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## The Best Interests of the Child and the Rights of the Parent: Damron v. Damron and the Future of Parenting and Child Custody in North Dakota

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THE BEST INTERESTS OF THE CHILD  
AND THE RIGHTS OF THE PARENT:  
*DAMRON V. DAMRON* AND THE FUTURE OF PARENTING  
AND CHILD CUSTODY IN NORTH DAKOTA

*In itself, homosexuality is as limiting as heterosexuality:  
the ideal should be to be capable of loving a woman or a man; either, a  
human being, without feeling fear, restraint, or obligation.*<sup>1</sup>

I. INTRODUCTION

Simone de Beauvoir's sentiments speak volumes about American culture; society is often preoccupied with comparing heterosexuality to homosexuality in many aspects of life.<sup>2</sup> This notion is especially true in the family sphere with regard to how courts view homosexual and same-sex couple parenting.<sup>3</sup> For many years, the topic of homosexual parents' rights in child custody has been heavily debated.<sup>4</sup> Discussions typically involve issues relating to moral character, nurturing style, and personal religious belief.<sup>5</sup> While courts have traditionally considered the parenting skills of homosexual individuals and the appropriateness of their child rearing environments to be potentially hazardous to children for various reasons, gay and lesbian parents have recently pressured courts to stray from these conclusions.<sup>6</sup>

For example, the North Dakota Supreme Court recently held in *Damron v. Damron*<sup>7</sup> that the averment that a custodial parent is homosexual is not a per se reason to modify child custody.<sup>8</sup> The environment in which

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1. Simone de Beauvoir—quotation, <http://www.quote花园.com/homosexuality.html>.

2. See Eileen P. Huff, *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 AM. U. J. GENDER SOC. POL'Y & L. 695, 696 (2001) (providing that a homosexual parent provides a living environment as suitable for children as a heterosexual parent, and that "courts should not find a distinction between homosexual and heterosexual parenting").

3. See *id.* (explaining that in following early custody modification rulings, courts believed that homosexuality alone was grounds for modification).

4. *Id.*

5. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 833 (1997) (arguing that homosexual or same-sex parenting will not result in the same positive upbringing of children as heterosexual parenting, and explaining why society generally reaches this conclusion).

6. Bruce D. Gill, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361, 362 (2001) (arguing that gay and lesbian parents may provide an environment equal to that of heterosexual parents).

7. 2003 ND 166, 670 N.W.2d 871.

8. *Damron*, ¶ 10, 670 N.W.2d at 875.

the child lives, as well as the best interests of the child, are the most important issues surrounding custody.<sup>9</sup> Homosexual parents have been encouraging courts, such as the North Dakota Supreme Court, to recognize the injustice of holding homosexual and heterosexual parents to a different standard with regard to child custody matters.<sup>10</sup> The North Dakota Supreme Court's ruling in *Damron* could prompt other jurisdictions to ignore the topic of homosexuality altogether, or to ask for more evidence than a parent's sexual orientation when considering whether a child's best interests will be served.<sup>11</sup> This more stringent approach would press those jurisdictions to truly address the best interests of the child, thereby preventing courts from considering how homosexuality will endanger a child.<sup>12</sup> Courts would therefore also justly afford more parents the constitutionally recognized right to have and raise a family.<sup>13</sup>

This note begins with a brief history of how courts have dealt with lesbian and gay parenting issues, followed by an overview of the legal standards applied in various jurisdictions to afford, or take away, rights from both children and homosexual parents.<sup>14</sup> Most importantly, Part II focuses on *Damron*, which is the most recent North Dakota case to reach the conclusion that evidence of homosexuality is not a per se justification to modify child custody.<sup>15</sup> Next, Part III discusses the evidence needed, as provided by the North Dakota Supreme Court in *Damron*, to modify a child custody ruling favoring a gay or lesbian parent in North Dakota.<sup>16</sup> This section also discusses the rights of parents and the best interests of the child, facets upon which judiciaries focus in child custody determinations.<sup>17</sup> Part III further addresses the implications that *Damron* may have on future

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9. *Id.* ¶ 3, 670 N.W.2d at 873.

10. Gill, *supra* note 6, at 362.

11. See generally Brief of Appellant at 4, *Damron v. Damron*, 2003 WL 23695772 (No. 20030135) (N.D. (2003)) (arguing that modification of child custody due to a parent's sexual orientation violates the Equal Protection Clause, and that many jurisdictions have held that a parent's homosexuality cannot be considered in modification of custody unless the child is directly harmed); Gill, *supra* note 6, at 362 (arguing that a court may deny custody to a homosexual parent as a "pretext for the court's own bias or political agenda regarding homosexuality").

12. See generally Huff, *supra* note 2, at 695 (stating that although courts generally look at the best interests of the child when determining custody and modification, homosexuality is frequently addressed and the courts incorrectly focus on this aspect of the case).

13. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right to bear and raise children is a fundamental right).

14. See discussion *infra* Part II (examining United States Supreme Court decisions, legal standards, and notions of the morality of homosexuality).

15. *Damron v. Damron*, 2003 ND 166, ¶ 10, 670 N.W.2d 871, 875.

16. See discussion *infra* Part III (explaining the *Damron* decision and the amount of evidence needed to modify a preliminary custody ruling based on homosexuality).

17. See discussion *infra* Part III.A (explaining the best interests of the child standard and the rights of the parent).

