Justice MacPherson, people with abnormal tastes and proclivities, presumably including the lesbian mother, would constitute a negative influence on her children. The mother lost custody to her ex-husband. As Mary Eaton stated: "the absence of evidence on the issue was held against the mother in that the potential of emotional harm or disturbance was a factor mitigating against granting the mother custody."⁸⁸ In the absence of such costly evidence, lesbianism operates as a bar to custody, because courts seem prepared to give effect to stereotype.

⁸⁵ One of the main fears that arises within the legal system and society is that if a child is raised by a lesbian mother, the child will learn from her and become homosexual. The difficulty I see is that in order to retain custody of her children, the lesbian mother is put in the position of having to reject her own sexuality in order to protect her children. Nancy Polikoff has expressed some reservation about this legal tactic: see Polikoff, *supra* note 65.

⁸⁶ *Case v. Case* (1974), 18 R.F.L. 132 (Sask.Q.B.).

⁸⁷ *Ibid.* at 138.

⁸⁸ Mary Eaton, "Lesbians and the Law," *Lesbians in Canada*. Ed. Sharon Dale Stone. Toronto: Between The Lines, 1990 at 118.

It is interesting to note that in *Robertson v. Geisinger*⁸⁹ where sexual orientation was not raised as an issue by either party, as the application arose between a lesbian mother and a gay male father, it was raised by the presiding judge. Justice Barclay in making his decision stated "I am concerned as to what effect the sexual preferences of both [parents] may eventually have on Alison."⁹⁰ But because Justice Barclay did not have a viable alternative, he chose to grant custody to the lesbian mother because she made it clear to the judge that her daughter would always be her first priority. A parent's homosexuality and its negative effects on the children are always a concern, even when it is not raised by either of the parents involved.

Lesbian mothers have found that in order to successfully discharge the unacknowledged burden of proof that arises from judicial speculations and prejudices regarding the effects of being raised by lesbian mothers, they must produce expert witnesses to testify to their "fitness" as mothers. While the use of expert testimony does not guarantee that the lesbian mother will win a custody battle, it may provide her with a better chance at winning. In discussing the case of *Bezaire v. Bezaire*,⁹¹ authors Leopold and King noted that:

The failure to spell out the full circumstances of the situation appears to account, at least in part, for the outcome in the Bezaire case. When the trial judge terminated the mother's custody, he said: I do not have any answer for Mrs. Bezaire's conduct other than that I am now satisfied that the instability in the children's past existence is rooted in the psychological instability of Mrs. Bezaire herself; that the continued need of movement from one spot to another, the changing of schools, the changing of relationships, even the changing of lesbian

⁸⁹ *Robertson v. Geisinger* (1991), 36 R.F.L. (3rd) 261 (Sask.Q.B.).

⁹⁰ *Ibid.* at 264.

⁹¹ *Bezaire v. Bezaire* (1980), 20 R.F.L. (2nd) 358 (Ont.C.A.).

partners, indicate to this court a very deep-rooted instability in Mrs. Bezaire. On appeal, new evidence was presented. This evidence included a report by the official guardian, a "very comprehensive psychiatric assessment," and a recommendation that the children should remain with their mother. Other new evidence was offered to explain the mother's various moves and her living arrangements. The appellate decision found as undisputed fact that she had moved in order to obtain employment. And yet, the trial judge's assumption that Mrs. Bezaire was unstable - an assumption that was made without the benefit of the new evidence before the Court of Appeal and that was obviously hostile to her "lifestyle" - was allowed to stand. Mrs. Bezaire lost custody of her children.⁹²

The difficulty that arose for Mrs. Bezaire was that the judge repeatedly ignored the expert evidence presented in the case and tended to rely on his/her own assumptions and ingrained myths about lesbianism. Many judges have paid little attention to the actual harm that separation from their mother inflicts upon the children and instead have focused upon the possible future harm that might be caused by the mother's lesbianism. Like mothers who have been labelled mentally ill, lesbian mothers need to prove their fitness by relying upon the institutions of psychology and psychiatry in their defence. However, the lesbian mother cannot trust that judges will accept such evidence; in some cases judges continue to rely on stereotypes rather than on the expert evidence provided.

Such stereotypes included viewing lesbian mothers as "man-haters." This is a quality that is seen as inherently antisocial, unwomanly and dangerously un-motherly. As Millbank has stated "[i]t is possible that the often-used epithet 'militant' in the case law referred to a fear that lesbians hate men and would try to turn their children against

⁹² Margaret Leopold and Wendy King. "Compulsory Heterosexuality: Lesbians, and the Law: The Case for Constitutional Protection" *Canadian Journal of Women and the Law* 1(1985-86) at 176.

men."⁹³ If the father or the court can portray the lesbian mother as being "militant"⁹⁴ or if the courts believe that the children of a lesbian mother will grow up to emulate their mother's sexual orientation,⁹⁵ the lesbian mother will risk losing custody of her children. The lesbian mother, then would be viewed by the judiciary as a poor role model for her child(ren). Such was the case in a 1981 Quebec case, *Monette c. Sylvestre*,⁹⁶ where the father and a psychologist claimed that if the child was to continue to live with his/her lesbian mother her sexuality would disturb the child's development into a woman. They claimed that the child would reject men and would grow up to emulate her mother and become a lesbian.

In another Quebec case, *Cloutier c. Trudel*,⁹⁷ the lesbian mother had to defend against possible *Criminal Code* violations. While the father told the court that the mother was a "good" mother, concerned with the morality of their children and that she would not insist that the children imitate her choice in sexual orientation, the father wished to place restrictions on the mother's access to the children. The court found that they could surmise that during the few nights a week that the children stayed with their mother, that no incident would take place that could be covered under the then section 168 of the *Criminal Code*, which provides:

⁹³ Jenni Millbank. "Lesbians, Child Custody, and the Long Lingering Gaze of the Law." *Challenging The Public/Private Divide: Feminism, Law, and Public Policy*. Ed. Susan B. Boyd. Toronto: University of Toronto Press. 1997 at 285.

⁹⁴ *Case v. Case* 1974.

⁹⁵ *Monette c. Sylvestre*, [1981] C.S. 731, *Droit De La Famille - 31* (1983), 34 R.F.L. (2nd) 127 (C.S. Que.).

⁹⁶ *Monette c. Sylvestre*, [1981] C.S. 731.

⁹⁷ *Droit De La Famille - 31* (1983), 34 R.F.L. (2nd) 127 (C.S. Que.).

Corrupting children- Everyone who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offense and liable to imprisonment for a term not exceeding two years⁹⁸.

While the lesbian mother in this case was only looking to eliminate the restrictions which her male ex-partner wished to place on her access to their children, she found herself having to dispel the myth that she would corrupt her children while they were in her company. The judge's statement was an implicit threat to the lesbian mother that if she were to step out of line she could lose access to her children and potentially be charged with a serious offense under the *Criminal Code*.

In *Elliott v. Elliott*⁹⁹ the expert evidence presented on the part of the lesbian mother did not prove to be beneficial for the lesbian mother's position in her custody case. Mrs. Elliott provided the court with evidence from two family court counsellors as well as a psychiatrist. All three testified that there was no indication that this mother's lesbianism would be harmful to the child in any way. Moreover, the psychiatrist produced materials showing that lesbianism in the parent has no effect on the psycho-sexual development of the child. The judge, nevertheless, held that there was no evidence before him to assist him in determining whether having a mother in a homosexual relationship would harm or disturb the children emotionally. Justice MacKinnon stated: "[w]hatever one might accept of private practice, I cannot conclude that indulging in homosexuality is something for the

⁹⁸ *Criminal Code of Canada*, R.S. 1985, c. 19 (3d Supp.), s.6.

⁹⁹ *Elliott v. Elliott* (1984), 25 A.C.W.S. (2nd) 304 (B.C.S.C.) (QL).

edification of young children.”¹⁰⁰ Justice MacKinnon proceeded to deny the lesbian mother custody of her seven-year-old daughter despite the psychiatric evidence presented on her behalf.

However, expert evidence as to the possible impermanence of lesbian sexual identity may be more acceptable. In an earlier case, *K. v. K.*¹⁰¹, the judge relied on expert testimony from a psychiatrist who testified that Mrs. K. might “in the future, return to a heterosexual relationship.”¹⁰² Therefore, in this case the judge “could grant Mrs. K. custody with some degree of assurance that her child would be socialized in accordance with the dominant values of society.”¹⁰³ The judge placed significant trust in the psychiatric evidence presented at trial and awarded custody to the lesbian mother.

The key to the mother's success in *K. v. K.* was the fact that she led a “normal” middle class lifestyle, with the exception that she lived with a woman and not a man. These same factors were the downfall for the “lesbian” mother in *Ewankiw v. Ewankiw*.¹⁰⁴ In this case the mother did not identify as a lesbian and lived with another woman. This conduct was viewed as being secretive or devious behaviour by the judge.¹⁰⁵ This behaviour raised concerns about the credibility of the mother, as Justice Diamon stated:

¹⁰⁰ Susan Boyd. “Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?” *Canadian Journal of Family Law* 15 (1997) at 136-137.

¹⁰¹ *K. v. K.* (1976), 23 R.F.L. 58 (Alta. Prov. Ct.).

¹⁰² *Ibid.* at 62.

¹⁰³ Katherine Arnup. “Mothers Just Like Others”: Lesbians, Divorce, and Child Custody in Canada” *Canadian Journal of Women and the Law* 3 (1989) at 30.

¹⁰⁴ *Ewankiw v. Ewankiw* (1994), 4 Man. R. (2d) 302 (Q.B.(Fam.Div.)).

¹⁰⁵ Susan Boyd, *supra* note 101 at 138-139.

[t]he evidence of the mother and Tracy Scheel can best be described as a detailed web of lies and deception. I note that many aspects of their evidence were remarkably identical... Both the mother and Tracy Scheel deny that they are having a lesbian relationship. This is in spite of overwhelming evidence to the contrary... The sexual preference of the mother is her own business and is not relevant to the issue of care and control. However, what is relevant to the issue of care and control is the mother's lying... This mother is a stranger to the truth!¹⁰⁶

To further demonstrate that the mother's relationship with Tracy Sheel was one "fraught with dishonesty", the court noted that when the two women met, Tracy Scheel was dressed as a man and presented herself as Bo Bodien. Relying on this information the judge stated that "[i]f this bizarre situation was in fact true, it reflects badly upon the mother's judgement in becoming best friends and roommates with a person who was dishonest with her and her children... It is not in Kayla's best interests to be raised in an environment fraught with so much dishonesty and deception."¹⁰⁷ The court concluded that the mother was lying about her relationship and that it was not in the child's best interests to be raised in this environment. Joint custody of the youngest child was granted, with the father having primary care and control of the child. Because the mother did not identify as a lesbian, the judge found her to be a liar and it was because of this that she lost custody of the children.¹⁰⁸

¹⁰⁶ *Supra* note 105 at 305-306.

¹⁰⁷ *Ibid.* at 306.

¹⁰⁸ This case also demonstrates how the family law system and the judges working within such courts are not familiar with lesbian culture, in this case, drag king or gender queer culture. For more information on drag king and gender queer culture in Canada, the United States and England see Del La Grace Volcano and Judith "Jack" Halberstam's book *The Drag King Book*. London: Serpents Tail Press, 1999.

In other cases judges have ordered assessments to be done on the individuals involved in the custody dispute. Such was the case in *Barkley v. Barkley*¹⁰⁹ where Justice Nasmith directly rejected the stigma argument in regard to the disadvantage of growing up in a homophobic society. He ordered a clinical assessment of the children with one of the questions being the effect that social stigma would have on the children. According to author Wendy Gross, "the assessors addressed the issue of social disapproval and concluded that while there would be periodic stress and trauma, the quality of the relationship that existed between the child and her mother was "reassuring" and tended to minimise these concerns."¹¹⁰ Justice Nasmith found that the child would have to bear the stigma of her mother's sexual orientation in the future, but relied on the clinical assessments and the testimony of social workers who were experienced in this field in deciding that stigma was not an insurmountable problem.

In all of the cases within this time period, where the court appointed a psychologist, a psychiatrist or a counsellor they were used to interview the mother and/or her children and for the most part made recommendations in the mother's favour. However the lesbian mother was successful in gaining custody only fifty percent of the time.¹¹¹ It seems that all an opposing party needed to do in a custody case involving a lesbian mother was to raise "concerns" regarding the child(ren) living with and being

¹⁰⁹ *Re Barkley and Barkley* (1980), 28 O.R. (2nd) 136 (Provincial Court County of Frontenac) also known as *B. v. B.* (1980), 16 R.F.L. (2nd) 7 (Ont. Prov. Ct.).

¹¹⁰ Wendy L. Gross. "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" *Canadian Journal of Women and the Law* 2 (1986) at 517.

¹¹¹ Those who won: *Daller v. Daller*, 1988; *K. v. K.*, 1975; *Roberston v. Geisinger*, 1991; *Barkley v. Barkley*, 1980 and those who lost: *Elliott v. Elliott*, 1987; *Bernhardt v. Bernhardt*, 1979; *Case v. Case*, 1974; *Bezaire v. Bezaire*, 1980.

brought up by a lesbian for the burden on her to disprove her unfitness to be triggered, much like the situation of the mother labelled mentally ill. When the issue of a mother's mental "fitness" is raised in a child welfare case, the mother needs to prove, against great odds, that she can be a "good" mother and that her mental condition will not, sometime in the future, harm her children. The overt way in which the label of mental illness has been used against mothers to require them to prove their fitness helped me to see the more subtle ways in which a similar process of labelling, pathologizing and then requiring expert proof of fitness is employed against lesbian mothers. Nowhere does one find courts placing any obligations on those who express such "concerns" to substantiate their claims of "harm"; potential harm is assumed to exist.

Similarly the label man-hater is a label denoting potential harm. As some of these cases demonstrate "[w]omen and girls who do not focus their attention on men are called "man-haters", a term stereotypically understood as synonymous with lesbian, a term that is explicitly designed to re-focus attention back on men."¹¹² This is a social indicator used by law and society to control women who are on the margins of the dominant ideology. These women are not "good" girls, they do not focus their attention on men and therefore, must be controlled by such labels as "lesbian", "dyke," and "man-hater" in an attempt to force them back into conformity with the dominant ideology of female behaviour, including motherhood. These are mechanisms through which lesbian mothers are forced to assimilate or face losing custody of their children. Courts use stereotypes to control

¹¹² Diana Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context." *Canadian Journal of Women and the Law* 7 (1994): 286-317, at 312.

"deviant" women and to find that they are "unfit" mothers when they do not comply with the dominant ideology of motherhood.

The Sexual Lesbian

Mothers in the margins traverse the traditional expectations of motherhood and are often characterised as selfish by the judiciary for doing so. Lesbian mothers are viewed as being selfish by the judiciary because they are seen as placing their own sexuality before the needs of their children. This perceived selfishness is based in the fact that the mother does not desire the father and in effect has broken up, in most of these cases, a "normal" hetero-nuclear family unit in order for the mother to "explore" her new found identity which excludes men. What the case law has demonstrated is that asexuality is part of the ideology of motherhood, especially when the mother is lesbian, as lesbianism equals sex. The mother actually having sex is not necessarily the focus, but is a factor underlying a variety of other activities viewed as inherently sexual in a lesbian context. These activities, often described as "sexual displays," include: the mother sleeping in the same bed as her partner¹¹³, subjecting the children to outward displays of affection between the mother and her lover (such as hugging, kissing, holding hands)¹¹⁴, the mother and her partner spending time together in the bedroom during the day¹¹⁵, and the mother and her lesbian partner

¹¹³ *Barkeley v. Barkeley*, 1980; *Case v. Case*, 1974; and *K. v. K.*, 1976.

¹¹⁴ *Bernhardt v. Bernhardt* (1979), 10 R.F.L. (2nd) 32 (Man. Q.B.).

¹¹⁵ *Elliott v. Elliott*, [1987] B.C.D.Civ. 1528-01 (B.C.S.C.) (QL).

walking around the house in their dressing gowns.¹¹⁶ These things are seen as sexual simply because lesbians are doing them.

In *Bernhardt v. Bernhardt*,¹¹⁷ the father, on a motion to vary a previous order granting custody to the lesbian mother, called the mother's former landlady in to testify that she had heard the women making kissing sounds in their apartment. Scholar Mary Eaton pointed out that the focus of the testimony was to suggest "that even having two women kissing in front of the children would be detrimental to them."¹¹⁸ The judge found that the behaviour of the two women, including a somewhat open sexual life, was worse than that of the father, who had been accused of incestuous behaviour with his daughter.