North Dakota child custody issues.<sup>18</sup> Then, Part IV acknowledges the prospect of the disappearance of the stigmatization of homosexual parents, as well as a review of the negative and plausibly unfounded conclusions that North Dakota courts and judiciaries nationwide have reached when confronted with homosexual parenting issues.<sup>19</sup> Finally, this note concludes with a suggestion for a more effective legal standard to determine child custody when homosexual parents or same-sex couples are involved, which would ensure that both children's and parents' rights are justly recognized.<sup>20</sup>

Until recently, courts placed great emphasis on homosexuality to prevent gay or lesbian parents from obtaining or maintaining custody of their children.<sup>21</sup> The reasons for denying custody to gay and lesbian parents arise from the proverbial "tradition" of denying rights to gay, lesbian, bisexual, and transgendered individuals, occurring at both federal and state levels.<sup>22</sup> In the future, however, North Dakota may have an impact in reversing those judicial tendencies in the child custody sphere, placing less emphasis on sexual orientation in child custody matters.<sup>23</sup> Over time, North Dakota may completely erase the stigmatization of gay and lesbian parents.<sup>24</sup> Courts would then emphasize only the most important factors in child custody matters, including the best interests of the child and the quality of parenting itself; but until that day surfaces, it must be determined why courts have historically denied parental rights and child custody to homosexual parents.<sup>25</sup>

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18. See discussion *infra* Part III.B.4 (exploring the *Damron* decision).

19. See discussion *infra* Part IV (describing *Damron* as a model for future North Dakota child custody cases).

20. See discussion *infra* Part V (discussing the use of a standard that goes beyond that used in *Damron* to determine whether to award child custody to a homosexual parent).

21. See Huff, *supra* note 2, at 699-701 (discussing the courts' evaluation of the custodial rights of gay or lesbian parents).

22. See discussion *infra* Parts II.A & II.B (providing examples of rights denied to homosexual individuals in various federal and state cases).

23. See generally Huff, *supra* note 2, at 696 (arguing that as homosexual parents continue to press courts to focus less on homosexuality and more on the quality of parenting itself, there will be less emphasis on sexual orientation). There is likely to be less emphasis on sexual orientation with an increased use of the middle ground and nexus standards, as well. *Id.*; see also discussion *infra* Part III.B (analyzing three approaches to child custody modification).

24. See discussion *infra* Part III.B.4 (discussing *Damron* and the argument that North Dakota uses a stringent approach, making it difficult for heterosexual parents to prove that homosexuality will endanger a child). If North Dakota courts continue to follow this approach and as case law changes, there may be little to no emphasis on homosexuality in the future. *Id.*

25. See Huff, *supra* note 2, at 696 (arguing that homosexuality should not be a focus in child custody cases, because it is unlikely that proof offering to distinguish between homosexual and heterosexual parenting would be viable); see also discussion *infra* Part II (reviewing federal and state cases that have denied rights and child custody to homosexual parents).

## II. A HISTORY OF—AND REASONS FOR—DENYING RIGHTS AND CUSTODY TO HOMOSEXUAL INDIVIDUALS AND PARENTS

The reasons that courts deny custody to lesbian and gay parents have been both numerous and diverse.<sup>26</sup> Some of the most oft-quoted reasons to deny a homosexual parent custody are: (1) the child will become homosexual; (2) the child will adopt socially unaccepted morals as he or she matures; (3) the child's peers will ostracize him or her; or (4) the child is more likely to be molested by a homosexual parent than a heterosexual parent.<sup>27</sup> These reasons for denying custody are viewed as unfounded by many individuals who advocate for the eradication of court-opined differences between homosexual and heterosexual parenting fitness.<sup>28</sup> Furthermore, any information that might be gleaned in support of these conclusions has been extremely limited in terms of social examination.<sup>29</sup> However, many state and federal courts have used these and several other "unfounded" reasons to deny custody to homosexual parents.<sup>30</sup> The courts that use these reasons to deny custody may base custody denials on homosexual rights-related United States Supreme Court precedent.<sup>31</sup> Discussions relating to societal morals and values are topics that are often entrenched in some of the Court's most influential decisions.<sup>32</sup>

### A. CONCERNS OF THE UNITED STATES SUPREME COURT

Historically, legislators and U.S. courts have generally avoided affording rights to gay and lesbian individuals.<sup>33</sup> Courts have often discussed the mores and values of American society, and are further concerned with how

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26. David M. Rosenblum, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1669-70 (1991).

27. Huff, *supra* note 2, at 701-02.

28. *Id.* at 702.

29. *See id.* (arguing that the reasons set forth by courts to deny custody to homosexual parents lack factual support).

30. *See* discussion *infra* Part II.A (examining the use of morality arguments in United States Supreme Court and state cases involving homosexual individuals).

31. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (denying readmission of a former Boy Scouts member to the organization via the New Jersey public accommodation statute because the private organization, although alleging that it followed a set of mores and standards disallowing homosexual members, did not fall under the New Jersey statute). *See also* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that a Texas statute criminalizing homosexual conduct was unconstitutional, while opining that society tends to view homosexuality as immoral).

32. *See, e.g., Lawrence*, 539 U.S. at 578 (stating that society views homosexuality as immoral); *Dale*, 530 U.S. at 661 (upholding the mores of the Boy Scouts organization to deny membership to a former member because of his sexuality).

33. *See, e.g., Dale*, 530 U.S. at 640 (stating that a private organization may deny membership if it deems homosexuality immoral).

various statutes or laws affording rights to homosexual individuals may negatively affect those values.<sup>34</sup> Recent Supreme Court decisions, discussed in the following sections, reflect these views.<sup>35</sup>

### 1. *Boy Scouts of America v. Dale*

In *Boy Scouts of America v. Dale*,<sup>36</sup> Dale challenged his expulsion from the Boy Scouts organization.<sup>37</sup> The organization discovered that Dale was homosexual, and to justify his expulsion, averred that “homosexual conduct is inconsistent with the values [that the Boy Scouts organization] seeks to instill.”<sup>38</sup> Although the New Jersey public accommodations statute forbade sexual discrimination based on sexual orientation, the United States Supreme Court held that the statute could not afford redress to the former member because Boy Scouts of America (Boy Scouts) was a *private* organization.<sup>39</sup> Chief Justice Rehnquist delivered the Court’s opinion and declared that whether the judiciary disagrees with the organization’s ideologies was not the issue before the Court; instead, the question was whether the State of New Jersey could require a private institution such as the Boy Scouts to readmit a member under the public accommodations statute.<sup>40</sup> Justice Rehnquist suggested that the New Jersey public accommodations statute be applied narrowly to find that the former Boy Scouts member was justly disbanded due to his sexual orientation.<sup>41</sup>

Leading the dissent in *Dale*, Justice Stevens accused the Court of applying the public accommodations statute too narrowly.<sup>42</sup> He stated that the New Jersey law had previously been applied to “*broadly* [protect] the opportunity of *all persons* to obtain the advantages and privileges ‘of any place of public accommodation.’”<sup>43</sup> Finally, Justice Stevens stated that the Supreme Court, regardless of whether the public accommodations facet would prohibit discrimination, had not in previous decisions hesitated to reject discriminatory policies applied by “private schools . . . and labor organizations.”<sup>44</sup> Justice Stevens’ dissent suggested that contrary to the

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34. *Id.*

35. *Id.*

36. 530 U.S. 640 (2000).

37. *Dale*, 530 U.S. at 644.

38. *Id.*

39. *Id.* at 644-45 (citing N.J. STAT. ANN. §§ 10:5-4 to 5-6 (West Supp. 2000)).

40. *Id.* at 661.

41. *Id.*

42. *Id.*

43. *Id.* at 663 (Stevens, J., dissenting) (emphasis added).

44. *Id.* at 678-79.

majority opinion, Dale deserved redress.<sup>45</sup> Justice Stevens' analysis also chastised the Court for allowing private organizations to practice discriminatory policies that affected the public generally.<sup>46</sup>

The United States Supreme Court in *Dale* seemingly failed to remedy or alleviate the continuation of discriminatory practices.<sup>47</sup> In the next few years, the Supreme Court faced additional issues surrounding the discriminatory effects of statutes and policies upon homosexual individuals in other areas of the country.<sup>48</sup> Instead of allowing discriminatory practices to continue as in *Dale*, however, the Supreme Court struck down a statute that discriminated against gay and lesbian individuals.<sup>49</sup>

## 2. *Lawrence v. Texas*

In 2003, the Supreme Court considered the rights of gay and lesbian individuals when the Court analyzed whether a public statute could rightfully interfere with the private lives of persons.<sup>50</sup> In *Lawrence v. Texas*,<sup>51</sup> a Texas statute deemed sexual conduct between members of the same sex a criminal act.<sup>52</sup> In *Lawrence*, the Court found that the state did not offer a legitimate interest in interfering with the "personal and private life of the individual."<sup>53</sup>

The *Lawrence* decision was a step toward recognizing a growing need for the equal rights of homosexual persons.<sup>54</sup> The Court recognized that, while policies may purport to be directed at prohibiting unfavorable activities of all persons, many laws are unjustly directed to prohibit the actions of a particular group.<sup>55</sup> In *Lawrence*, gay and lesbian individuals comprised

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45. *See id.* (stating that the Court had not hesitated to reject discriminatory policies in previous decisions, yet here a homosexual individual was discriminated against and the Court upheld the public accommodation statute).

46. *Id.*

47. *Id.*

48. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (holding that a statute criminalizing sodomy was unconstitutional because it discriminated against a targeted group).

49. *Id.*

50. *See id.* (stating that "[w]hen a State makes homosexual conduct criminal," thus interfering with the private lives of individuals, the statute's only purpose is to discriminate).

51. 539 U.S. 558 (2003).

52. *Lawrence*, 539 U.S. at 558.

53. *Id.* at 578.