Mrs. K¹¹⁹ in her custody case was able to present her relationship with her lesbian partner as being asexual. A psychiatrist testified that separate accommodations for the two women lovers would be a preferable living arrangement - or at least separate bedrooms. The mother was granted custody because the relationship between the two women in this case was hidden with the exception that they shared the same bed. In addition, it was shown that there was a possibility that the mother may return to heterosexual relationships in the future, and the fact that she had previously enjoyed heterosexual relationships and had "nothing against" them, was held in a favourable light.

¹¹⁶ *Ibid.*

¹¹⁷ *Supra* note 115.

¹¹⁸ Mary Eaton, *supra* note 89 at 119.

¹¹⁹ *Supra* note 102.

In *Elliott v. Elliott*¹²⁰ the mother's two sons stated in their affidavits that their mother and Sandra Whittle, their mother's partner, did not keep a clean house, walked around the house in their housecoats, spent time alone in their bedroom and let the children watch television.¹²¹ The paramount issue in the eyes of Justice MacKinnon was the lesbian mother's inability to adopt an acceptable parental mode and "lifestyle". The court found that the mother and Sandra Whittle's behaviour was inappropriate for any mother.

The Elliott case serves as an example of the court presuming rampant sexuality in a lesbian home. Only the most restrictive "lifestyle", like that of Mrs. K and her partner, will alleviate the court's fears in this regard. While I believe that the cases under study did reveal judicial disapproval of active sexuality and promote the concept of motherhood as an asexual role, I argue that lesbian sexuality was emblematic of far more. It was not just the mother's sexuality that was the issue but a pathologized sexuality, viewed as uncontrolled, which was the subject of concern. Once these mothers were classified as being sexual, they inevitably lost custody of their children because of the pathological nature of their behaviour which was seen to leak into every thing that they did. That is, the lesbian mother hugging her partner or another woman becomes suspect and the lesbian mother socializing in her bedroom with her partner is a sexual act simply because she is a lesbian.

There is an underlying assumption that there is something wrong with lesbians because they have adopted a sexual and emotional orientation from which men are

¹²⁰ *Supra* note 116.

¹²¹ *Ibid.* at para. 43 (QL).

excluded. Lesbian mothers experience heterosexism at an even deeper level than most single mothers. A single mother can present herself as an available women, available to a man who can, at least in the future, help her (re)establish a "normal" hetero-nuclear family unit. The lesbian mother, on the other hand, threatens the gender order premised on the presumed indispensability of the father. The lesbian mother has left a heterosexual relationship and the father of her children for a lesbian relationship. That relationship, then, is seen as an agent of destabilisation; it is the visible cause of the rupture of the "normal" family. The true nature of the lesbian relationship is to destroy the family, not to create a new one. Thus attempts to deprive lesbian mothers of custody can be considered in the context of an historical pattern of punishing political women.

Lesbian "Lifestyle"

As was discussed in the context of the presumption of unfitness, we can see, in earlier cases concerning lesbian mothers, that judicial attitudes were preoccupied with how the mother's "lifestyle" will affect her children's sexual orientation and self-esteem. These attitudes punish the lesbian mother "prohibiting her from fully expressing her own sexuality and remind both parent and children of the guilt which society expects her to feel about her homosexuality."¹²² In *Case v. Case* Mr. Justice MacPherson stated that:

it seems to me that homosexuality on the part of a parent is a factor to be considered along with all the other evidence in the case. It should not be considered a bar in itself to a parent's right to custody.¹²³

¹²² Nan Hunter and Nancy Polikoff. "Custody Rights of Lesbian Mothers - Legal Theory and Litigation Strategy" *Buffalo Law Review* 25 (1976) at 694.

¹²³ *Supra* note 87 at 136.

According to Arnup, this apparently open-minded approach:

is contradicted by the judge's discussion of the wife's "life style." Describing the father as a "stable and secure and responsible person," the judge added: "I hesitate to put adjectives on the personality of the mother but the evidence shows, I think, that her way of life is irregular." In considering her role as vice president of the local gay club, he added, "I greatly fear that if these children are raised by the mother they will be too much in contact with people of abnormal tastes and proclivities." Thus, while Mrs. Case's lesbianism was not in itself a bar to custody, her "lifestyle" was.¹²⁴

Within the judgement of *K. v. K.*¹²⁵ the judge explicitly distinguished Mrs. K.'s situation from *Case v. Case*:

The situation before this court is, in my view, different. Mrs. K. is not a missionary about to convert heterosexuals to her present way of life. She does not regard herself as gay in the sense that heterosexuals are "morose" ... Mrs. K. is a good mother and a warm, loving, concerned parent.¹²⁶

The judge further stated that "Mrs. K's homosexuality is... no more of a bar to her obtaining custody than is the fact of Mr. K's drug use."¹²⁷ The father's occasional drug use was equated with the mother's "homosexuality" and these two negative factors, in the judge's mind, cancelled each other out. In this case, the mother was able to prove that she was not living a "lesbian life style." She needed to prove that she was not active within the lesbian and gay community, that she was not "out" to her neighbourhood, that she was not involved in the feminist movement, and that she could pass as a single mother who lived in a home with another single woman for financial reasons.

¹²⁴ Katherine Arnup, *supra* note 104 at 26-27.

¹²⁵ *Supra* note 102.

¹²⁶ *Ibid.* at 64.

¹²⁷ *Ibid.* at 58.

The main reason behind the lesbian mother's loss of custody in *Monette c. Sylvestre*¹²⁸ was because of the mother's "bohemian" lifestyle. Although the judge congratulated the mother on her courage in pursuing her sexual orientation in a society that frowns upon such a "choice," her "lifestyle" was held to present a risk in the current circumstances.¹²⁹ The mother was raising her daughter on a vegetarian diet, vacationing on nudist beaches, and she did not have a stable partner. All of this contributed to what the judge characterized as a "bohemian" lifestyle. The mother lost custody to her male ex-partner who had re-married, was a doctor and offered the child an upper-middle class "family" lifestyle.

Much like the *Monette* case, in *Adams v. Woodbury*¹³⁰ the young lesbian mother lost custody of her son because his adoptive parents could provide him with a more stable and hetero-normal lifestyle. In this case, Ms. Adams had been pressured by her parents to put her child up for adoption. Soon after the adoption, Ms. Adams, after coming to terms with her lesbianism, decided to try to re-gain custody of her son. Justice Lamperson concluded that:

Her life to this point has been a turbulent and intensively unhappy one... The evidence, even if interpreted most favourably to the mother, shows that she has encountered nothing but problems and that these have been visited on the child. That is not to say that the mother has not tried her best against great odds considering her youth, her lack of skills and earning capacity and her isolation from her family and the problems which she has with her sexuality. Despite the obvious sympathy which this court has

¹²⁸ *Supra* note 96.

¹²⁹ *Ibid.* at para. 734.

¹³⁰ *Adams v. Woodbury*, [1986] B.C.J. No. 2735 (B.C.S.C.) (QL).

for her there is no evidence which supports the contention that her difficulties are behind her.¹³¹

On the other hand, the Woodburys, the heterosexual couple who had adopted Brandice, presented the court with an ideal family life, one that would provide Brandice with a "very normal and stable" upbringing. These were advantages which the mother could not offer. Therefore Justice Lamperson ruled that "the mother's consent is dispensed with, and there is to be an order of adoption in favour of the Woodburys." The mother's application for custody was dismissed.

The Indiscreet Lesbian

Apart from the status of being a lesbian, a lesbian's level of "discretion," her level of "militancy," her degree of commitment to lesbianism as opposed to heterosexuality, and her attitudes about her children's sexuality have all operated as factors that can serve to deny or grant her custody.¹³² In earlier cases discretion took the form of a lesbian relationship not being "flaunted" to the children or to the community at large¹³³ and the lesbian mother refraining from "sexual" contact in front of her child(ren).¹³⁴ More recently, discretion has continued to be cited as a justification for awarding custody to lesbians. In a 1991 Saskatchewan case, *D.M v. M.D*¹³⁵, the judge awarded custody of two children to

¹³¹ *Ibid.* at para. 21 (QL).

¹³² Mary Eaton, *supra* note 89 at 118.

¹³³ *K. v. K*, 1976 and *Barkley v. Barkley*, 1980.

¹³⁴ *Barkley v. Barkley*, 1980 and *Elliott v. Elliott*, 1987.

¹³⁵ *D.M v. M.D.*, [1990] 94 Sask.R. 315.

their great aunt, a woman who had been involved in a lesbian relationship for twelve years.

In discussing the relationship between the two women, the judge noted:

I found these two women to be rather straightforward. Their relationship does not meet with the approval of all members of society in general. They were neither apologetic nor aggressive about their relationship. They are very discreet. They make no effort to recruit others to their way of living. They make no special effort to associate with others who pursue that lifestyle. In short, D. and H. mind their own business and go their own way in a discreet and dignified way.¹³⁶

While the lesbian great aunt won custody of the children, it was interesting to note the circumstances of the biological mother. The biological mother was sexually abused as a child, was found to function "in a borderline range"¹³⁷ mentally, and was involved in a shaky relationship with the children's biological father who did not appear at the time of the trial. D.M. took the two children when M.D. approached her for help in raising her children. Justice MacLeod found that it was in the children's best interests that custody was awarded to D.M. The discrete lesbian is preferred over the woman labelled as mentally ill.

The focus of judgements upon whether a mother is "discreet" about her sexuality or "flaunts" it is often taken by theorists to mean that mothers who approximate the heterosexual, white, middle class ideal as closely as possible will have a better chance of success in custody litigation.¹³⁸ "Discretion" was taken to mean discretion in the world at large (the public) and sometimes taken to mean discretion in front of the children (the

¹³⁶ *Ibid.* at 318.

¹³⁷ *Ibid.* at 316.

¹³⁸ See the works of Nancy Polikoff, Susan Boyd, Katherine Arnup and Ruthann Robson.

private). In *Droit De La Famille-31*¹³⁹ the "discreet" lesbian mother lost custody of her children because she lived in a small community where her lesbianism could in the future be known. In addition to this, the judge was concerned with the idea of the children growing up in the presence of the lesbian mother and her partner and that there would be no male presence in the home. The judge was uncomfortable with the thought that G.G., the mother's lesbian partner, would replace the role of the father in the household,¹⁴⁰ thereby, subverting gender stereotypes and confusing the children. The judge granted custody to the father. In some cases the lack of a male presence within the "family" unit is acceptable but only when the lesbian provides a "discreet" and uneventful "lifestyle" and is often equated with a single mother. In *D.M. v. M.D.*¹⁴¹ Justice MacLeod found Diane Monk to be a suitable custodial parent. In his/her remarks Justice MacLeod found that "[t]here may be a problem of the absence of a male presence, but this is no worse for them or for her than many single parent families."¹⁴² Custody was granted to Diane Monk and according to Justice MacLeod it was in the best interests of the children to do so.¹⁴³ As this case demonstrates, it is preferable that lesbian mothers appear as single mothers to the community at large. Single mothers may in the future (re)establish relations with men,

¹³⁹ *Supra* note 96.

¹⁴⁰ *Ibid.* at 134.

¹⁴¹ *Supra* note 136.

¹⁴² *Ibid.* at 316.

¹⁴³ While the outcome of this case was positive for the lesbian applicant, the outcome for the biological mother was quite devastating. Michelle Aitken had long history of mental and physical disabilities and had faced many rough obstacles in her young age. For more information on custody disputes and women with disabilities read Judith Mosoff's article "Motherhood, Madness, and Law" *University of Toronto Law Journal* 45 (1995): 107-142.

whereas, a lesbian mother, will not and does not wish to (re)establish the hetero-nuclear family form. It is easier for a patriarchal, heterosexist culture to try to de-sex the lesbian mother and remove "lesbian" than to combat its inherent heterosexism.

The discreet lesbians were the mothers who, in staying closeted, that is not joining lesbian and gay organizations and not seeking community support, were seen as exercising self-discipline. She is selfish in being a lesbian, but is capable of making sacrifices for her children, thus proving that she is a "good" mother. In remaining closeted with the children, the mother does not "look" like a lesbian and is not leading a lesbian "lifestyle." If she is successful, she has managed to remove the sexual component of her lesbianism from her children's lives, thus kissing her lover goodbye is no longer sexual because it is not done by a lesbian. Her everyday actions are once again everyday, thus there is no harm in doing them in front of her children. Lesbian mothers are forced to safeguard the custody of her children by not engaging in observable lesbian behaviour.

The manner in which the assimilation theme plays out for lesbian mothers, like First Nations mothers and single mothers, is that lesbians are required to amend their "lifestyles" to approximate the "status quo" model of motherhood. Those lesbian mothers who cannot or do not want to change or hide their "lifestyles" risk loosing custody of their children. Courts promote the "safety" and assimilation of the next generation by ensuring that they are being raised as closely as possible to the heterosexual, white, middle class norm.

Lesbian Relationships as Unstable

Judges frequently claim that lesbian relationships are inherently unstable. Judges repeatedly examine the number of female partners that the mother has had.¹⁴⁴ When judges could not substantiate their claims in this manner, they often turned to inquire into how many female sexual partners the lesbian mother's current partner has had.¹⁴⁵ Judges turn to the mother's partner usually because the mother is involved in her first lesbian relationship and therefore can not be accused of instability on that ground.

In *Elliott v. Elliott*¹⁴⁶ the judge relied on evidence concerning the mother's partner to further legitimise denying custody to the lesbian mother. The evidence demonstrated that "[p]rior to the commencement of her relationship with the mother Mrs. Whittle was involved in a relationship, referred to as a 'threesome', when she, her husband and another woman, had sexual relations together and at the same time."¹⁴⁷ Because of this, Justice MacKinnon concluded that the lesbian mother and her partner were unable to provide the children with proper role models.¹⁴⁸

Heterosexual relationships are assumed to be stable and when a lesbian mother is faced with a couple who can provide the hetero-nuclear family form for her child, she will lose her custody case. Such was the case in *Adams v. Woodbury*¹⁴⁹ where the judge

¹⁴⁴ *Case v. Case*, 1974 and *Adams v. Woodbury* 1986.

¹⁴⁵ *Case v. Case*, 1974; *Adams v. Woodbury*, 1986 and *Elliott v. Elliott* 1987.

¹⁴⁶ *Supra* note 116.

¹⁴⁷ *Ibid.* at para. 38 (QL).

¹⁴⁸ *Ibid.* at para 41 (QL).

¹⁴⁹ *Supra* note 131.

weighed the number of lesbian relationships the mother and her partner had been involved in as evidence against the lesbian mother and viewed her present relationship as being unstable because of their past histories.¹⁵⁰ The lesbian mother, as discussed earlier in this chapter, was forced by her parents to give her son up for adoption and then decided to take the adoptive parents to court to try to regain custody. In regard to her sexual orientation, Justice Lamperson stated that "her lesbianism does not bear directly on the custody issue." However a primary concern that emerged during the trial was whether her present relationship with Miss Young was a permanent and stable one. Because of the lesbian mother's and her partner's past lesbian relationships the lesbian mother lost custody of her child to the adoptive parents who could provide the child with a "very normal and stable" upbringing.

Conditions

Conditional custody is a judicial tool which allows judges to award custody to the lesbian mother on terms that effectively eliminate the "distasteful" aspects of the mother's "lifestyle". These custody conditions "frequently violate the parent's civil rights and are likely to be detrimental to the emotional well-being of the parent."¹⁵¹ Such conditions typically prohibit the lesbian mother from cohabiting with her lover, being active in the lesbian or feminist political movements and associating with other lesbian or gay individuals. Mary Eaton has pointed out that "[a]t times it seems that the courts' real

¹⁵⁰ *Ibid.* at para. 20 (QL).

¹⁵¹ Wendy L. Gross, *supra* note 111 at 527.

mission is not to protect children, but to directly thwart lesbian sexuality.”¹⁵² The court system is in effect attempting to assimilate the lesbian mother into the dominant heterosexual society, or at least isolate her from lesbian and gay culture and influence. If she lives alone in her home with her children, does not attend lesbian and gay clubs, she in effect will appear to the world at large, and to some degree to her children, to be a single mother who is non political, discreet and happy (as happy as a mother can be without a husband or boyfriend). She is forced to focus on her children and not on herself (her sexuality) or on the politics that often infuses one's sexual orientation when one is not heterosexual.

In *Bezaire v. Bezaire*, we can see how Mrs. Bezaire was forced to adopt a celibate "lifestyle" in order to retain custody of her children and then how her later decision to live with a woman was seen by the court to constitute her unfitness as a mother. In this case, the court's decision to impose conditions on the lesbian mother's custody order was explicitly to ensure that Gayle Bezaire's children would not be exposed to lesbian sexuality in any way. The decision was not merely an effort to keep the mother in the closet, but to directly control her sexuality. The judge imposed the following conditions on the lesbian mother's custody award:

[It] will be a condition of the custody order that no other person shall reside with Mrs. Bezaire without the approval of the judge. ... I realize that of an economic necessity it might become necessary that Mrs. Bezaire reside with someone else, but I have indicated that I am attempting to improve the situation and that includes negating any open, declared and avowed lesbian or homosexual relationship.¹⁵³

¹⁵² Mary Eaton, *supra* note 89 at 119.

¹⁵³ *Supra* note 1980 at 321.

Shortly after this order was made, the mother and children began living with the mother's partner. The father brought an application before the original judge to reverse the original order and grant him custody. He won his application. The mother launched an unsuccessful appeal to the Ontario Court of Appeal. Although the appellate judges did state that homosexuality in itself is not a negative factor and that the controlling issue is the best interests of the children, they did not question the propriety of the original conditional order. They treated the evidence that the mother had violated the terms of that order as establishing her psychological unfitness.¹⁵⁴

The practice of imposing conditions on lesbian mothers is, according to Katherine Arnup:

based on the assumption that a parent's homosexuality may negatively affect the child, but that those effects can be overcome if the parent meets certain conditions, such as not cohabitating with a lover, not sharing a bedroom with a lover, and not showing affection of any kind in front of the child.¹⁵⁵

Arnup goes on to note the work of Paula Brantner who has commented on the unfairness of these conditions, stating that: "Heterosexual parents are not routinely asked to forgo sexual relationships with other adults to obtain custody of their children - lesbian and gay parents are."¹⁵⁶ The impact of these conditions on the lives of lesbian and gay parents is severe. Brantner notes that:

gay parents are forced to make impossible and intolerable decisions. Parents who fail to comply with the court's restrictions may lose their children. If they do

¹⁵⁴ Wendy L. Gross, *supra* note 111 at 527.

¹⁵⁵ Katherine Arnup, *supra* note 61 at 381.

¹⁵⁶ Paula A. Brantner, "When Mommy or Daddy is Gay: Developing Constitutional Standards for Custody Decisions" *Hastings Women's Law Journal* 3 (Winter 1991) at 112.

comply, they may lose their partners or the ability to be openly gay and to maintain contact with other gay persons, which takes its own psychological toll.¹⁵⁷

The Courts are placing the lesbian mother in an alienating situation, one where she is forced to isolate herself not only from lesbian contacts but also from the possibility of finding a partner.

*J. v. R.*¹⁵⁸ was a Quebec case where the two parties were in agreement in all points of their divorce with the exception of one. The husband wanted to limit his ex-wife's access to the children because of her lesbianism. The lesbian mother objected to a clause which stipulated that her access be limited to times when her "woman friend" was absent. Justice Letarte rejected the disputed clause, as the ex-husband had not presented any evidence that the mother's lesbianism was a ground for limiting the mother's access to the children. The judge held that the clause clearly amounted to sexual discrimination prohibited by s. 10 of the *Quebec Charter*.¹⁵⁹

Around the same time in another Quebec case, *Cloutier c. Trudel*,¹⁶⁰ the father was seeking to place similar limitations upon the mother's access to the children. Custody of the children was decided between the parents. The mother was to spend a weekend a month with the children. The father wanted to place limitations on the mother's access to the children so that she could not have female friends over when the children were staying with her. The father contended that this limitation was well-founded as it would help

¹⁵⁷ *Ibid.*

¹⁵⁸ *J. v. R.* (1982), 27 R.F.L. (2nd) 380 (Quebec S.C.).

¹⁵⁹ *Charter of Rights and Freedoms*, L.R.Q. 1977, c. C-12, art. 10 [am. 1978, c.7, s. 112; 1980, c. 11, s. 34].

¹⁶⁰ *Cloutier c. Trudel*, [1982] C.S. 951.

protect the morality of the children. The ex-husband did not bring any evidence before the court to prove that the children were in any danger other than his own account of the potential danger of spending time with their mother's lesbian friends and potential lovers. In deciding this case the court found that there was little likelihood that while the children were with their mother that they would be subjected to any situations where the mother could be charged under section 168 of the *Criminal Code*.¹⁶¹ The judge further stated that in his mind, there was nothing presented to convince him/her that the children would not ultimately be traumatized in an irreversible way by the divulgence of their mother's sexual orientation and from their understanding of the particular mores of their mother. The judge instructed the father to return to court on the basis of change in circumstances to review the access rights of the mother if she divulged her sexual orientation to her children.¹⁶² It is interesting to note that in *Cloutier c. Trudel*, which took place in Quebec during the same time period as *J. v. R.*,¹⁶³ the mother needed to defend herself against the implication that her conduct was potentially of a criminal nature. On the other hand, in *J. v. R.*, the court ruled that it was against the *Quebec Charter* for the father to request the implementation of conditions to limit that same type of conduct by the lesbian mother.

Judges tend use the prospect of loss of custody due to a future "change of circumstances" to threaten the lesbian mother into complying with the restrictions placed on her by the court. In *Elliott v. Elliott*¹⁶⁴ a lesbian mother was denied custody in part due

¹⁶¹ *Criminal Code of Canada*, R.S. 1985, c. 19 (3d Supp.), s.6.

¹⁶² *Supra* note 161 at 953.

¹⁶³ *Supra* note 159.

¹⁶⁴ *Supra* note 116.

to her living arrangements with her partner. After the first custody order was made, the children requested to live with their mother, who by that time was no longer living with her lesbian partner. The mother then brought an application for custody on the grounds of material change in circumstances. The judge granted the application, but he warned her that "if the present circumstances changed" (that is, if she resumed living with a woman), the custody order could be varied. As Gross stated:

Mr. Justice MacDonald did not explicitly place a condition on the custody order, but in effect, his warning amounted to one: "The other factor that is a change that is significant is that the unhealthy relationship or possibly so between the mother and the lady that she had an affair with has ceased, at least to the extent that they are no longer in the same house." This is a definite factor that is a change because Mr. Justice Trainor, of course, found as part of the basis for [denying custody to the mother] this relationship.¹⁶⁵

Ms. Elliott, upon a further "change in circumstances" application lost custody of her children to her ex-husband because, shortly after obtaining custody of her children, she began re-cohabiting with her lesbian partner.¹⁶⁶

Placing conditions on custody orders involving a lesbian mother allows judges to award custody to a lesbian mother on terms that effectively eliminate the "objectionable" aspect of the parent's "lifestyle". Both *Bezaire* and *Elliott*, demonstrate the power of the legal system to inhibit and threaten lesbian mothers into curtailing the way in which they live their lives and raise their children. It is better for a lesbian mother to be single than partnered with a woman and raising her child(ren) with her partner. This is despite the negative stigma that is associated with single motherhood, as outlined by Martha Fineman in the previous chapter. It is the mother's sexual orientation and the social discomfort that

¹⁶⁵ Wendy Gross, *supra* note 111 at 528.

¹⁶⁶ *Supra* note 116.

such an orientation creates in larger society that are the focal concerns of the court, not the best interests of the children or of the mother. Within this framework, it is never countenanced that a lesbian mother remaining in a marriage would be unhappy or that a single lesbian mother distanced from the queer community would be unhappy; it is never countenanced that children of an unhappy mother might suffer themselves. The mother's choices are instantly suspect as originating in selfish motivations thereby suggesting that decisions must be made by someone else in order to genuinely reflect the children's best interests. Conditions are the court's attempt to force assimilation on lesbian mothers so that they better "fit" into the ideal of motherhood. These conditions also serve the purpose of monitoring the lesbian mother in order to ensure that she remains assimilated, as was the case for mothers labelled mentally ill in the last chapter. Like lesbian mothers, mothers labelled mentally ill are monitored after they have gained custody of their children.¹⁶⁷ The enforcer of the conditions for the lesbian mother is the father who is told by the court that, if the circumstances change, he should return to the court for a reversal of the original order, thereby threatening the lesbian mother not to step out of line.

Homosexuality is not a bar to custody... but

Many judges begin their judgements by claiming that the mother's lesbianism is "but one factor among many to be considered." In the first documented case concerning a lesbian mother, *Case v. Case*,¹⁶⁸ Justice MacPherson stated that "homosexuality on the

¹⁶⁷ *Supra* note 47.

¹⁶⁸ *Supra* note 87.

part of a parent is a factor to be considered along with all of the other evidence in the case. It should not be considered a bar in itself to a parent's right to custody."¹⁶⁹

However, the preceding review of cases suggests that lesbianism is often the main issue in a custody decision, even for those judges who declare that it is not a bar but is simply a factor for consideration. These judges seem oblivious to the contradiction inherent in their decisions.

In *Monette c. Sylvestre*,¹⁷⁰ in reference to the mother's lesbianism, the judge stated that homosexuality on the part of the mother is to be considered a factor like all others when determining custody of the child. The court must not consider homosexuality a negative factor against the parent and must consider all of the other factors presented in the case.¹⁷¹ This fairly open minded statement was contradicted by the judge's conclusion in which he found that while the mother's lesbianism does not make her an inadequate parent, the fact that the father could offer the child a stable nuclear family outweighed any chance of the mother retaining custody of her child.¹⁷²

In *Elliott v. Elliott*¹⁷³ the judge stated that:

[t]he Court is not concerned with the sexual preference of the mother insofar as she is concerned. All that is relevant is whether or not that relationship is one

¹⁶⁹ *Ibid.* at 136.

¹⁷⁰ *Supra* note 96.

¹⁷¹ *Ibid* at 734.

¹⁷² *Ibid.*

¹⁷³ *Supra* note 100.

which might harm the children. It is only one factor to be taken into consideration in determining the best interests of the children.¹⁷⁴

The Court refused the mother's application for an appeal of the order awarding custody to the father. In justifying this decision, the judge stated:

I do not think they should stay with their mother in those circumstances in which she lives, which she told me she intends to pursue. In those circumstances I am satisfied the children should go to their father and go now.¹⁷⁵

That is, the judge objected to the fact that the mother was a lesbian and that she lived with and intended to pursue a relationship with her female partner. While the judge's statement that the custodial mother's lesbianism was irrelevant except as it affects the welfare of the child appears to be a neutral test, the best interest of the child principle embodies a heterosexist bias as it is applied by many judges.¹⁷⁶ That is:

factors other than sexual orientation per se that judges typically take into account in determining the best interests of children, or which parent is better suited for the custodial role, can result in a bias against those who are regarded as having a sexual preference that is different from the heterosexual norm.¹⁷⁷

The notion of a permanent and stable "family" unit is one such factor which is code for heterosexual nuclear family form.

Another way in which heterosexism affects a lesbian mother's chances of winning custody is the fear that the children will experience public reprobation if the mother's lesbianism is known to community in which the mother and children live. Such was the

¹⁷⁴ *Ibid.* at para 6 (QL).

¹⁷⁵ *Ibid.*

¹⁷⁶ Susan Boyd, *supra* note 101 at 137.

¹⁷⁷ *Ibid.*

case in the Quebec case *Droit De La Famille-31*,¹⁷⁸ where it was not the mother's lesbianism per se that cost her custody of her children; it was the possibility of her being outed in her community that did. This lesbian mother lost custody of her children because it appeared that her lesbianism could eventually be known or discovered by the community as the parties lived in a very small town. The judge found that mother would have had a better chance of retaining custody if they lived in an urban city where tolerance for diverse populations is greater.¹⁷⁹

The judges in these cases pointed out that each case must be judged on the basis of its own evidence and that the possible impact of the mother's lesbianism on the children must be considered. However as Arnup pointed out:

even such an apparently fair-minded approach, however, contains within it a trap for the lesbian mother. In many communities lesbianism is viewed with disgust. A child of a lesbian might well be the object of abuse by neighborhood children if the mother's lesbianism were discovered or even suspected.¹⁸⁰

According to these cases, lesbianism is not itself a ground for refusing custody, but it is a question of whether the lesbian mother's "make up" and "lifestyle" have an adverse effect on the welfare of the child. It is clear from these cases that the factors that constitute the lesbian mother's make-up and lifestyle are viewed through a heterosexist/homophobic lens and that the *but* factor in this premise is thinly veiled heterosexism.

¹⁷⁸ *Supra* note 96.

¹⁷⁹ *Ibid.* at 131-132.

¹⁸⁰ Katherine Arnup, *supra* note 56 at 250.

Conclusion

While there are cases in which judges explicitly characterise lesbian mothers as "unusual", "irregular", "abnormal" or "strange", usually the judge will go to some length to distance her/himself from the value judgement inherent in such statements. Instead they claim that this is what the child "will" feel, or this is how the "community" will react to the lesbian mother. Most judges offer the homosexuality is not a bar...but disclaimer, first stated in 1974 by Justice MacPherson in the first documented child custody case concerning a lesbian mother and her ex-partner. It has been restated in numerous other cases to date. Judges often find themselves able to take judicial notice of aspects of lesbian life, often phrased as "common sense" knowledge rather than observation. "Common sense" assumptions about the likelihood of children being subject to peer trauma or growing up lesbian/gay are littered throughout judgements. This reveals more about the underlying beliefs and fears of judges than about the lesbian mothers themselves and provides a key to unlocking the dominant ideology of motherhood.

The writers who have written in this area have all stated that these cases illustrate the distinction which judges have drawn between what they determine to be "good" and "bad" lesbian mothers. Arnup notes that:

Good lesbian mothers, women who live quiet, discreet lives, who promise that they will raise their children to be heterosexual, who appear to the outside world to be heterosexual single parents, have in recent years increasingly succeeded in winning custody of their children. "Bad" lesbian mothers, women who are open about their sexual orientation, who attend gay and lesbian demonstrations and other public events, and who view their lesbianism positively or as one aspect of an entire challenge to society, are almost certain to lose custody of their children to their ex-husbands.¹⁸¹

¹⁸¹ Katherine Arnup, *supra* note 61 at 383-394.

Lesbian mothers will bend over backwards not to expose their children to a gay "lifestyle"; they remain closeted in order to make their children appear as normal (heterosexual) as possible and to prove to the court that they can and will shield their children from the inherent homophobia in society. According to Boyd this argument:

adopts and reinforces the thinly veiled fear of lesbians and gay men in society; that they are predatory, dirty, flagrant, etc. In turn, this approach creates a situation where a lesbian mother's ability to argue successfully for custody depends on her ability to convince judges that she lives on the safe side of the line between "good" and "bad" lesbians.¹⁸²

Generally the mothers who were "private" and endeavoured to conceal their sexuality had a greater chance of success than lesbians who were "out."

The restrictions that are placed on the lesbian mother are rooted in the mother's "deviant" sexual orientation. She is pathologized because she is sexual and because her sexuality is not directed towards men. Because of this there are underlying myths of what a lesbian mother will do to her child(ren) if she gains custody of them. They can be summarized as: 1) lesbianism is a contagious disease and the mother's sexual orientation will rub off on the child(ren); 2) lesbians hate men, they will turn their daughters into "man haters" and cannot love their sons; 3) lesbians have destroyed the family; 4) lesbians flaunt their sexuality in front of their children and in the community which is dangerous for the child(ren) and will create a hostile environment for them in the community.¹⁸³ The mother's lesbianism becomes the focus of inquiry; her sexuality permeates the judgments to such an extent that all other factors become secondary. Evidence and facts become secondary to

¹⁸² Susan Boyd, *supra* note 101 at 143.

¹⁸³ Katherine Arnup, *supra* note 56 at 251.

fears, myths, and perceptions of risk. Myths serve as facts which are used to punish lesbian mothers because they stray from the dominant white hetero-nuclear family form.

Heterosexist biases are deeply entrenched in judicial reasoning. The difficulties lesbian mothers face in the legal system are only symptoms of a larger, perceived, social threat felt by dominant society about lesbianism. These same myths and assumptions and the terms used to encode them, as well as some new ones are present in the cases since 1992, which I discuss in the chapter that follows.

Chapter Four: The Case Law: From 1992 to 2000

One of the foundations upon which this thesis rests is that custody cases involving lesbian mothers are primarily about lesbianism. Lesbianism may not explicitly be the deciding factor in the case but it is a central issue around which the case revolves. For example, with respect to *Case v. Case*¹⁸⁴ which we looked at in the previous chapter, some commentators are of the view that the rationale of the decision rested upon the mother's political activism while others consider *Case* to be a decision founded on the mother's sexual orientation. Either way, it is obvious that the mother's lesbianism was the central concern of the judge. It may not be explicitly about the mother's lesbianism but it is about how the mother responds to her own sexuality, whether she's involved in local lesbian and gay organisations, socialises with other lesbians, and the degree to which she is "out" in her community and to her children. What is clear from the previous chapter is that "lesbian" is regarded as a suspect identity category, one that must be scrutinised when linked to the most revered role for a woman in society: "mother."