54. *See id.* (holding that the Texas statute was unconstitutional because it criminalized private activity). The Court brought the issue of discrimination to the forefront of the discussion in stating that the statute's only purpose was to discriminate against homosexuals. *Id.* The Court also stressed the need for the right to privacy. *Id.*

55. *Id.* at 583.

the targeted group.<sup>56</sup> Justice Kennedy, writing for the majority, reprimanded the state and emphasized the true purpose of the Texas statute:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.<sup>57</sup>

By deeming the Texas statute unconstitutional, the *Lawrence* decision promoted a movement in legislation to recognize the rights of homosexual individuals.<sup>58</sup> In fact, since *Lawrence* was decided, most jurisdictions have repealed their laws prohibiting non-marital or consensual sexual activity.<sup>59</sup> The Supreme Court's decision in *Lawrence* departed from *Dale*'s precedent, and showed that the private lives of individuals were beginning to be recognized more readily by state legislatures and judiciaries.<sup>60</sup> Unlike *Dale*, the *Lawrence* Court recognized that the sexuality of an individual—and not merely the sexual activity in which the individual engages—is a private facet of one's life, undeserving of public scrutiny and discrimination.<sup>61</sup> Thus, the societal value of privacy became an important topic regarding gay and lesbian rights.<sup>62</sup>

### 3. *Societal Values in Federal and State Decisions*

Although *Dale* and *Lawrence* do not directly adhere to the topic of the rights of homosexual parents and the best interests of children in custody hearings, the decisions address how the Court generally views homosexuality.<sup>63</sup> The cases also address, in the majority and dissenting opinions, the mores and values of society and the struggles of gay and lesbian individuals

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56. *Id.*

57. *Id.* at 578.

58. See Jennifer Naeger, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 408-19 (2004) (outlining *Lawrence* and its effect on similar sodomy laws and the parental rights of homosexual parents).

59. *Id.* at 422.

60. See *Lawrence*, 539 U.S. at 575-76 (stressing the importance of the right to privacy).

61. *Id.*

62. *Id.*

63. See generally *id.* at 563 (stating that society generally views homosexuality as immoral); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (stating that homosexuals may be denied readmission to the Boy Scouts if homosexuality is deemed immoral).

in both private and public spheres.<sup>64</sup> The discussion of both public and private areas is necessary, as both are involved in domestic court deliberations of child custody.<sup>65</sup> In considering child custody and child placement, courts continue to analyze public approval of homosexuality and how children will be affected in their private environments.<sup>66</sup>

The moral and value issues discussed in United States Supreme Court cases are also considered by state courts in child custody cases.<sup>67</sup> In the Nebraska case of *Hassenstab v. Hassenstab*,<sup>68</sup> for example, a woman's ex-husband sought to modify child custody when he discovered that she was openly homosexual.<sup>69</sup> A Nebraska child custody law required "[t]he party seeking modification of child custody [to bear] the burden of showing that a material change in circumstances has occurred."<sup>70</sup> While the woman's ex-husband offered that an openly homosexual relationship was sufficient to justify a change in custody, the Nebraska Court of Appeals held that homosexuality *alone* was not a factor in modifying custody; however, homosexuality could be considered in addition to other factors, including the "moral fitness of the child's parents and the parents' sexual conduct."<sup>71</sup>

*Hassenstab* emanated the sentiments of mores, values, and negative responses to homosexual "activities" discussed in *Dale* and *Lawrence*.<sup>72</sup> The Nebraska Appellate Court's holding, however, was a movement toward furthering gay and lesbian parental rights and a realization of what truly is in the best interests of the child, because the court determined that homosexuality "does not render [a] parent unfit or require an award of custody to the other parent."<sup>73</sup> The Nebraska Appellate Court is one of several courts, however, that have expressed concern with the idea that homosexual

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64. See *Lawrence*, 539 U.S. at 563 (finding that many Americans believe homosexuality is immoral); see also *Dale*, 530 U.S. at 640 (reiterating that the Boy Scouts deem homosexuality as immoral).

65. See *Hassenstab v. Hassenstab*, 570 N.W.2d 368, 371-73 (Neb. Ct. App. 1997) (reviewing both public, social behavior and the private sexual conduct of lesbian partners in determining whether child custody modification should occur).

66. *Id.*

67. See, e.g., *Lawrence*, 539 U.S. at 568 (explaining society's general views regarding homosexuality); see also *Hassenstab*, 570 N.W.2d at 374 (Hannon, J., dissenting) (stating that homosexuality should be considered because the parents' moral fitness, due to homosexuality, may have a bearing on the issue).

68. 570 N.W.2d 368 (Neb. Ct. App. 1997).

69. *Hassenstab*, 570 N.W.2d at 372.

70. *Id.* at 371.

71. *Id.* at 372.

72. See *Lawrence*, 539 U.S. at 568 (discussing society's views on homosexuality); Boy Scouts of Am. v. *Dale*, 530 U.S. 640, 665 (discussing the morals that the Boy Scouts organization seeks to instill in its members); *Hassenstab*, 570 N.W.2d at 374 (Hannon, J., dissenting) (arguing that the morality of homosexuality should be considered in determining custody).

73. *Hassenstab*, 570 N.W.2d at 372.

parents have the capacity to endanger children, and therefore authorize child custody modification.<sup>74</sup>

As previously mentioned, courts follow the lead of United States Supreme Court precedent and discuss the concept of morality as grounds for child custody and custody modification.<sup>75</sup> Although it is appropriate for a court to carefully evaluate morality as an important consideration in many matters, courts' holdings often suggest that homosexuality is in itself immoral, thus rendering homosexual parents unfit to raise children.<sup>76</sup> Moreover, many courts seemingly believe that the morals and values of homosexual parents differ from the morals and values of heterosexual parents.<sup>77</sup>

#### 4. *Other Reasons Courts Cite to Deny Custody to Gay and Lesbian Parents*

There are many reasons, aside from moral considerations, that courts provide when deciding whether to award or modify custody favoring homosexual parents.<sup>78</sup> One reason that courts may not grant custody to a homosexual parent is possible stigmatization of the child for his or her parent's sexual orientation.<sup>79</sup> Lynn D. Wardle, proponent of "traditional families," has stated: "The legalization of homosexual parenting, essentially rendering sexual conduct of a parent a presumably irrelevant factor for purposes of child custody . . . would constitute a significant shift in the legal and social assumptions and legal model of parenting."<sup>80</sup>

Of the reasons offered to deny lesbian and gay parents the custody of their children, most arguably represent speculative social fear of homosexuality.<sup>81</sup> Furthermore, the idea that Wardle expresses, that the legalization of homosexual parenting would corrupt social values and change social

74. See *McGriff v. McGriff*, 99 P.3d 111, 113-14 (Idaho 2004) (discussing a mother's wish to conceal her ex-husband's homosexuality from her children in a child custody dispute); *Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (holding that homosexuality has the potential to harm children); *Hassenstab*, 570 N.W.2d at 372 (discussing the morality of homosexual individuals and homosexual relationships).

75. See *Lawrence*, 539 U.S. at 571 (stating that society often views homosexuality as immoral); *Dale*, 530 U.S. at 673 (stating that the standards of morality of a private organization may warrant the denial of readmission of a homosexual man).

76. See, e.g., *Dale*, 530 U.S. at 673 (allowing the Boy Scouts organization to deny readmission to a former Boy Scouts member because the organization believed that homosexuality was immoral and did not further the values that the organization sought to instill).

77. Rosenblum, *supra* note 26, at 1669-70.

78. *Id.* at 1667-84.

79. *Id.*

80. Wardle, *supra* note 5, at 838.

81. Rosenblum, *supra* note 26, at 1677-78.

assumptions, is common, but may be negated.<sup>82</sup> Contrary to Wardle's belief, there are many reasons to favor full legalization of homosexual parenting and award homosexual parents child custody.<sup>83</sup> Some arguments in favor of the full legalization of homosexual parenting include the eradication of social stigmatization and the formation of strong and healthy families.<sup>84</sup>

The acknowledgment of lesbian and gay parents would also promote adept—and therefore prevent inept—parenting.<sup>85</sup> For example, suppose a court were to focus on the homosexuality of a parent and offer child custody to the child's socially accepted heterosexual parent.<sup>86</sup> That child may be faced with a future of inept parenting.<sup>87</sup> Courts may simply assume that the heterosexual parent, unlike the child's homosexual parent, is not strapped with social rejection and will therefore provide a more caring and stable environment.<sup>88</sup>

Like the court in the above example, advocates of traditional families and heterosexual parenting feel that this parent-child relationship is necessary for the healthy upbringing of a child.<sup>89</sup> This notion of necessity is connected to the belief that only heterosexuals are entitled to marriage and parenting. It is also attached to the idea that the presence of both male and female parents is essential for a child's healthy development.<sup>90</sup> Proponents of heterosexual-only parenting allege that “recent research suggest[s] that a daddy and a mommy together provide by far the best environment in which a child may be reared.”<sup>91</sup> Proponents, such as Wardle, also argue that the traditional family best serves child development because “[s]eparation of

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82. See generally *id.* at 1665-66 (arguing that misunderstandings of homosexuality and societal fears contribute to the idea that homosexual parenting will harm children).

83. Huff, *supra* note 2, at 695-99.

84. *Id.*

85. See *id.* (stating that strong families may be formed with homosexual parents, and that homosexuals do not lack the parenting skills that heterosexual parents possess).

86. See *infra* note 87 and accompanying text (explaining the possible negative impact resulting from forcing a child into a heterosexual household versus a homosexual household).

87. See generally Huff, *supra* note 2, at 696-99 (suggesting that homosexual parents are just as capable as heterosexual parents at raising children in a safe and healthy living environment). If Huff's sentiments ring true, and a child were placed in a household simply because that household was headed by a heterosexual parent, a court would lose sight of the child's best interests. *Id.* The main focus would be on sexuality rather than the environment that the parents provide. *Id.* Thus, the focus of the court would move from the best interests of the child to the parent's sexuality. *Id.*

88. *Id.*

89. Wardle, *supra* note 5, at 857.

90. Jenny Stokes, *Homosexuality: Same-Sex Parenting* (2007), <http://www.saltshakers.org.au/html/P/9/B/235/>; see also Wardle, *supra* note 5, at 857 (arguing that children need both a mother and a father to ensure the best possible living environment).

91. Wardle, *supra* note 5, at 857.

children from their fathers is ‘the leading cause of declining child well-being in our society.’”<sup>92</sup> However, according to advocates for the recognition of homosexual parenting and otherwise diverse family relationships, these statements are little more than overbroad generalizations lacking fundamental and factual support.<sup>93</sup> Furthermore, the proponents of heterosexual-only, two-parent traditional families provide only arguments discussing the decline of societal mores and an inferred increase in homosexual parenting, concrete evidence of which is limited.<sup>94</sup>

With all of the aforementioned arguments favoring limits to homosexual parenting, many courts have reached conclusions in child custody and custody-related matters that appease society’s fears or dislikes of homosexuality.<sup>95</sup> This practice does little to further the best interests of the child or parental rights.<sup>96</sup> Instead, the practice perpetuates the misunderstanding that homosexual parents provide fewer benefits or somehow offer substandard care for their children when compared to heterosexual parents.<sup>97</sup>

It is imperative that courts endorse the most just approach toward these issues for both children and parents.<sup>98</sup> To reach a just result, courts should not apply standards implying a difference between homosexual and heterosexual individuals.<sup>99</sup> If courts were to discontinue distinguishing between homosexual and heterosexual individuals, child custody cases would focus more on the child and less on the parents, and custody matters would less likely result in undue distinctions between homosexual and heterosexual parenting.<sup>100</sup> The United States Supreme Court in *Meyer v. State of Nebraska*<sup>101</sup> can be said to have supported this just approach as early as 1923: “[L]iberty . . . denotes . . . the right of the individual to . . .