This chapter will explore the various ways in which "lesbianism" becomes the central concern in custody proceedings involving lesbian mothers in Canada from 1992 to 2000. As in the preceding chapter, I will rely on the headings of presumption of unfitness, the sexual lesbian, lesbian "lifestyle," the indiscreet lesbian, lesbian relationships as unstable, and homosexuality is not a bar to custody... but.¹⁸⁵ However, unlike the previous chapter I will not be including conditions as a subheading. In the previous chapter, we saw

¹⁸⁴ *Supra* note 87.

¹⁸⁵ In this chapter I moved the sub heading "The Indiscreet Lesbian" into the "Lesbian Lifestyle" section because it did not make sense to make two separate categories for one case.

how conditions were used in cases involving lesbian mothers in order to minimize the negative effects that their "lifestyle" and sexual orientation could have on their children. Within this more recent time period, 1992 to 2000, judges do not appear to have imposed conditions as a tool to control lesbian mothers.

However, I will be adding the following new headings to the headings employed: mother-blaming, heterosexism and homophobia. These headings emerge from these more recent cases and will further assist in analysing and understanding how the dominant ideology of motherhood affects lesbian mothers. While homophobia is a key factor that emerges within all of these categories, I decided to create a separate category in order to properly deal with issues that could not be properly dealt with under the other subheadings. As in the previous chapter, I will draw on the larger themes of individualism, pathology, heterosexism, labelling, and assimilation to further understand the effects that the ideology of motherhood has on lesbian mothers. In this chapter, I will focus on case law from 1992 to 2000 which are all cases that have been subjected to very little, if any, scholarly review. However, I have chosen to include an analysis of a much earlier case that involves inter-lesbian support¹⁸⁶ that took place in 1986. Because there are so few cases involving inter-lesbian parenting, I wanted to discuss them together to enable me to explore judicial changes in attitude in regards to inter-lesbian parenting.

Presumption of Unfitness

As the previous chapter has illustrated, in order to combat the many assumptions and myths surrounding lesbian motherhood, lawyers and gay and lesbian advocates turn to

¹⁸⁶ *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

"experts" to produce the sociological and psychological evidence that demonstrates that the lesbian mother's sexuality will not have an adverse effect on her child(ren) and in some circumstances might be of some benefit.¹⁸⁷ It has become common place in custody litigation involving lesbians to have an expert witness summarise an array of scholarly studies in order to dispel the common homophobic stereotypes about lesbian mothering.¹⁸⁸ These studies show that the children show no greater likelihood of becoming lesbian or gay; that lesbian and gay individuals are children of heterosexual couples; that children of lesbian and gay parents are not likely to be harmed or molested by their parents; and that there is no support for the assumption that gay and lesbian parents are unstable and unable to fulfil their parental role.

This expanding database of knowledge has helped lesbian mothers dispel the numerous myths and stereotypes that they often face in custody disputes. Such was the case in the 1998 case of *Anger v. Anger*.¹⁸⁹ In this case a registered psychologist presented evidence in support of the mother's claim stating that "the children had not disclosed any inappropriate or harmful behavior toward them by either parent."¹⁹⁰ However, the psychologist's affidavit introduced by the father stated that any professional would undoubtedly have to admit that there is a possibility that with further contact between the psychologist and the children disclosures of inappropriate behavior might yet emerge, or

¹⁸⁷ For example see: S. Golombok and F. Tasker's article "Children in Lesbian and Gay Families: Theories and Evidence" in *Lesbians Raising Sons*, Jess Wells (ed.) Los Angeles: Alyson Books, 1997 and C.J. Patterson's "Children of the Lesbian Baby Boom: Behavioural Adjustment, Self Concepts and Sex Role Identity" in *Lesbian and Gay Psychology: Theory Research and Clinical Applications*, B. Greene and G.M. Herek (eds.) Newbury Park, California: Sage.

¹⁸⁸ See Martha A. MacCarthy and Joanna L. Radbord's article "Family Law For Same Sex Couples: Chart(er)ing The Course" *Canadian Journal of Family Law* 15 (1998): 101-177.

¹⁸⁹ *Anger v. Anger*, [1998] B.C.J. No. 1392 (B.C.S.C.) (QL).

¹⁹⁰ *Ibid.* at 8 (QL).

they might not. The judge found that "the petitioner is so convinced of the righteousness of his stance vis a vis the respondent, he is not prepared to accept any evidence that, in fact, the respondent can be a lesbian and still be a good mother."¹⁹¹ In this case, the judge rejected the father's homophobic claim because he did not provide any evidence to counter the evidence presented by the lesbian mother in regard to her lesbianism and her ability to be a "good" mother.

While expert evidence is a necessary step in countering the numerous stereotypes that infect the dominant ideology of motherhood, the stereotypes persist and continue to inform judicial decisions. The test of "the best interests of the child" provides the judge with fairly wide ranging discretion to decide who is the more "fit" parent to raise the children. As in the earlier cases, this is where the numerous stereotypes surrounding a lesbian mother surfaced in the more recent case law. There is nothing in the case law to indicate that there still exists a presumption of unfitness. There appears, however, to be a move from a focus on unfitness to a less overtly biased application of the best interests of the child test. The ways in which judges justify granting or revoking custody to a lesbian based on the best interests of the child will be explored in my discussion of the other headings.

The Sexual Lesbian

Lawyers and judges continue to place the sexual lives of lesbian mothers and their partners under an arduous amount of scrutiny. As the previous chapter illustrated, the mother actually having sex is not necessarily the focus but is an assumption that underlies

¹⁹¹ *Ibid.* at para. 21 (QL).

other activities that are seen as being sexual in a lesbian context. In the case *N. v. N.*¹⁹² the lesbian mother needed to introduce evidence that there was no "overt sexual relationship" between her and her partner. A frequent visitor to the women's home was called to testify on her behalf. The court noted that she was a woman who had visited their home over the years and took into account that she "had never seen anything that would indicate an overt sexual relationship between them."¹⁹³ This evidence was important to the judge because "it addresses a concern expressed by the father through his counsel about the children living in a lesbian environment."¹⁹⁴ Neither the judge nor the person testifying on behalf of the lesbian mother explained what an "overt sexual relationship" was nor why such a relationship was considered problematic. However the judge was satisfied that an overt sexual relationship did not exist and that the mother was a "good" mother and awarded custody to her.

In *Korniaikov v. Korniaikov*,¹⁹⁵ the father raised the concern that the mother had demonstrated a tendency towards lesbianism. He stated in his testimony that:

on a certain weekend that the respondent spent with another woman, she discussed the concept with that individual. She told the applicant that she had been willing to become involved in a lesbian relationship with the other woman, but the other woman was not so inclined. As a result, the applicant has interpreted certain contact between the respondent and Vesna [their daughter] as constituting the beginning of a lesbian relationship.¹⁹⁶

¹⁹² *N. v. N.*, [1992] B.C.J. No. 1507 (QL).

¹⁹³ *Ibid.* at para. 7-8 (QL).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Supra* note 76.

¹⁹⁶ *Ibid.* at para 22 (QL).

This case provides us with a blatant example of the myth of lesbians as child molesters, with a father accusing the mother, whom he perceived as a lesbian, of incestuous behaviour. Justice Main found that this action was "nothing more than the natural interaction between a mother and her daughter and I think the applicant is incorrect in his conclusion."¹⁹⁷ However, custody of the two children was awarded to the father with liberal access to the mother, not because of the father's accusation that the mother was a lesbian but because the mother lacked any real plan for the children's welfare.

Because the mother in Korniakov was interested in pursuing a "lesbian relationship," she was pathologized by her ex-husband and her sexuality was viewed, by him, as a threat to her ability to exercise "good" mothering. He feared that, because she displayed a "tendency towards lesbianism," the interaction between the mother and her daughter was sexual. In this case, it is difficult to discern whether the judge was swayed by the father's concerns of the mother's tendency towards lesbianism and what the father viewed as the mother molesting her daughter or whether the decision was solely based on the fact that the mother had no clear plan for the children's welfare. At any rate, the judge's reaction to the father's concerns was tame considering the outrageousness of the accusation. It is also interesting to note that the judge granted custody to the father who had been known to be both physically and mentally abusive towards his children, especially his son.¹⁹⁸ The assessor's report indicated that the father was a very conservative, serious and thoughtful man who took child rearing as a serious matter. He had a rigid approach

¹⁹⁷ *Ibid.* at para. 22 (QL).

¹⁹⁸ I will discuss these points later in this chapter under the heading "Fatherly Influence."

to childcare and had been taking parental skills counselling.¹⁹⁹ Although the mother was relatively more flexible and relaxed in her views of child rearing, the assessor reported that she was depressed, confused and lacked any concrete plan for the children's welfare.²⁰⁰ She was also involved with a man who had no interests in raising her children.

Lesbian "Lifestyle"

The lesbian mother's "lifestyle" is still a matter of concern for judges in custody proceedings. We continue to find that where the lesbian mother can provide her child with a more "stable" upbringing, that is one where the lesbian mother's sexual orientation is not known to the community and the lesbian mother is "discreet" in front of her children she is more likely to gain custody.²⁰¹ Such was the case in *N. v. N.*²⁰² where Justice Warren found that "[t]here was no evidence whatsoever that the lesbian relationship was in any way notorious in the community or in the school nor was there any evidence that the children were being affected by the relationship their mother had with Constable B."²⁰³

Not much has changed since *Case v. Case* (1974) and *K. v. K.* (1976) where the more "discreet" a lesbian mother is with her lesbianism the more likely it is that she will be granted custody of her children. In the most recent case, *Bubis v. Jones*²⁰⁴, the judge

¹⁹⁹ *Supra* note 76 at para 8.

²⁰⁰ *Ibid.* at para 9.

²⁰¹ Such was the case in *Bubis v. Jones*, 2000, *N. v. N.*, 1992 and *Gledhill v. Green*, 2000.

²⁰² *Supra* note 193.

²⁰³ *Ibid.* at para. 14 (QL).

²⁰⁴ *Bubis v. Jones*, [2000] O.J. No. 1310 (Ont. S.C.J. Fam. Ct.) (QL).

attempts to dispel the "myths and stereotypes which have followed same-sex partners."²⁰⁵

Here the judge turns to Justice Nevins's findings in the same-sex adoption case *Re K.*²⁰⁶ as an example. The Judge further stated that:

There is no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than are families with homosexual parents... lesbian relationships do not break down at a significantly different rate than do heterosexual relationships and the sexual orientation of children is not influenced by the gender preference of their parents. It is true that the children of a lesbian in a same-sex relationship may be ostracized by some peers because of the lifestyle of their mother. However, I do not think that a rational decision by this court should be precluded by the possibility that it may provoke an irrational response in others. The end result of all of this is that the same-sex preference of a parent is merely one of the many factors which a court should consider when determining the best interests for children. A lesbian relationship, conducted with discretion and sensitivity, is no more harmful to children than a heterosexual relationship, conducted with discretion and sensitivity. Heterosexual parenting is not better than lesbian parenting - just different.²⁰⁷

While this judge held a seemingly liberal view on lesbianism, the influential factors that helped the judge decide to give custody to the lesbian mother were that she conducted her lesbian relationship and her lesbianism with discretion and sensitivity.

In *Seselja v. Seselja*,²⁰⁸ the focus of the case was not on the mother's sexual orientation, per se, because she did not self identify as a lesbian; what was at issue was her new "lifestyle". Since the breakdown of the relationship with her husband, Mrs. Seselja discovered the new found freedom of going out with new friends and working outside of the home. Ms. Seselja had a new female friend, Ms. Mohammed, who spent quite a lot of

²⁰⁵ *Ibid.* at para. 17 (QL).

²⁰⁶ *Re K.* (1995), 15 R.F.L. (4th) 129 (Ont. Prov. Div).

²⁰⁷ *Surpa* note 205 at para. 18-19 (QL).

²⁰⁸ *Seselja v. Seselja*, [1994] O.J. No.639 (Ont. C.J. (Prov. Div. Brampton, Ont. Karswick Prov. Div. J.) (QL).

time at her home and slept in the mother's bed with her. The father's lawyers and the judge presented the case so that the question of whether or not Ms. Seselja was a lesbian was not directly an issue. What was presented as the central issue in this case was the effect upon the children these changes had brought about and the undefined role that Ms. Mohammed played in their life. The mother lost custody of her children to the father because of the confusion that the children were experiencing. In particular, Ms. Seselja's eldest son Ryan was feeling angry and rejected by his mother and was uncomfortable with the present living arrangements. The children were finding it difficult to adjust to their parents' divorce and were uncomfortable with their mother's new lifestyle. In this case, it appeared that the mother's apparent lesbianism was made more problematic by her inability or unwillingness to acknowledge it.

As the last chapter established, a "discreet" lesbian mother is someone who does not join gay and lesbian organisations, does not seek community support and exercises self-discipline in her sexual orientation. She is selfish in being a lesbian, but redeems herself to some extent by masking her lesbianism to both her children and the community at large. She is therefore a "good" mother, capable of making sacrifices for the interests of her children. In *Seselja* the father and the Official Guardian were concerned about the mother's relationship with a "friend." The judge noted that it was "not the nature" of the mother's relationship with her friend that was of concern "but rather the confusion that the children are experiencing as a result of the issue."²⁰⁹ The mother answered by saying that the children were only asking questions because the father had told the children that she

²⁰⁹ *Ibid.* at para. 11 (QL).

was a lesbian. The truth or falsity of the claim was repeatedly side-stepped. Despite the assertions that the mother's "lesbianism" was not an issue, I contend that it was the central issue in the case. It was because the mother was in an "unidentifiable" relationship with a female "friend" that the judge granted custody to the father.

The earlier cases demonstrated that the more discrete lesbian mother was more likely to retain custody of her children,²¹⁰ but this more current case portrays a "catch-22" for the lesbian mother. If lesbian mothers are not closeted enough they will lose custody of their children, but if they are too closeted in their relationships they also will lose custody.

Homosexuality is not a bar to custody... but

In these more recent cases involving lesbian mothers, judges still make the claim that homosexuality is not a bar to custody... but. An example of this is when the lesbian mother is seen to be placing her interests above those of her children by choosing to live a lesbian "lifestyle," as was the case in *S. v. S.*²¹¹ In *S. v. S.* a lesbian mother, who had recently "come out" of the closet, lost custody of her two daughters to their father. Justice Melnick stated at the onset of the case that "I start from the base assumption that being a lesbian or a homosexual does not, in itself, make a person unfit to be a parent or have custody of a child."²¹² However, the "state of development of Ms. S's awareness and

²¹⁰ *J. v. R.*, 1982 and *Monette c. Sylvestre*, 1981.

²¹¹ *S. v. S.*, [1992] B.C.J. No. 1579 (B.C.S.C.) (QL).

²¹² *Ibid.* at para 32 (QL).

experience of her being a lesbian has had some impact on my decision."²¹³ In this case, the fact that the lesbian mother was only beginning to develop her lesbian identity was utilized by the judge as the primary reason to deny her custody of her children. This was largely due to the fact that the judge could not forecast the future effects that Mrs. S's lesbianism and future lesbian relationship(s) would have on her children.

Susan Boyd has noted that lawyers "for the non lesbian or gay parent now tend to argue that while they are not concerned with the sexual orientation of the other parent per se, they are concerned about the effect of some factor related to it on the children, such as the role of the lesbian mother's partner or confusion of the children."²¹⁴ In *Seselja v. Seselja*,²¹⁵ as discussed previously in Lesbian "Lifestyle," the confusion of the children was marked as one of the key factors behind custody being granted to the father. While the mother's sexual orientation is not questioned because she does not "self identify as a lesbian," her new "lifestyle" and friendship with Ms. Mohammed and its effects upon the children are the major reasons behind Mrs. Seselja's loss of custody.

Custody decisions where one or both applicants are lesbian clearly state that homosexuality is not in itself a ground for refusing custody, rather it is a question of whether the homosexual parent's "make-up" and "lifestyle" have an adverse effect on the welfare of the child. After closely examining the case law on lesbian mothers, it is clear that the factors that constitute the lesbian mother's "make-up" and "lifestyle" are heterosexist, homophobic, and that the "but" factor in this premise is biased.

²¹³ *Ibid.* at para 33 (QL).

²¹⁴ Susan Boyd, *supra* note 101 at 137, footnote 12.

²¹⁵ *Supra* note 209.

Lesbian Relationships As Unstable

Judges frequently make the claim that lesbian relationships are inherently unstable. This assumption arose in the previous chapter and was often expressed by the judge in an examination of how many female partners the mother has had or her partner has had. The combination of the mother and the partner's past relationships was frequently used to determine that the current relationship between the mother and her partner could not possibly be stable.

In *S. v. S.*,²¹⁶ the lesbian mother did not have a past history of lesbian relationships. However, the court expressed fear that a future relationship would not be stable or long lasting and that the mother's move to a larger city was an "adventure" that would help her establish some sense of lesbian community. The judge did not know what kind of lesbian she was going to become in the future but suspected that this "virgin" lesbian was going to be promiscuous. By granting custody to the father the judge ensured that the children would be protected from their mother's future unknown actions.

It was interesting to note how the judge in *Anderson v. Luoma*,²¹⁷ the mid 1980s inter-lesbian support case,²¹⁸ viewed the lesbian relationship between the two parties.

Justice Dohm began his concluding comments by characterizing the parties:

[m]y impression of the plaintiff is that she is sincere and forthright but quite naïve. She was a neophyte in the lesbian world. She wanted to believe that her new found life was really no different than the one she just left. This keen desire of wanting

²¹⁶ *Ibid.* Discussed above under "Homosexuality is not a bar to custody... but."

²¹⁷ *Supra* note 187.

²¹⁸ As I mentioned in the introduction of this chapter, I chose to deal with this case here instead of the first case law chapter because there are few inter-lesbian custody and support cases that I found it valuable to discuss it in relation to the other inter-lesbian cases.

things to work out and to develop and be part of a "family unit" very much clouded the plaintiff's judgment. Moreover, I think it has influenced her approach in giving evidence. The defendant too seems sincere but she is not altogether forthright. She was a veteran in the world she invited the plaintiff to enter having been in at least two other lesbian relationships involving house-mates at Wellington.²¹⁹

Anderson sought child support for their two children from her ex-female partner, Luoma.²²⁰ The court characterized the defendant as a "third party" in relation to the children whom she had helped to raise since their birth and refused to order her to pay child support. Throughout the decision there are clear indications that Justice Dohm saw this 10-year relationship as unstable and impermanent. The imbalance in the relationship is ascribed to the difference between the parties in terms of lesbian experience. Justice Dohm refers to Luoma's expert knowledge of the lesbian "world" into which she lured the unsuspecting Anderson. The judge portrayed Anderson as a gullible person who "wanted to believe that her new found life was really no different than the one she left."²²¹ But according to Justice Dohm, it clearly was different. She should have known better than to enter into a lesbian relationship when what she was really looking for was a heterosexual one, that is she wanted a stable nuclear family unit within which to raise children.

The judge in this case constructed the mother's lesbian partner as "dominant" in the relationship and the mother as submissive. This characterization makes the biological lesbian mother look as if she were deprived of agency; she was led astray by someone more powerful, sexual and less feminine than herself. The biological mother was viewed as

²¹⁹ *Supra* note 187 at para 50 (QL).

²²⁰ Anderson also claimed "spousal" support and a division of property. She was partially successful in her property claim.

²²¹ *Ibid.* at para. 50 (QL).

a pawn who was being played by her more experienced lesbian partner, who once tired of their "game" gave her up for a new one.

In other cases, judges have found that a relationship between two lesbians can be stable. Such was the case in *Monk v. Sjoberg*²²² where the petitioner, Monk, sought maintenance from her former female partner, Sjoberg, for the children of her niece who had been living with them since early 1989, and of whom they were awarded custody in July 1990²²³. In order to prove that Sjoberg was responsible for maintenance of the two children, it had to be shown that she "demonstrated a settled intention to treat the children as children of her family."²²⁴ Justice Armstrong relied heavily on the findings of Justice MacLeod in the custody battle between Monk and her niece Doan, in which Monk had been awarded custody of the two children. While only Monk had applied for custody in that case, Mr. Justice MacLeod said in his judgment "...and I might say that for all practical purposes, the two of them [Monk and Sjoberg] must be considered as a couple who shared this application and who are willing to share the responsibilities of custody." Sjoberg had testified that she was prepared to "...support the household... to the best of my ability."²²⁵ It was obvious, from the wording of the custody decision that Sjoberg figured significantly in Justice MacLeod's decision to award custody to Monk. However, in the present case, Sjoberg was now stating that "her willingness to support the children

²²² *Monk v. Sjoberg*. [1996] S.J. No. 411 (Sask. Court of Queen's Bench, Judicial District of Regina - Family Law Div.) (QL).

²²³ *Supra* note 136.

²²⁴ *Supra* note 223 at para. 4 (QL).

²²⁵ *Ibid.* at para 2 (QL).

was limited to supporting the children so long as she and Monk were together."²²⁶ Now that the two women had separated, Sjoberg saw no further need to support Monk and the children. Justice Armstrong disagreed, stating that:

[t]he testimony of Sjoberg at the custody trial, coming well over a year after the children had been taken in, and her conduct since that trial while living with Monk and the children satisfy me that she has demonstrated a settled intention to treat the children as children of her family to the extent necessary to make her a parent within the meaning of the Act."²²⁷

The 12 year relationship between Monk and Sjoberg was recognized and Sjoberg was required to pay child support.

In the most recent reported case concerning a lesbian mother, *Bubis v. Jones*,²²⁸ the lesbian mother filed for a change in custody based upon a "change in circumstances." The judge found that:

the applicant has satisfied the threshold requirement of showing that, since the Order, there has been a material change in circumstances that affects the best interest of the children. The applicant's current circumstances are considerably different than those which prevailed at the time of the Order, when she was unemployed and cohabiting with Ms. Gallant in a new relationship. She is now employed, has secured superb accommodation and appears to have established a union of stability and permanence with Ms. Gallant.²²⁹

In this case the judge noted that "most trial judges apply a cautious approach when considering changes to established custodial arrangements that appear to be working. Nonetheless, after considering the matters... I am easily drawn to the conclusion that here

²²⁶ *Ibid.* at para 5 (QL).

²²⁷ *Ibid.* at para. 7 (QL).

²²⁸ *Supra* note 205.

²²⁹ *Ibid.* at para. 21 (QL).

a change in custody is in the best interests of the children."²³⁰ The lesbian mother and her partner were able to prove that their new living arrangement and their relationship were stable and secure as they had been together since the original custody order. The father, on the other hand, had not re-married, worked a strenuous job and did not have sufficient time to spend with his children as he was often too tired after work. The judge in this case placed a lot of emphasis on the co-operative, where the mother and her partner lived. The judge viewed this as a good opportunity for the children as they would be involved in more social activities in this living environment.

As the previous chapter has illustrated, once lesbian mothers are classified as being sexual they almost inevitably lose custody of their children. However, the present cases have demonstrated that lesbian mothers can in fact demonstrate to some family court judges that their relationships are stable and concerns regarding the mother's sexual practices have diminished.

In regard to inter-lesbian relationships there has been a slow trend toward recognizing lesbian relationships since the first family law case, *Anderson v. Luoma*.²³¹ In *Monk v. Sjoberg* the adoptive lesbian mother's ex-partner was obliged to pay child support and in *Buist v. Greaves* the non-biological mother was obliged to pay child support and received access to but not custody of her son. However, the lesbian mother must still prove that her relationship with her partner is a stable one, unlike the father whose

²³⁰ *Ibid.* at para. 29 (QL).

²³¹ *Supra.* note 187.

relationship is assumed to be stable because it makes up a heterosexual relationship. The stereotype that lesbians are promiscuous still haunts the cases.

Mother-Blaming

As the previous chapter has illustrated, lesbian mothers have often been treated as being selfish because they acted on their lesbianism.²³² In the most recent cases we find a twist on how the judges treat the lesbian mother who leaves a relationship when children are involved. This is through the process of "mother-blaming." In the context of child custody proceedings, the lesbian mother is blamed for the break up of the hetero-nuclear marriage. This is interesting because blame is no longer supposed to be a factor in custody decisions. For example section 24(3) of the *Children's Law Reform Act* (Ontario) reads:

The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to act as a parent of a child.²³³

"Mother-blaming" is not supposed to be a factor in custody proceedings but it has been in such cases as *Gledhill v. Green* and *Buist v. Greaves*. In *Gledhill v. Green*²³⁴ the mother was blamed for the breakdown of her relationship with her male ex-partner. The judge noted that she:

is very protective of her new found identity...[and] is not yet ready to acknowledge that her sexual preference has had a profound effect on her

²³² *Elliott v. Elliott*, 1987; *Case v. Case*, 1974; and *Bezaire v. Bezaire*, 1980.

²³³ *Children's Law Reform Act*, R.S.O., 1990, c. C12.

²³⁴ *Gledhill v. Green*, [2000] B.C.J. No. 575 (B.C.S.C.) (QL).

relationship with the defendant... her sexual preference would have a profound effect on the marriage long before the actual separation occurred.²³⁵

Her application for custody was dismissed.

In *Buist v. Greaves*²³⁶ the non-biological lesbian mother, Buist, was deemed selfish and self-centred by the judge. The judge stated "that her pursuit of her claims had more to do with her perception of her own rights than they did with the best interests of Simon."²³⁷ Ms. Buist took the position that it was not in Simon's best interests to be moved to Vancouver because change is not good for him and she thought that Ms. Greaves should put her needs second to his. Justice Benotto countered this argument by stating that "when she made the decision to leave Ms. Greaves, she chose what was best for herself, not for Simon. In making her choice, she precipitated the most significant change in his life. I also note that Simon adjusted to that change, as I believe he will to the move."²³⁸ The judge found that the inevitable loss from a less regular schedule of contact with Ms. Buist was more than offset by the benefits of moving with his mother and brother.²³⁹ Ms. Buist initially placed her "selfish" interests above those of her son's when she left the relationship and, thereby, totally undermined her claim to custody of the child.

²³⁵ *Ibid.* at para. 33 (QL).

²³⁶ *Ibid.*

²³⁷ *Ibid.* at para. 22 (QL).

²³⁸ *Ibid.* at para. 30 (QL).

²³⁹ *Ibid.* at para 29 (QL).

It is interesting to note the connection between *Buist v. Greaves* and the next case that I will be analysing, *S. v. S.*²⁴⁰ Unsuccessfully Buist argued that it would not be in the child's best interests to move from London to Vancouver and that the biological mother, Greaves should put her interests second to those of the children. While Buist was unsuccessful in her case, Mr. S. was successful in gaining custody, based on the same argument. In *S. v. S.*²⁴¹ the lesbian mother lost custody of her children because the judge viewed her as being selfish in wanting to move to a larger city with her children.²⁴² The mother found Cranbrook to be "too conservative an environment," where there were not enough social opportunities for her and her new found lesbianism, and the move to the greater Vancouver area would allow her children to enrol in French immersion programs. Justice Melnick viewed this move as being "grounded in her own personal needs, not those of her children."²⁴³ The judge also noted that:

[a] move to Vancouver will be a significant step along her road to her defining who she is as a person now that she has come out as a lesbian. However, it is but a step on that road. At this point, I have no way of determining what her real environment will be like once she moves to the Lower Mainland.²⁴⁴

As in *S. v. S.*, lesbian mothers who leave their marriages are often characterized as shattering the "family" in order to indulge themselves in sexual delights, and in so doing are seen as neglectful of their child(ren). Lesbian mothers' choices are instantly suspect as

²⁴⁰ *Supra* note 212.

²⁴¹ *Ibid.*

²⁴² As discussed earlier in this chapter, the lesbian mother was found to be "unstable" because the judge could not gauge the future effects that the mother's relationships would have on her children.

²⁴³ *Ibid.* at para 42 (QL).

²⁴⁴ *Ibid.* at para 44 (QL).

they are seen to be originating from selfish motivations. Lesbian mothers' decisions to choose the course of their own lives removes them from the boundaries of "good" motherhood. A variation of this characterization applies when both parents are lesbians. The recent case of *Buist v. Greaves*²⁴⁵ demonstrates how the non-biological mother was pushed outside the boundaries of motherhood and deemed selfish because she left the relationship and sought custody of their child. In *S. v. S.* the lesbian mother was not granted custody of her children and she was deemed selfish because she left the hetero-nuclear relationship and sought to move to Vancouver with her children. In both of these cases the lesbian mother and the non-biological lesbian mother were essentially blamed for the breakdown of the relationship and were viewed as selfish because they left the relationship and then had the audacity to seek custody of their child(ren). However, *Buist v. Greaves* adds another level of complexity in that it is the "abandoned" lesbian, who is also the biological mother, who wants to move, whereas the lesbian mother in *S. v. S.* who wanted to move was described as selfish for putting her own desire for adventure ahead of the needs of her children, there is no mention of Ms. Greaves as selfish, even though the move from London, Ontario to Vancouver with a very young child would potentially have a devastating impact on the child's relationship with the non-biological lesbian mother. The label selfish is used in complicated ways but it is consistently used to characterise the less desirable mother.

²⁴⁵ *Buist v. Greaves*, [1997] O.J. No. 2646 DRS 97-10005 (Ont. C.J.(Gen.Div.)) (QL).

Heterosexism

In *Buist v. Greaves*²⁴⁶ the non-biological mother's claim for a declaration that she was a "mother" was dismissed. She wanted to be named mother in addition to, and not in substitution for, the biological mother, in order to recognise and solidify her relationship with the child. She relied on the precedent of a child having two mothers in the case of a same sex adoption.²⁴⁷ Justice Benotto suggested that the court may not have jurisdiction to find two women to be mothers, noting that the drafters of section 4 of the *Children's Law Reform Act*²⁴⁸ did not think that more than one person could be the mother of a child. Furthermore, even if such a declaration were possible, the court would have to find, on a balance of probabilities, that the "relationship of mother and child has been established."²⁴⁹ In this case, the judge found that, while the relationship was close, the child did not consider her his mother. Justice Benotto concluded "even if I had the jurisdiction to declare that a child could have two mothers under section 4, I would not, on the facts of this case, exercise my discretion to do so."²⁵⁰ While the judge would not grant Buist the status of "mother," he did find that Buist was responsible for providing child support for the child. This is similar to the earlier case of *Monk v. Sjoberg*,²⁵¹ discussed in relation to

²⁴⁶ *Ibid.*

²⁴⁷ See *Re. K.* (1995), 15 R.F.L. (4th) 129 (Ont. C.J. (Prov.Div.)) for more information on this adoption case.

²⁴⁸ Which reads: "Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child."

²⁴⁹ *Supra* note 245 at para. 35 (QL).

²⁵⁰ *Ibid.*

²⁵¹ *Supra* note 223.

"Lesbian Relationships As Unstable," in which Sjoberg, the ex-lesbian partner of Monk, was ordered to pay child support to Monk for the two children that they had been raising.²⁵²

In *Anderson v. Luoma*²⁵³ the biological lesbian mother, Anderson, was seeking support from the children's non-biological mother, Luoma.²⁵⁴ Luoma argued that the *Family Relations Act* makes no provisions where the litigants are of the same gender; therefore, the court needed to resolve whether the *Family Relations Act*, C. 121, R.S.B.C. 1979, could be applied where the parties are persons of the same gender. Justice Odhm, relying on a ruling handed down by Justice Wallace in 1984, found that the *Family Relations Act* provides no relief for the plaintiff or her children. Justice Wallace, in October of 1984 concluded:

The *Family Relations Act* does not purport to affect the legal responsibilities which homosexuals may have to each other or to children born to one of them as a result of artificial insemination. The Act's application is, in general, directed to the spousal and parental relations of men and women in their role as husband, wife and parent.²⁵⁵

Justice Odhm found that the phrase "living together as man and wife," as used in paragraph (A)II), can only mean what it says; namely, a man and woman living together and not married. Justice Odhm further stated that "two persons of the same gender living

²⁵² Note section "Lesbian Relationships As Unstable" of this chapter to see how the judge found the relationship between Sjoberg and Monk to be stable, thereby ordering Sjoberg to pay child support.

²⁵³ *Supra* note 187.

²⁵⁴ Earlier in this chapter I demonstrated how the judge found the 10 year relationship between Anderson and Luoma to be unstable.

²⁵⁵ *Supra* note 187 at 188.

together misses the mark by 50 per cent...[and] the defendant in my view can never be a "parent" ...to the children."²⁵⁶ The Justice further stated that:

[i]t is doubtful it can be said of the plaintiff's and defendant's relationship of ten years that they were "just playing house". The duration of the relationship and the births of the children would go a long way to weaken that conclusion. On the other hand I very much doubt that the relationship gives rise to contractual benefits and obligations for the parties.²⁵⁷

The court further considered that it could act if the person is neither a parent nor a guardian but is someone who has assumed a parent-like responsibility towards the child but that the standard for imposing such liability on a third party was very high. Justice Odhm stated that:

it seems to me the court only uses its jurisdiction as *parens patriae* when the child may suffer injury or when the child is at risk in some other fashion. The children here will not suffer injury if there is no award for maintenance nor are they at risk in any other way. The court would be very reluctant to invoke the jurisdiction and impose liability on a third party (a category the defendant is in regarding the children) whatever the circumstances.²⁵⁸

While Justice Odhm surmised that he/she had no doubt that the children were loved and cared for by both women and that they formed a "family-like unit,"²⁵⁹ the biological lesbian mother could not substantiate her claim and was not granted child support from Luoma.