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92. *Id.* at 859.

93. *See* Rosenblum, *supra* note 26, at 2676 (citing *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 (Tenn. App. Mar. 30, 1988) (explaining that courts’ fears of homosexual parenting often arise from the fear that homosexuality is a “learned behavior” and that children would “choose” a homosexual “lifestyle,” and refuting these fears with an explanation of psychological studies providing otherwise)).

94. *See id.* at 1666-69 (stating generally that society believes that homosexuality is harmful and will harm children). Very little is offered to prove that homosexuality in itself will harm children, because the notions of harm are based mostly on fear of homosexuality. *Id.*

95. *See generally* Huff, *supra* note 2, at 701-02 (arguing that courts often find differences between homosexual and heterosexual parents and focus on their sexuality, regardless of the parents’ individual parenting skills).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 262 U.S. 390 (1923).

marry, establish a home and bring up children . . . as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest.”<sup>102</sup> Although courts may profess to protect “public interest” or the moral fitness of American citizens by denying custody to homosexual parents, protection is a fallacy when it interferes with the liberty to have and raise a family.<sup>103</sup>

## B. NORTH DAKOTA’S POSITION ON HOMOSEXUAL PARENTING IN CHILD CUSTODY MATTERS

Several North Dakota cases have determined whether to award child custody to homosexual parents.<sup>104</sup> The North Dakota Supreme Court’s decisions in these cases provide a wide spectrum of opinions regarding homosexual parenting.<sup>105</sup> *Damron v. Damron*, the most recent child custody decision by the North Dakota Supreme Court to overrule a per se bar to awarding custody to a homosexual parent, may offer an updated approach in determining child custody matters.<sup>106</sup>

### 1. *Child Custody and Homosexual Parenting Prior to Damron*

In concert with the traditional view that homosexuality has a negative affect on the mores of society, until recently North Dakota case law followed the 1981 child custody ruling of *Jacobson v. Jacobson*.<sup>107</sup> In *Jacobson*, a man sought to modify child custody when he discovered that his ex-wife Sandra was a lesbian, and believed that her homosexual relationship with another woman would have a negative impact on their

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102. *Meyer*, 262 U.S. at 399-400.

103. See generally Huff, *supra* note 2, at 701-02 (stating that courts place too much emphasis on the morality of homosexuality and should focus instead on a parent’s ability to raise a child successfully and in a healthy environment).

104. See, e.g., *Damron v. Damron*, 2003 ND 166, ¶ 10, 670 N.W.2d 871, 875 (opining that the homosexuality of a mother was not a per se bar to child custody in a custody modification case); *Johnson v. Schlotman*, 502 N.W.2d 831, 835 (N.D. 1993) (holding that although the father harmed his children by instilling his ideas about homosexuality in them, the father retained custody because homosexuality could be considered as a factor in the child custody dispute); *Jacobson v. Jacobson*, 314 N.W.2d 78, 79-82 (N.D. 1981) (discussing whether homosexuality will harm children in a child custody modification dispute).

105. See *Jacobson*, 314 N.W.2d at 82 (holding that homosexuality is a per se bar to child custody); but see *Damron*, 670 N.W.2d at 876 (holding that homosexuality is not a per se bar to child custody).

106. See *Damron*, 670 N.W.2d at 876 (determining that homosexuality is not a reason to deny a parent custody of a child, and holding that the parent seeking child custody modification must provide evidence sufficient to show that the child’s well-being is in danger).

107. 314 N.W.2d 78 (N.D. 1981).

children.<sup>108</sup> The North Dakota Supreme Court stated, “we believe the homosexuality of Sandra is the overriding factor.”<sup>109</sup> The court concluded that, since both parents were otherwise equally fit to care for their children, it was in the best interests of the children to be placed with their father.<sup>110</sup> The court found that the mother’s homosexuality would potentially have an adverse affect on the children’s moral well-being.<sup>111</sup>

In addition to finding that homosexuality alone may harm children, North Dakota case law has offered comparisons as to the difference between heterosexual and homosexual parenting.<sup>112</sup> In *Lapp v. Lapp*,<sup>113</sup> a mother moved for child custody modification when she discovered that her ex-husband had entered into a new relationship.<sup>114</sup> She declared that her ex-husband’s decision to move in with another woman merited a change in circumstances that was significant enough to require modification.<sup>115</sup> The mother further argued that because her ex-husband was living with a woman to whom he was not married, the living arrangement would be detrimental to their child.<sup>116</sup> The North Dakota Supreme Court declared that the detrimental effect of the father’s relationship would be only speculative.<sup>117</sup> The court also distinguished the case from *Jacobson*.<sup>118</sup> In *Lapp*, both individuals vying for custody were heterosexual.<sup>119</sup> In *Jacobson*, the custodial parent, who ultimately lost custody, was homosexual.<sup>120</sup> The *Lapp* court found this distinction important, stating, “the fact that the mother was involved in a homosexual relationship in *Jacobson* was of major importance in our decision.”<sup>121</sup> Therefore, it may be inferred that if the father in *Lapp* was living with a man instead of a woman, his homosexual

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108. *Jacobson*, 314 N.W.2d at 78.