The positive move that has taken place since *Anderson v. Luoma* is that the judges, in both Monk and Buist, recognized that the couple had intended to raise their child(ren) together and were both responsible for their welfare, thereby affirming that lesbian mothers can and do raise children together. So, there has been a change in regard to the

²⁵⁶ *Supra* note 187 at para 42 (QL).

²⁵⁷ *Ibid.* at para. 49 (QL).

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.* at para. 19 (QL).

ideology of motherhood and how the family law system deals with cases involving inter-lesbian disputes over the eleven-year period between 1986 and 1997.

The judges in *Monk* and *Buist* found that both non-biological "mothers" were responsible for child support while in Anderson, the non-biological mother was absolved of any responsibility for her ex-partner and their children. While there has been a slow move towards accepting inter-lesbian relationships as a place for forming "families" and raising children, the acceptance is limited to requiring support and allowing access; the courts have shied away from granting the inter-lesbian non-biological mother custody. In *Buist v. Greaves*, the non-biological mother's attempt to be legally recognized as the "mother" of her son in addition to Greaves was unsuccessful. It seems easier for the courts to impose a financial obligation on the non-biological lesbian mother but they remain reluctant to fully recognize non-biological lesbians as mothers.

Homophobia

Even though all of the cases discussed arguably exhibit homophobia, I decided to include homophobia as a separate sub-heading because there were a number of blatant examples of homophobia that could not be properly dealt with under the previous sub-headings. Such homophobic beliefs often surfaced in situations where the father's religious and cultural beliefs were such that he must be "master in his home"²⁶⁰ or where religious

²⁶⁰ *N. v. N.*, 1992; *N. v. N.*, 1994; and *Tomanek v. Tomanek*, 1993.

beliefs are homophobic and the mother is a lesbian.²⁶¹ In *Anger v. Anger*,²⁶² the father found the mother's lesbianism "repugnant and reprehensible on religious and moral grounds."²⁶³ In *Tomanek v. Tomanek*,²⁶⁴ the father believed in a traditional European home environment according to which "the father works and provides financial support and expects the wife to be in the home to be a traditional wife, mother and sexual partner... the father rules the home and is the authority figure."²⁶⁵ The father presented the mother as a lesbian in a context that demeaned the mother to the children. There was evidence presented that the father, during both authorized and unauthorized access visits, had spoken to the children in this manner and calculated to expand his control of the children at the expense of both the children and their mother. Problems had arisen in the marriage as the mother began exploring her options; she became less subservient and a mutual lack of trust developed within the relationship. While the mother did not identify as a lesbian or apparently engage in any lesbian behaviour, Mr. Tomanek began calling her a lesbian in order to humiliate her and control her actions because she did not fill his expectations of what a "proper" wife should be. Justice Noble recognized the negative behaviour of the father in stating that "[r]egretfully I have come to the conclusion that the father was a protagonist in this conduct and that the children in their relationship with

²⁶¹ *N. v. N.*, 1992; *N. v. N.*, 1994; and *Anger v. Anger*, 1998.

²⁶² *Supra* note 190.

²⁶³ *Ibid.* at para. 18 (QL).

²⁶⁴ *Supra* note 75.

²⁶⁵ *Ibid.* at para 33 (QL).

each of their parents has suffered as a result."²⁶⁶ The action was dismissed and custody was awarded to the mother with specified access to the father.

In *N. v. N.*²⁶⁷ the father was a devout member of the Salvation Army and held "traditional" attitudes towards women. While the results in this case were positive for the lesbian mother,²⁶⁸ the overall message was that the onus was on the mother to ensure that neither the father nor the children were upset by her lesbianism. In addition to this, she was expected to keep the sexual nature of her relationship with her partner as "discreet" as possible. This is a classic example of what Boyd describes as the dictates of the ideology of motherhood:

that children are best raised by a woman with a man in the house... albeit in modified form, and mothers who do receive custody are expected to continue fulfilling the role of the "good" mother by being "reasonable" and facilitating contact between children and fathers.²⁶⁹

This message also emerges in *Daller v. Daller*²⁷⁰ in which the judge ruled that it was the lesbian mother's responsibility to accommodate the father's access to their child and take responsibility for the costs of flying their child from Ottawa to Toronto on a bi-weekly basis. The father was not comfortable with the mother's lesbianism and was harassing the lesbian mother and her lover by telephone and through notes delivered by their son. The mother did not say anything negative about the father to their son and was

²⁶⁶ *Ibid.* at para. 25 (QL).

²⁶⁷ *Supra* note 193.

²⁶⁸ On appeal, *N.v.N.* 1994, the Court of Appeal found that the trial judge was not in error in awarding sole custody of the children to the mother.

²⁶⁹ Susan Boyd, *supra* note 28 at 510.

²⁷⁰ *Daller v. Daller* (1988), 18 R.F.L. (3rd) 53 (Ont. H.C.).

diligent in making sure the son visited the father on a regular schedule. Custody was awarded to the mother and the decision was upheld on appeal.

Another way in which homophobia arises is highlighted in the cases involving mothers who were accused of being a lesbian by their male ex-partner and were believed by the judge that they were not. Diana Majury has explored how lesbian oppression has functioned to reinforce and perpetuate strict notions of gender. Majury has stated that:

[l]esbian inequality is the warning to girls and women not to challenge the prescribed meaning of being female in this society. Those girls and women who do start to assert their autonomy and to challenge their sexual subordination and the centrality/necessity of men in women's lives are often quickly and powerfully reminded that it could get worse. They are called "lesbian" or "dyke", not because they do, or are even thought to, have sex with women but because the ostracism and increased inequality that the label "lesbian" represents are used to try to bring women back into gender line.²⁷¹

The case *J.E.B. v. R.G.B.*²⁷² is a good example of how the label "lesbian" works to control women in our society. In this case the father held the fact that the mother had been involved in a "brief lesbian relationship" against the mother. He used this information to get her to sign a separation agreement by threatening to publicly humiliate her by exposing her as a lesbian.²⁷³ The mother was ashamed and complied with her husband's demands. In order to put her life back in order the mother moved away from her ex-husband and her children and then brought her ex-husband to court for custody of the children. She was no longer in a relationship with a woman and dispelled her lesbianism by being embarrassed

²⁷¹ Diana Majury, *supra* note 113 at 312.

²⁷² *J.E.B. v. R.G.B.*, [1996] B.C.J. No. 2735 (B.C.S.C.) (QL).

²⁷³ *Ibid.* at para. 10 (QL).

and showing discomfort with the whole ordeal, the court granted joint custody with primary residence with the mother.

Conclusion

The mother's lesbianism has been the central concern in the majority of these cases, arising primarily through the various myths and assumptions that surfaced while the judges were considering the "child's best interests." The same myths and assumptions that plagued lesbian mothers in the first case law chapter were still apparent in more recent cases, at times in somewhat different forms (such as the apparently closeted lesbian mother who is outed in the custody dispute while still managing to stay closeted). One of the ways in which lawyers of lesbian mothers try to dispel lesbian myths and stereotypes is to enter into heterosexual assimilationist arguments. As we have seen from the two case law analysis chapters, the assimilationist strategy makes perfect sense for the mother whose primary concern is getting custody of her child(ren). The lesbian mother who best "fits" the dominant heterosexual, middle class, model of motherhood is more likely to win custody of her children than the lesbian mother who cannot or will not "fit" this construct.

In the following chapter, I will be making links between the themes of assimilation, individualism, pathology, heterosexism, and labelling and the case law analysis of the previous two chapters in order to more fully understand how lesbian mothers are marginalized by the dominant ideology of motherhood.

Chapter Five: Conclusion

"Institutionalized motherhood demands of women maternal "instinct" rather than intelligence, selflessness rather than self-realization, relation to others rather than the creation of self. Motherhood is "sacred" so long as its offspring are "legitimate" - that is, as long as the child bears the name of a father who legally controls the mother."²⁷⁴

The central questions I wished to address in this thesis were what does lesbian motherhood, in the ways it is constructed in and by law reveal about ideologies of motherhood? How has lesbian motherhood re-enforced and accommodated itself to the ideology of motherhood and what has been the impact on the ideology of motherhood of lesbian mothers' claims to custody of their children? The cases have highlighted that there is a reciprocal process occurring whereby the ideology of motherhood revealed within the case law is expanding to admit some lesbian mothers while lesbian mothers themselves are re-enforcing the dominant ideology in their attempts to "fit" and thereby retain custody of their children. The lesbian mothers who lost custody of their children were those who could not "fit" or would not reconfigure themselves to "fit" the dominant model of motherhood.

The marginal position of lesbian mother as "other" is capable of illuminating more than its own account of motherhood and holds the potential to shed light on that which is dominant. Some lesbian mothers are tolerated while others are stripped of their role as mother and lose custody of their children. It is the rationalizations that judges use in custody cases that serve as a tool to explore how the dominant ideology of motherhood works.

²⁷⁴ Adrienne Rich, *Of Women Born: Motherhood as Experience and Institution*. (10th Ed.) New York: W.W. Norton & Co., 1986 at 42.

In this conclusion, I will explore the ways in which the themes of pathology, assimilation, individualism, labels, and heterosexism play out in custody cases involving lesbian mothers and mothers labelled lesbian by their ex-partners. These were the themes identified by scholars as providing the mechanisms for the marginalization of mothers from a variety of oppressed groups. As the Ideology of Motherhood chapter explored, these themes play a significant role in sustaining the dominant ideology of motherhood. They each, in their own way, are used to control "deviant" or "marginalized" mothers in order to "protect" society and the future generation, thereby supporting and reaffirming those at the centre of the ideology. Through this analysis the dominant ideology of motherhood will become more clear, as will the intensified marginalization of the more "dangerous" lesbian mothers.

A new theme arose from the case law that I reviewed and I have decided to term it fatherly influence. This theme was not apparent in the literature review but it emerged as an important theme in the lesbian mother custody cases. As with the previously identified themes, I will discuss how fatherly influence works to contain lesbian mothers. Given the way it works in lesbian cases I suspect that this theme also plays a significant role in marginalizing mothers in other contexts.

Heterosexism

Heterosexism is one of a number of factors that marginalize First Nations mothers, single mothers, and mothers labelled mentally ill. However heterosexism is the foundation upon which the marginalization of lesbian mothers rests. Heterosexuality is an essential part of the patriarchal gender script. As Sylvia Law has stated:

[a] panoply of legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression. The presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity. Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.²⁷⁵

The base assumption that heterosexuality is the only natural expression of intimacy sets same-sex relationships as deviant, abnormal, perverse, and unnatural. Lesbians and lesbian relationships are pathologized because of this. Heterosexuality is seen as biologically inevitable and compulsory.²⁷⁶ While motherhood has been constructed ideologically as compulsory, it is compulsory only for those women who are considered "fit." According to Kline, "[t]he ideology of motherhood...speaks not only to gender roles and behaviour, but it also constructs some locations within social relations of race, class, sexuality, ability, and so on as more appropriate for motherhood than others."²⁷⁷ Those women who have been considered "unfit" are judged so on the basis of their social location. For lesbian mothers, procreation has been discouraged and devalued. Motherhood then is better understood as a privilege than as a right. It is a privilege that can be withheld ideologically and materially from women who are not dominant members of society. Those who presume to resist their marginalization by having children will be deemed "unfit" and lose custody of their children.

Shelley Gavigan remarked that the family:

²⁷⁵ Sylvia Law, "Homosexuality and the Social Meaning of Gender" *Wisconsin Law Review* (1988): 187, at 196.

²⁷⁶ See Adrienne Rich's "Compulsory Heterosexuality and Lesbian Existence" *Signs* 5 (1981): 158.

²⁷⁷ Marlee Kline, *supra* note 35 at 312.

[i]s presented both in law and in popular culture as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self evident. Its privacy is sought to be protected and its sanctity proclaimed. That it is the fittest place to raise children is again self evident as to not merit question and the hold of the family is strong despite the knowledge that large numbers of individuals live in households which bear no resemblance to the ideal family.²⁷⁸

The lesbian mother poses a major threat to traditional ideologies of both motherhood and the family. Familial ideology becomes integral to a discussion of lesbian mothers and motherhood ideology because of the ways in which lesbian mothers are seen as "bad" mothers precisely because of their rejection of the father and because they have formed and created intentionally fatherless families. Attempts to deprive lesbian mothers of custody must be considered in the context of an historical pattern of punishing political women who do not fit the "ideal" model by declaring them to be "unfit" mothers and taking their children away. From the perspective of familial ideology, "single" and lesbian mothers who avail themselves of assisted conception deny children their fathers, mothers who leave a marriage for a lesbian relationship and claim custody seek to deny children a (live in) father. All of these mothers are framed as selfish, anti-family, even by implication anti-mother, for actively denying the importance and centrality of fatherhood. The lesbian mother deviates most from the patriarchal standard and most emphatically and visibly rejects the father and so presents the greatest risk to male supremacy.

While heterosexual parents are encouraged to find new partners with whom to share custody, thereby promoting the traditional hetero-nuclear family form, lesbian mothers are encouraged to stay single in order to look, to her children and to her

²⁷⁸ Shelley Gavigan, *supra* note 29.

community, like a divorced single mother.²⁷⁹ This provides a heterosexist twist to Martha Fineman's thesis on single motherhood. According to Fineman, the perceived solution to the "problem" of single motherhood lies in the (re)establishment of the paternal presence. The lesbian mother, because of her lesbianism, cannot (re)establish a relationship with a man; she is better controlled and accepted when she appears as a less threatening form of motherhood - single - which makes her at least appear available to men.

I am torn whether I should claim that there has been some improvement within the family law system in tackling its inherent heterosexist bias. As the case law involving inter-lesbian disputes demonstrates, there has been a move toward acknowledging the relationship of the non-biological mother and her child(ren). While the non-biological lesbian mother in Canada has not been awarded custody of her child(ren), non-biological lesbian mothers, in later cases are likely to be found responsible for providing support²⁸⁰ and in one case the non-biological lesbian mother was granted access to her son.²⁸¹ While some recognition of the non-biological lesbian mother is now viewed as a possibility for family law judges, one court has been reluctant to grant the non-biological mother a declaration that she is a "mother" in addition to the biological mother, as was the case in *Buist v. Greaves*.²⁸² It can be argued that the reason lesbian mothers and non-biological mothers are beginning to be recognized by the family law system is because of the process of privatisation, which I discuss later in this chapter under the sub-heading of assimilation,

²⁷⁹ *Bernhardt v. Bernhardt*, 1979; *Bezaire v. Bezaire*, 1979; *Bezaire v. Bezaire*, 1980; *Elliott v. Elliott*, 1987; *K. v. K.*, 1976; and *N. v. N.*, 1992.

²⁸⁰ *Buist v. Greaves*, 1997; and *Monk v. Sjoberg*, 1996.

²⁸¹ *Buist v. Greaves*, 1997.

²⁸² *Supra* note 245.

and ultimately because of what Ruthann Robson coined the "domestication" of lesbian existence.²⁸³ The dominant ideology of motherhood is central to this "domestication." Lesbian mothers within the family law system attempt to conform to the dominant notion of what constitutes "motherhood." To the extent that lesbian mothers conform to the status quo model of motherhood, they are being "domesticated" by the legal category "Mother." Once they turn to the legal system to settle custody disputes, they are reinforcing the law and import the law into their lesbianism.²⁸⁴ While this may be a positive step for those lesbian mothers who can and want to "fit" within the dominant ideology of motherhood, it is a major, often insurmountable, impediment for those lesbian mothers who do not or cannot "fit," thereby confirming themselves as a "dangerous" marginal category of lesbian mothers.

Another way in which the theme of heterosexism arises within custody disputes involving lesbian mothers is in a sameness/difference model.²⁸⁵ The strategies of lesbian litigants have been to reinforce, rather than challenge, the construction of "homosexuals" as a species dissectible into what they are and what they do. This divide has been created and policed by judges, such that, lesbian mothers are only awarded custody of their children when they are "like" the dominant model. Therefore, the lesbian mother and her counsel must emphasise that there is a broad continuum of shared experience between heterosexuals and "homosexuals." These claims consist of appeals to sameness and denials

²⁸³ Ruthann Robson, *supra* note 67.

²⁸⁴ Ruthann Robson, *supra* note 71.

²⁸⁵ For more on the sameness/difference model see Mary Eaton's article "Lesbian, Gay and The Struggle for Equality Rights: Reversing the Progressive Hypothesis" *Dalhousie Law Journal* 17 (1994): 130-186.

of difference between the two groups. This process forces the lesbian mother to try to look like the dominant ideological motherhood type and hide or control any "differences." The lesbian mother must closet herself to a certain extent but not be too closeted so that her actions are seen as being deceitful in order to win custody of her children. It is a system that does not recognize the injury that "closeting" or "passing" holds for those who do not "fit" the dominant ideology of motherhood, which ultimately harms, not only the mothers but their children because they do not know who their mother truly is.

Labels

Some labels almost automatically place the mother outside the ideology of motherhood due to assumptions about fitness to mother to which the label gives rise. Such is the case when the mother is a lesbian or is labelled as being a lesbian by her male ex-partner; it is also the case when mothers are labelled mentally ill, First Nations or single. These women are assumed to be unable to mother or at least not to be "good" mothers. In order for such mothers to be found "fit" against the assumptions that attach to their labels, the mother must prove herself worthy in relation to the dominant ideology of motherhood. Like all other labelled mothers, it is the label lesbian that qualifies and marginalizes the lesbian mother.

Because a mother is deemed or identifies as lesbian, a number of myths, assumptions and stereotypes emerge concerning these mothers. In the case law analysis these myths, assumptions and stereotypes emerged under the numerous sub headings that I used to explore the case law: the presumption of unfitness, the sexual lesbian, lesbian "lifestyle", the indiscreet lesbian, lesbian relationships as unstable, conditions,

homosexuality is not a bar to custody...but, mother-blaming, heterosexism, and homophobia. These myths, assumptions and stereotypes are the main hurdles faced by lesbian mothers within the family court system. They must overcome the inherent "common sense" assumptions that judges, lawyers, counsellors, and society have concerning the mother's lesbianism.

As I noted in both chapter three and four of this thesis, there are an ever increasing number of "expert" witnesses and testimony available to lawyers representing lesbian mothers to challenge myths and stereotypes in relation to their client. Because of this evidence, judges can no longer simply rely on "common sense" assumptions in custody proceedings and are forced to find new more subtle ways to deny the lesbian mother custody of her child(ren). In this process, some lesbian mothers, that is those who are able to "prove" they are "good" lesbian mothers, are accepted as mothers and are awarded custody of their children. Such was the case in *N. v. N.*²⁸⁶ where the lesbian mother had to bring in a witness to testify that there was no "overt sexual relationship" between the mother and her partner and that the couple was not notorious to the community and was only out to certain individuals. The judge granted custody to the lesbian mother. Ms. N. was willing to contain her lesbianism in order to protect her children. It is through the language of best interest of the child rather than presumptions of unfitness that judges now assess and judge the lesbian mother.

Lesbians challenge the dominant ideology of gender and motherhood in our society and are therefore punished for their behavior.²⁸⁷ In the case law, lesbian mothers are often

²⁸⁶ *Supra* note 193.

²⁸⁷ Diana Majury, *supra* note 113 at 311.

described as "militant," a quality that is inherently antisocial, unwomanly and dangerously un-motherly. As Millbank has stated "[i]t is possible that the often-used epithet 'militant' in the case law referred to a fear that lesbians hate men and would try to turn their children against men."²⁸⁸ In the earlier cases, if the father or the court portrayed the lesbian mother as "militant," the lesbian mother was likely to lose custody of her children. Such was the case in *Case v. Case*²⁸⁹ where the court found the lesbian mother to be militant in that she was the head of her local lesbian and gay organization and socialised with other lesbian and gay individuals. It was also the case in *Monette c. Sylvestre*²⁹⁰ and *Droit De La Famille - 31*,²⁹¹ where the judge believed that the children of the lesbian mother would grow up to emulate their mother's sexual orientation. However, in more recent cases, the mother's "militant" nature is not the focus of the judges' attention so much as the effects that her lesbianism would have on her children. Judges tend to be more subtle in the ways in which they consider the mother's lesbianism. Instead of directly scrutinising the lesbian mother's "lifestyle" and invoking the presumption that a lesbian mother is unfit simply because she is a lesbian, judges have moved their focus to the less overtly biased "best interests of the child" test. However, there still exists a divide between the "good" and the "bad" lesbian mother. Those who are "discreet" and "stable" are more likely to gain custody over those who are "out" and do not adhere to the hetero-nuclear white middle class ideal of motherhood. While the mother who wins custody is considered selfish in

²⁸⁸ Jenni Millbank, *supra* note 94 at 285.

²⁸⁹ *Supra* note 87.

²⁹⁰ *Supra* note 96.

²⁹¹ *Supra* note 96.

being a lesbian, because she is capable of masking her lesbianism, she is rewarded for making sacrifices in the best interests of her children.

Fathers, as well as judges, have changed their approach to lesbian mothers. There has been a shift in how some fathers have used the label to gain control over their female ex-partner. The term lesbian is a tool used by others to push a woman back into the "boundary of her sex role." It was invented "by the man to throw at any woman who dares to be his equal, who dares to challenge his prerogatives, who dares to assert the primacy of her own needs,"²⁹² in this context, who dares challenge him for custody of her child(ren). In earlier case law, judges would often place conditions on the lesbian mother limiting her sexuality and controlling her behavior.²⁹³ However, there has been a shift within the case law and judges no longer utilise conditions as a way to limit the mother's sexuality. However, some fathers have begun attempting to use the label lesbian as an agent of control in custody disputes. This tactic has been used not only to influence judges but also to control the mother's behavior and to turn the children against her. Such was the case in *Tomanek v. Tomanek*,²⁹⁴ *J.E.B. v. R.G.B.*,²⁹⁵ and *Korniakov v. Korniakov*,²⁹⁶ where the judge rejected the fathers claims and believed the mother that she was not a lesbian. However, these accusations also surfaced in *Ewankin v. Ewankin*²⁹⁷ and *Seselja v.*

²⁹² Radicalesbians, *supra* note 73 at 18.

²⁹³ *Bezaire v. Bezaire* 1979, *Bezaire v. Bezaire* 1980, *Elliott v. Elliott* 1984, *Elliott v. Elliott* 1987.

²⁹⁴ *Supra* note 75.

²⁹⁵ *Supra* note 272.

²⁹⁶ *Supra* note 76.

²⁹⁷ *Supra* note 105.

Seselja,²⁹⁸ where the father accused the mother of being a lesbian and was believed by the judge. In these cases the mother lost custody of her children because of the alleged confusion that she was causing to her husband and children and because she was viewed as a "stranger to the truth."

What is apparent from the case law is that labels are used as an agent of control. The label highlights the ways in which the mother deviates or is marginalized by the dominant ideology of motherhood and invokes a number of images regarding lesbians. There are a number of fears and beliefs regarding lesbians as mothers that surface within the family law system. These fears were not specific to the mother actually before the court, but existed on a larger cultural scale because all of the lesbian mothers appeared to face the same barriers in custody cases. The case law says more about the fears and misconceptions regarding lesbians than about the mothers themselves. The label lesbian is a major hurdle for a lesbian mother seeking custody of her children. In trying to soften the meaning of that label, many lesbian mothers are put in the position of denying themselves their lesbian identity.

Pathology

There is an assumption that there must be something wrong with lesbianism because it is a sexual and emotional orientation that does not include men. As Carol Smart has stated:

[s]exuality is comprehended as the pleasure of the Phallus, and by extension the pleasures of penetration and intercourse - for men. Although this does not disallow the possibility of [male] homosexuality it undeniably renders lesbianism

²⁹⁸ *Supra* note 209.

incomprehensible and pathological. Female pleasure is assumed to coincide with the male definition or to be beyond understanding.²⁹⁹

Once the lesbian mother is viewed as sexual, it is easy for judges to deem the lesbian mother to be pathological and to deny her custody of her children on this basis. Lesbian mothers threaten the gender order, premised on the presumed indispensability of the father. As the cases disclose, mothers who leave an apparently normal heterosexual relationship to pursue a lesbian relationship are seen as "unstable." Once the lesbian relationship is seen in this way, as causing or even symbolising destabilisation, it is very easy to presume it must therefore be unstable or dysfunctional in itself. Judges have often referred to the mother's or her partner's lesbian sexual histories as evidence that their relationship is not a stable one.³⁰⁰ Even in the absence of an active lesbian sexual history, judges will assume instability. In the case of a "virgin" lesbian mother, in *S. v. S.*,³⁰¹ who had only recently come "out" and did not have a past history of lesbian relationships, the judge expressed concern that a future relationship would not be stable. The courts tend to focus on the lesbian mother's and her partner's past sexual histories in order to prove that their relationship is unstable. The judge can rationalise accepting this as evidence because there is an assumption that lesbians are promiscuous and that their relationships are then unstable. It is the pathological nature of the lesbian relationship. She is pathologised because she has sexual relations with other women, and not men, and because she is thereby seen to be promiscuous. It has been difficult for lesbian mothers to prove that their

²⁹⁹ Carol Smart. *Feminism and the Power of Law*. London: Routledge. 1989. at 28.

³⁰⁰ See "Lesbian Relationships As Unstable" in Chapters Three and Four.

³⁰¹ *Supra* note 212.

relationship with their partner is stable and long lasting because they are not permitted to marry,³⁰² which, despite relatively high divorce rates, is a key indicator of stability and commitment for heterosexual couples. However, some lesbian mothers in more recent cases, have been able to prove that their relationships are "stable" and long lasting. In the most recent custody case, *Bubis v. Jones*³⁰³ the judge found that the lesbian relationship was "stable" and that the two were committed to each other and their children. The lesbian mother and her partner had been together since the original custody order, at which time the judge has assumed that their relationship would be unstable and the lesbian mother lost custody. It would seem that lesbian mothers can refute the assumption that their relationships are unstable but only when they can prove that their relationship has lasted a number of years.

Another way in which lesbian mothers are pathologized is through the courts' perception of lesbian mothers as "selfish." She is selfish because she left an apparently normal heterosexual relationship to pursue a lesbian relationship, thereby placing her needs above those of her children, which is an un-motherly characteristic.³⁰⁴ In *Buist v. Greaves*, the non-biological mother was deemed selfish and self centred by the judge because of her pursuit of custody of her son after she was the one to leave the relationship. This case not only provides us with an example of how some lesbian mothers are deemed selfish for leaving a "stable" relationship but it is also an example of how judges tend to blame lesbian

³⁰² Susan Boyd, *supra* note 28 at 504.

³⁰³ *Supra* note 205.

³⁰⁴ *Case v. Case*, 1974; *Elliott v. Elliott*, 1987; *S. v. S.*, 1992; and *Buist v. Greaves*, 1997 (where the non-biological mother was deemed selfish for leaving the biological mother and their son and for pursuing the custody case).

mothers in case law. Because the mother is assumed to be responsible for the breakdown of the relationship, she is seen as selfish; because she is seen to be indulging in sensual delights, she is seen as neglectful of her children. Because the mother's actions are viewed as originating in selfish motives, her choices are instantly suspect and she is seen as incapable of determining the best interests of her child.

Assimilation

Like "other" marginalized mothers, lesbian mothers are urged to amend their "lifestyles" in order to approximate the "status quo" model of motherhood. Those lesbian mothers who cannot or do not want to change or hide their "lifestyles" from the judges or their neighbours risk losing custody of their children, often to fathers who better approximate the hetero-nuclear family form. Lesbian mothers are pressured to assimilate at a high cost. In the early cases, they were expected to abandon partners and become celibate; in the more recent cases they are expected to hide or downplay their lesbianism by being "discreet" and non-threatening.

The lesbian mothers who are tolerated are those who are least visible as lesbians, such as the lesbian mother who is "out" but "discreet," to the extent that her children and the community at large do not see her as a lesbian. Apart from the status of being a lesbian, a lesbian's level of "discretion," her level of "militancy," her degree of commitment to lesbianism, and her attitudes about her children's sexuality have all operated as factors that can serve to deny or grant her custody.³⁰⁵ Discretion has taken on the form of a

³⁰⁵ Mary Eaton, *supra* note 89 at 118.

lesbian relationship not being "flaunted" to the children or to the community at large³⁰⁶ and not engaging in sexual contact in front of the child(ren).³⁰⁷

When a divorced lesbian mother safeguards the custody of her children by not engaging in observable lesbian behaviour, she is in some ways manifesting the discomfort which society expects her to feel about her lesbianism. This is key to the process of assimilation. If the family law system can make a lesbian mother feel badly about her new found identity and force her to comply with the dominant ideology of motherhood, the family law system can not only safeguard the "proper" upbringing of her child(ren) but it can also make it look like she is but a "single" mother raising her child(ren). In so doing the lesbian mother masks the subversiveness of her sexual orientation and her "choice" of living without a man in her house. As Lynne Pearlman explains, "[h]eteropatriarchal dominance flourishes with lesbian erasure."³⁰⁸ It is because of this that the most "conspicuous" lesbians suffer the most severe sanctions of lesbian oppression. This is what Pearlman terms the "continuum of outness." At one end of this continuum, there are those lesbians who make it known that they are lesbians but that they are no different from other women. They define their aspirations and values as being no different from heterosexual aspirations and values.³⁰⁹ On the other end of the continuum are those lesbians "who not only make it known that they are lesbians, but... also... reject stereotypically feminine

³⁰⁶ *K. v. K.*, 1976 and *Barkley v. Barkley.*, 1980.

³⁰⁷ *Barkley v. Barkley*, 1980 and *Elliott v. Elliott*, 1987.

³⁰⁸ Lynne Pearlman. "Theorizing Lesbian Oppression and the Politics of Outness in the Case of *Waterman v. National Life Assurance*: A Beginning in Lesbian Human Rights/Equality Jurisprudence," *Canadian Journal of Women and the Law* 7 (1994): 454 at 461.

³⁰⁹ *Ibid.* at 463.

behaviours, priorities, appearances, and values (particularly the focus on men), and speak out about why they do so."³¹⁰ This continuum helps to explain why some lesbians are tolerated while others are targeted and harassed. For lesbian mothers this means that those who most comply with the heterosexual norm are rewarded with the custody of their children while those who explicitly reject or challenge the heterosexual norm are punished by the denial of custody.

The "continuum of outness" is a useful tool in understanding how "out" lesbians are treated within the family law system and society at large. However, there is a new problem arising for "lesbian" mothers who enter into the family court system and are not out as lesbians. Being closeted may produce behaviour that is viewed as dishonest and evasive, giving rise to credibility issues in a custody case. Such was the case in two cases, *Seselja v. Seselja*,³¹¹ and *Ewankew v. Ewankew*,³¹² in which the mother was in a questionable relationship with another women. In both cases, the mother did not self identify as lesbian. What was described as the "confusion" that allegedly arose for the fathers and the children provided the justification for the judge to grant custody of the children to their fathers. These women were being punished either because they were not comfortable with their sexual orientation or because the judges did not believe that they were not lesbians. As Cynthia Peterson has suggested, closeted lesbians experience unique forms of lesbian oppression. Peterson not only refers to the fear, self-hatred, and isolation but also to the anti-lesbian sentiment to which closeted lesbians are exposed because they

³¹⁰ *Ibid.*

³¹¹ *Supra* note 209.

³¹² *Supra* note 105.

pass as heterosexuals and are therefore assumed to hold a heterosexist perspective.³¹³ Not only does the dominant ideology of motherhood threaten "out" lesbian mothers it also threatens those mothers who are not out to themselves, to their family, to their community, or those who seek to deny their lesbianism, possibly in the hope of thus gaining custody of their children.³¹⁴ The lesbian mother entering into the family law system must safeguard that she is "out" but not actively out, that is not involved with lesbian and gay politics, organisations, or culture.

Conditions were utilized in earlier cases, between 1979 and 1987, as a tool against the lesbian mother in order to minimize the negative effects that her "lifestyle" and sexual orientation could have on her children. Only once the negative elements of her sexual orientation were purged from her life was she able to gain custody of her children. The court used its power to limit the mother's access to the queer community, lesbian and queer political organizations and politics, and bar the mother's partner or her female friends from her home while the children were present.

However, conditions, as a judicial tool, were not used in the more recent cases under analysis. This could be because lesbian and gay advocates have had some success in raising awareness surrounding lesbian and gay issues and because there is an ever increasing body of evidence that is used to dispel the more blatant myths and stereotypes surrounding lesbian mothering. Within a larger context, there may also be a growing

³¹³ Cynthia Peterson. "Envisioning a Lesbian Equality Jurisprudence." *Legal Inversions: Lesbians, Gay Men and the Politics of Law*. Eds. Didi Herman and Carol Stychin. Philadelphia: Temple University Press. 1995 at 130.