109. *Id.* at 80.

110. *Id.* at 80-81.

111. *See id.* at 79 (reiterating the trial court’s concern that the children would “suffer from the ‘slings and arrows’ of a disapproving society”).

112. *See Lapp v. Lapp*, 336 N.W.2d 350, 352 (N.D. 1983) (stating that the relationship of a homosexual individual may have a detrimental effect on children, and distinguishing homosexual parents from heterosexual parents).

113. 336 N.W.2d 350.

114. *Lapp*, 336 N.W.2d at 351.

115. *Id.*

116. *Id.*

117. *Id.* at 352-53.

118. *Id.* at 352.

119. *Id.* at 350.

120. *Jacobson v. Jacobson*, 314 N.W.2d 78, 78 (1981).

121. *Lapp*, 336 N.W.2d at 352.

relationship may have provided grounds for child custody modification in *Lapp* as it did in *Jacobson*.<sup>122</sup>

In *Johnson v. Schlotman*,<sup>123</sup> the North Dakota Supreme Court again discussed homosexuality as a major part of its decision.<sup>124</sup> In *Schlotman*, decided in 1993, the court denied an openly homosexual mother custody of her children.<sup>125</sup> When the mother moved to modify custody, the court spoke about her relationship and living arrangement with another woman.<sup>126</sup>

Although homosexuality encompassed much of the *court's* discussion, the *parties* to the case also focused on the immorality of homosexuality.<sup>127</sup> The father in *Schlotman* had ingrained his beliefs about the immorality of homosexuality in his children.<sup>128</sup> The court reprimanded the children's father for "expos[ing] the children to his belief that homosexuality is deviant and is not to be tolerated," and for turning his children "away from the other parent by poisoning the well." Although the court stressed that "bigotry, in whatever form, on the part of a parent is a matter affecting the best interests of the children," the court declined to modify the custody order in favor of the children's homosexual mother.<sup>129</sup> The court concluded that it would be in the children's best interests to remain with their father, even though, against the best interests of the children, he would likely continue to "poison the well."<sup>130</sup>

## 2. *Damron v. Damron*

Twenty-one years after *Schlotman* was decided, *Damron v. Damron* overruled the "presumption of harm to children living in a lesbian household and . . . any requirement for evidence of actual or potential harm to the

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122. *See id.* at 352 (stating that *Jacobson* is distinguishable from the present case due to the homosexual relationship in *Jacobson*); *Jacobson*, 314 N.W.2d at 78 (modifying a custody order in favor of the noncustodial parent, and finding that the children's well-being was in danger due to the custodial parent's homosexual relationship).

123. 502 N.W.2d 831 (N.D. 1993).

124. *Schlotman*, 502 N.W.2d at 832.

125. *Id.*

126. *Id.* at 834.

127. *See id.* at 832 (addressing the children's father's concern that due to their mother's homosexuality, she would be unfit as a parent); *see also id.* at 833 (discussing testimony regarding the children's father's belief that homosexuality was "deviant behavior that should not be tolerated"); *id.* (recalling expert testimony regarding the "propriety of [offering] custody" to a homosexual parent).

128. *Id.* at 834-35.

129. *Id.*

130. *Id.* at 834.

children” created by *Jacobson*.<sup>131</sup> In *Damron*, a father moved to modify the custody order of the trial court when he discovered that his wife was homosexual.<sup>132</sup> He relied on the court’s ruling in *Jacobson* to state that a homosexual parent could not create a living environment that would be in the best interests of the child.<sup>133</sup> The North Dakota Supreme Court in *Damron*, however, focused not primarily on the homosexuality of the mother, but on the best interests of the child.<sup>134</sup> The court further discussed the aversion that most jurisdictions tend to carry toward modifying custody rulings.<sup>135</sup>

The children’s father disagreed; he believed that modification was necessary and testified that the mother’s relationship would have a detrimental affect on the children’s “moral character.”<sup>136</sup> The *Damron* court, however, required actual evidence showing that the children would be harmed, and stated that the father presented none.<sup>137</sup> Therefore, the court held that no modification would take place.<sup>138</sup>

As the *Damron* holding suggests, North Dakota courts have begun to recognize the best interests of the children *and* the rights of homosexual parents.<sup>139</sup> In fact, the North Dakota Supreme Court mentioned both considerations in the *Damron* decision.<sup>140</sup> The court stated that its purpose was “to look solely to the best interest[s] of the particular children in the case before the [c]ourt.”<sup>141</sup> In overruling the presumption that a homosexual household would harm children, the court recognized the rights of the parent.<sup>142</sup> Unlike *Jacobson*, the *Damron* court’s decision did not allow children to be as easily removed from the homosexual parent’s home.<sup>143</sup> As

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131. *Damron v. Damron*, 2003 ND 166, ¶ 9, 670 N.W.2d 871, 875; *see also* *Jacobson v. Jacobson*, 314 N.W.2d 78, at 81-82 (holding that modification may take place due to the custodial parent’s homosexual relationship).