³¹⁴ See *J.E.B. v. R.G.B.*, *supra* note 272, where the mother who had been involved in a brief lesbian relationship portrayed herself as being uncomfortable with her brief lesbian encounter and was granted custody of her children.

acceptance of lesbian and gay relationships. Recently there has been the acknowledgment of a lesbian relationship in the Supreme Court of Canada case *M. v. H.*³¹⁵ and the passing of the *Modernization of Benefits and Obligations Act*³¹⁶ where the federal government affirmed the common-law responsibilities of same sex partners. The legal position of lesbian mothers has improved since the first custody cases back in 1974 and lesbian mothers are gaining acceptance in schools and communities across Canada.³¹⁷ The ideology of motherhood has shifted slightly to incorporate those lesbian mothers who most closely conform to the dominant ideal of motherhood. However, the gains are small and fragile; there is no certainty that her lesbianism will not be used against a lesbian mother to deny her custody of her child(ren).

Another way in which the theme of assimilation works against the lesbian mother is through privatization. Privatization is a major theme in family law generally and plays out both within inter-lesbian custody disputes and custody proceedings between the lesbian mother and her male ex-partner. Boyd gave us an insight into this mechanism when she stated:

[s]tate policy premises itself on the notion that costs related to reproduction should be borne as much as possible within the private sphere. If the fathers are happy, then maybe they'll pay. If mothers are supermoms, let them operate on their own (they'll be able to afford it). Judges do not articulate these assumptions, but they are influenced by the dominant ideology of heterosexual motherhood, which in turn fits nicely within the overall state policy of privatizing the costs of reproduction.³¹⁸

³¹⁵ *M. v. H.*, (1999) 2 S.C.R. 3.

³¹⁶ *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

³¹⁷ Katherine Arnup, *supra* note 101.

³¹⁸ Susan Boyd, *supra* note 28 at 512.

According to this theory, the role of the family is to ensure that the state is not responsible for supporting single mothers and their children. From this perspective, it is beneficial to incorporate lesbian mothers under the rubric of family when the state is at risk of providing support. The trade off for support is expected from lesbian mothers as it is from heterosexual mothers. Boyd suggests that it is the mother's responsibility to keep her male ex-partner happy so that she receives support for herself and her children. In a few cases, we saw the lesbian mother win custody because she was willing to provide the father with ample access to their child(ren).³¹⁹

In the few support and custody cases that have arisen between inter-lesbian relationships, we can see how the notion of privatization emerges. In *Monk v. Sjoberg*,³²⁰ Sjoberg was required to pay support for both the children and Monk. The judge found that they were a "family like unit". But perhaps the most decisive factor, as indicated by Boyd's analysis, is that Monk was otherwise reliant on welfare for support. In *Buist v. Greaves*,³²¹ Buist was denied her argument to be considered a mother under section 4 of the *Children's Law Reform Act*,³²² was denied joint custody of their son, but she was granted access and was required to pay support. While the non-biological or "other" mother was denied the benefit of the legal acknowledgment of her relationship with her child, she was obliged to act as a legally sanctioned parent, that is to pay support. Despite its limitations, this could be seen as a positive development for the "other" mother. In an early case

³¹⁹ *Daller v. Daller* 1988, 1989.

³²⁰ *Supra* note 223.

³²¹ *Supra* note 245.

³²² *Supra* note 248.

involving an inter-lesbian relationship, *Anderson v. Luoma*,³²³ the court did not recognize the couple's 10 year relationship, referring to Luoma as a "third party" who was not obliged to pay child or "spousal" support. There is an increasing move towards the recognition of relationships between lesbian and gay couples, at least for some purposes. But as Boyd points out, we should be skeptical of the reasons behind such recognition:

[i]f my argument about privatisation and the role of the family is at all accurate, then the incorporation of lesbians and gay men within family law may be as much about the domestication of deviant sexualities within a safe, useful and recognisable framework than about the transformatory confounding of normative sexualities.³²⁴

The move to assimilate some lesbian and gay relationships within the boundaries of "family" enables the law to more fully control them and further "domesticate"³²⁵ them into the "status quo" model. Privatisation then may allow more lesbian mothers to gain custody of or at least access to their children while, at the same time, more firmly entrenching other lesbian mothers on the margins. It is, as Ruthann Robson theorised, the label "Mother" as a legal category that is used to control lesbians and interfere with lesbian existence,³²⁶ especially when children are involved. When lesbians turn to the family law system, or any other governmental agency, to settle disputes they are reinforcing the powers of the dominant ideology to control the actions of those on the margins, thereby legitimating the family law system to control the lives of lesbian mothers and define the conditions under which lesbian mothers gain custody of their children. In so doing lesbian

³²³ *Supra* note 187.

³²⁴ Susan Boyd. "Family. Law and Sexuality: Feminist Engagements" *Social and Legal Studies* 8 (1999) at 378.

³²⁵ *Supra.* note 67.

³²⁶ *Ibid.*

mothers are re-enforcing the notion that the cost related to reproduction should be born within the private sphere.

Fatherly Influence

In a significant number of cases under analysis, the fathers were not subjected to even the most routine inquiry. In the cases reviewed, the father's "lifestyle" was most notable because of its absence. Questions regarding the father's parenting skills were often left unanswered or even unasked; his new partner seldom testified. The father's (re)establishment of a hetero-nuclear "family" unit, much like the father himself, was subject to little or no scrutiny by the courts. It was as if the hetero-nuclear combination of father, new wife, and child(ren) was unquestionably stable and unproblematic from the outset. In contrast, a new relationship was regarded as a negative factor for a lesbian mother. In early cases the lesbian mother having a relationship was effectively prohibited. More recently, however, if she has a relationship it will be viewed with skepticism. The lesbian mother has to wait to prove that her relationship is stable and long term and that it is discreet in order to offset its perceived negative effects.

The father, in re-partnering, was often characterized as attempting to "rebuild" the family unit, thereby displaying the traits of stability and altruism; the lesbian mother who partners is branded as selfish, seen to be acting on "impulse" and putting her needs ahead of her children and their father. The most frequently used word to characterize the father's new relationship or home (even though unsupported by evidence) was "stable."³²⁷ The

³²⁷ *Adams v. Woodbury*, 1986; *Elliott v. Elliott*, 1987; *Droit De La Famille* - 31, 1983; *Bernhardt v. Bernhardt*, 1979; and *Monette c. Sylvestre* 1981.

father stands a substantial chance of winning custody of his children when he can provide a replacement female caregiver. The fathers, in cases involving lesbian mothers, are viewed as "stable" in as much as they provide safe harbor from the hetero-destabilization posed by the lesbian mother. It is the degree that the lesbian mother inspires fear that is pivotal.

In matters pertaining to paternal fitness, judges tended to gloss over the lesbian mother's allegations of the father's alcoholism, physical and/or threatened violence against the mother, and sexual abuse of the children. Fathers accused of such behaviour often win when contesting against a lesbian mother.³²⁸ Frequently judges noted such allegations but refused to detail their substance. In *Bezaire v. Bezaire* the judge noted but did not go into allegations of sexual abuse of the children,³²⁹ in *Daller v. Daller* there were allegations of threats and harassment of the mother and her lover by the father; in *N. v. N.* there were allegations of physical violence towards the mother;³³⁰ in *Case v. Case* there were accusations of violence against the mother and that the father had kidnapped the child,³³¹ and in *K. v. K.* there was violence against the mother.³³² Not only are these serious allegations generally ignored, in one case they were actually turned against the mother. In

³²⁸ *Case v. Case*, 1974; *Bernhardt v. Bernhardt*, 1979; *Bezaire v. Bezaire* 1980; and *Korniakov v. Korniakov* 1997.

³²⁹ *Supra* note 91 at 360.

³³⁰ *Supra* note 193 at 15.

³³¹ *Supra* note 87 at 134.

³³² *Supra* note 102 at 59.

*Case v. Case*³³³ the allegations of the father's abusiveness were held against the mother as evidence of her tendency to exaggerate. Justice MacPherson dismissed the mother's allegations of the father's tendencies towards physical violence as no documentation could be found, in doctors' reports or in police records, to substantiate her claims. The judge determined that the mother exaggerated the allegations of bad conduct on the part of the father, finding that the father was not abusive but only "soundly spanked the son,"³³⁴ and that the mother was just "slightly hurt" when the father "pushed the mother around."³³⁵ This is an extreme example of how a judge can ignore claims of abuse and grant custody to the father.

If not turned against the mother, the father's abuse was often condoned as understandable by the judge. The range of hostile behaviour that was not generally considered to impact upon paternal fitness was often considered by judges to reflect the father's understandable unhappiness with his ex-partner's change in sexual orientation. Such hostile behaviour included the ex-husband's attempts to sabotage the mother's relationship with her children by verbally abusing the mother and her lover,³³⁶ abusing the mother verbally in an attempt to turn the child(ren) against the mother,³³⁷ and kidnapping the child(ren) from the lesbian mother prior to initiating a custody action.³³⁸ When serious

³³³ *Supra* note 87.

³³⁴ *Ibid* at 137.

³³⁵ *Ibid* at 137.

³³⁶ *Daller v. Daller*, 1988 and *Anger v. Anger* 1998.

³³⁷ *N. v. N.*, 1992 and *Seselja v. Seselja* 1994.

³³⁸ *Case v. Case* 1974.

allegations against the father are accepted, they are then weighed against the mother's lesbianism. For example in *K. v. K.*,³³⁹ the negative effects of the father's drug use counter balanced the negative effects of the mother's lesbianism and she was granted custody.

Even though the allegations against the father in *Korniakov v. Korniakov*,³⁴⁰ were more serious than in *K. v. K.*, the judge awarded custody to the father. In this case, the mother alleged that the father routinely abused her physically, verbally and emotionally and that this was what drove her out of the home.³⁴¹ The judge found that the father was not setting a "good example" for his children; however, custody was awarded to the father because the mother did not have a clear plan for the upbringing of her children.

Much like the fatherly influence in the earlier cases, fathers in more recent cases do not face the levels of scrutiny that lesbian mothers do. The lesbian mother is always the one under scrutiny, not the father. However, whereas in the earlier cases, a lesbian relationship was always negative, more recently if the lesbian mother can prove that her relationship is "stable" and "discreet," something that necessarily takes time to prove, she might succeed against a father who has not re-married or entered into a relationship. Fathers for the most part are favoured in custody cases when the mother is a lesbian unless the lesbian mother can prove that she can fill her role as "good" mother, that is place the best interests of her children before her lesbianism.

³³⁹ *Supra* note 102.

³⁴⁰ *Supra* note 76.

³⁴¹ *Ibid.* at para. 17 (QL).

Individualism

The family law system is unable to deal with identity as an active and group based concept. By this I mean to say that the family law system is based on an individualistic notion that largely ignores the compounding effects of race, class, ability, and sexuality on the individuals within each family law case. For all stigmatised groups, it is extremely important to recognize the discriminatory injury of neglecting the various social and historical factors that influence and make up that individual's "lifestyle." Lesbian mothers are often held responsible for their community's reaction to their sexual orientation and the effects that this would have on their children³⁴² and lesbian mothers are required to be "discreet" in order to protect their children from their lesbianism and their community.³⁴³ The individual focus on the "bad mother" is a source of difficulty for lesbian mothers in child custody cases as the family law system effectively blames lesbian mothers for the effects of social "morals" regarding lesbianism which are largely a consequence of a long history of patriarchy, homophobia and heterosexism. The system is based on the notion that a mother can be a lesbian but she must refrain from committing the acts associated with such an orientation, thereby forcing the lesbian mother to choose between her lesbian identity and her children. As so many judges have stated the mother's lesbianism is not per se a bar to custody *but...* what she does with her lesbianism and how it affects her child(ren) frequently bars her from custody.

³⁴² *Droit de la Famille* - 31, 1983 and *K. v. K.*, 1976.

³⁴³ *Bubis v. Jones*, 2000; *Elliott v. Elliott*, 1984; *K. v. K.*, 1976; *J. v. R.*, 1982; and *N. v. N.*, 1992.

Conclusion

If a woman does not fulfil her prescribed role as "woman" in society, severe sanctions will be imposed against her, up to and including the loss of custody of her children. This control is evident in the history of custody cases involving lesbian mothers. The first mechanism of control is the distinction made between "good" and "bad" lesbian mothers. "Good" lesbian mothers are those who conform most closely with the dominant ideals of motherhood and are seen as single mothers by their communities. These lesbian mothers are the ones who have the best chance of retaining custody of their children. "Bad" lesbian mothers are those who view their lesbianism as part of their challenge to the established order. They are threatening to the present social system because they refuse to abide by traditional sex role stereotypes and reject the hetero-nuclear family form. It is because these women are a threat to the fundamental components of patriarchal culture that they are not likely to gain custody of their children.

Assimilation, pathology, labels, individualism, heterosexism, and fatherly influence are social mechanisms that influence, and are used by, judges within the family law system to help them distinguish between "good" and "bad" mothers. However all marginalized mothers are labelled, are expected to try to assimilate, have been pathologized for failure to assimilate, have been isolated from their marginalized group and treated as deviant individuals, have been subjected to the domesticating force of heterosexism, and have been undermined by fatherly influence. In this thesis I have explored these themes in relation to lesbian mothers under the general concept of the ideology of motherhood. The ideology of motherhood has a strong impact on lesbian mothers within the family law system. It articulates that it is essential for lesbian mothers to try to conform to the dominant

ideology in order for them to have a chance at success in custody proceedings. Within this context lawyers are put in the position of having to construct their lesbian clients in ways that make their lives look as consistent as possible with the dominant "status quo" model of mother, thereby reinforcing the heterosexist and homophobic biases inherent within the family law system. As Nancy Polikoff notes "[t]he courtroom is no place in which to affirm our pride in our lesbian sexuality, or to advocate alternative child-rearing designed to produce strong, independent women."³⁴⁴

Lesbian mothers who enter into the family law system to deal with custody and access disputes face many hurdles and are, as Robson contends, "domesticated" by the family law system. The legal system punishes marginalized mothers for intentionally or unintentionally subverting the dominant ideologies of motherhood, patriarchy and family which are fundamental components of Canadian society. The lesbian mother who can best approximate the white, heterosexual, middle to upper class, ablest notion of motherhood and therefore, resembles the "centre" of the dominant ideology of motherhood is most likely to be granted custody of her children.

"Domestication" occurs because lesbian mothers are caught up in an ideology that rejects them and because they turn to or are forced into the family law system, which also rejects them, to deal with their disputes. In a system that punishes those who do not "fit" by loss of custody and forces lawyers to represent lesbian mothers as being "no different" from their heterosexual counterparts, lesbian mothers are "domesticated." While it is difficult for me to suggest alternatives to the family law system when custody disputes arise it is easy to see that it is a system that does not represent the needs of or identify with

³⁴⁴ Nancy Polikoff, *supra* note 63 at 907.

lesbian identity, however diverse that identity can be. When the lesbian mother enters into the family law system she is both reinforcing and substantiating the power of a legal system that is in effect perpetuating negative beliefs about lesbian motherhood.

Lesbian motherhood as constructed by law reveals an ideology of motherhood that is powerful. It is an ideology that is consuming to the point that it can utilise law as an agent of control, one that can "domesticate" lesbian mothers into the dominant ideology or abandon them on the margins. By simply utilizing labels, pathologizing the mother's actions, pressuring the mother to assimilate, by focussing solely on the individual, by deferring to father influence, and by relying on heterosexist biases, the ideology of motherhood works to grant or withhold custody to a lesbian. However, lesbian mothers engaging within the family law system have experienced a shift in the ideology of motherhood. Some lesbians mothers have been allowed to retain their role as mother and, while the non-biological lesbian mother has not yet been legally recognised as a mother, a relationship between her and her child has been recognized. As the ideology of motherhood has been forced to open up some space for lesbian mothers, society has moved to show some tolerance of inter-lesbian relationships and lesbian mothering more generally, and in turn family law has had to incorporate and reflect this same movement and limited tolerance.

So where is the appropriate place to affirm pride in our lesbianism and advocate alternative child-rearing? At this point I find myself wondering if it is possible to break down the barriers between the "good" and the "bad" lesbian motherhood and save the lesbian mother from denying her lesbianism, her political beliefs, her lesbian and gay friends and community while still holding a chance of winning or retaining custody of her

child(ren). How can lesbian mothers do this? Is it by rejecting the label mother, or by challenging the dominant construct of mother and pushing the boundaries of the dominant ideology of motherhood? Can these two apparently contradictory strategies be engaged in simultaneously and what would that look like? How are other groups of marginalized mothers engaging in these debates and strategizing for their and their children's survival? Whether to reject law or participate in law is a dilemma faced by all of us who are fighting for social change. While I have gained greater insight into the problems faced by lesbian mothers in this dilemma I agree with those who argue that we need to critique and reject law as we participate in it and challenge it from within.³⁴⁵

³⁴⁵ M. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method." *Women's Rights Law Reporter*, (1989).

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