132. *Damron*, ¶ 2, 670 N.W.2d at 873.

133. *Id.*

134. *Id.* ¶¶ 6-8, 670 N.W.2d at 874.

135. *Id.* ¶ 6.

136. *Id.* ¶ 13, 670 N.W.2d at 876.

137. *Id.*

138. *Id.*

139. *Compare* *Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (stating that homosexuality was a significant factor in denying custody), *with* *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality was not grounds for modifying child custody absent actual proof that the child was harmed).

140. *Damron*, ¶ 12, 670 N.W.2d at 876.

141. *Id.* ¶ 3, 670 N.W.2d at 873.

142. *See generally id.* ¶ 13, 670 N.W.2d at 876 (stating that homosexuality is not grounds for custody modification, and inferring a parent’s right to privacy to engage in a private relationship unless that relationship endangers the child).

143. *See id.* (refusing to modify custody based on homosexuality when the father had not offered actual proof of harm to the children); *but see* *Jacobson*, 314 N.W.2d at 82 (modifying child custody because of the mother’s homosexual relationship).

*Damron* suggests in overruling *Jacobson*, the rights of the parent may be an inevitable consideration in child custody matters; however, the best interests of the child continue to be the central theme in child custody concerns.<sup>144</sup>

### III. LEGAL STANDARDS AND OTHER CHILD CUSTODY CONSIDERATIONS

While the best interests of the child factors are by far the most important considerations in child custody matters, courts consider various other factors when determining what truly will be in a child's best interests.<sup>145</sup> In awarding custody to homosexual parents, courts often look to the sexuality of the parent to determine whether the parent's sexuality or relationships will harm the child in any way.<sup>146</sup> To reach this conclusion, courts use the per se, middle ground, or nexus approaches to award custody to either the heterosexual or homosexual parent.<sup>147</sup>

#### A. FACTORS DETERMINING THE BEST INTERESTS OF THE CHILD

The *Damron* court of course could not have reached its conclusion to overrule *Jacobson* had it not analyzed statutes and case law regarding child custody.<sup>148</sup> In initial child custody hearings, a court generally has discretion to make custody determinations as it sees fit, while using accepted standards.<sup>149</sup> A court must, however, determine custody in regard to the best interests of the child.<sup>150</sup> This has long been an established rule, not only in North Dakota, but in nearly all state courts.<sup>151</sup>

In North Dakota, when the best interests of the child are found in a preliminary custody hearing, the court may modify that ruling at any time to

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144. See N.D. CENT. CODE §14-09-06.6 (2007) (providing that post-judgment modification is necessary to serve the best interests of the child); *Damron*, ¶ 3, 670 N.W.2d at 873 (“[The] function of the court in matters of child custody is to look solely to the best interest[s] of the particular children.”); LINDA ELROD, CHILD CUSTODY PRAC. & PROC. § 4:4 (2006) (listing various factors that courts look to when serving the child's best interests).

145. See discussion *infra* Part III.A (examining factors which courts look to when determining the best interests of the child).

146. See discussion *infra* Part III.B (explaining the legal standards that courts use in child custody matters involving homosexual parents).

147. *Id.*

148. See *Damron*, ¶¶ 6-12, 670 N.W.2d at 874-76 (citing § 14-09-06; §§ 14-09-06.6(5)(b) to (6)(a)-(b) & 14-09-06.6(8) (2005); *Lovin v. Lovin*, 1997 ND 55, ¶ 12, 561 N.W.2d 612, 616) (suggesting authority to overrule *Jacobson*).

149. See N.D. CENT. CODE § 14-05-22.1 (2007) (defining the scope of the court's discretion).

150. *Larson v. Dutton*, 172 N.W. 869, 871 (N.D. 1919).

151. See ELROD, *supra* note 144, § 4:4 (providing a list of states that focus on the best interests of the child).

ensure the best interests of the child.<sup>152</sup> When the court determines the best interests of the child, it also determines the fitness of the parents.<sup>153</sup> The parents each have “equal rights with regard to the care, custody, education, and control of the children.”<sup>154</sup>

Upon preliminary custody determination, a court may modify the custody order no sooner than two years after the initial custody order unless “[t]he child’s present environment may endanger the child’s physical or emotional health or impair the child’s emotional development[.]”<sup>155</sup> A court may also modify the initial custody order before the two-year condition if it determines that the environment in which the child is living is otherwise unfit and will endanger the child.<sup>156</sup> A change in custody will be ordered if it will ensure that the best interests of the child are satisfied.<sup>157</sup>

Custody may also be modified if a material change has occurred in the circumstances of the custody of that child.<sup>158</sup> When a parent wishes to modify a prior custody ruling due to a “material change in circumstances,” the burden of proof is on that parent to show that significant changes have occurred so as to justify modification.<sup>159</sup> Courts perform a two-step analysis when confronted with a request for modification on these grounds.<sup>160</sup> A court first determines whether a significant change in circumstances has indeed occurred, followed by whether that change requires modification in order to meet the best interests of the child.<sup>161</sup>

North Dakota’s approach to child custody is an approach that is uniform throughout the country.<sup>162</sup> The best interests of the child are primary conditions requiring fulfillment in preliminary custody hearings.<sup>163</sup> Modification proceedings occur in the same manner.<sup>164</sup> Courts look to whether a substantial change has occurred to warrant modification.<sup>165</sup>

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152. § 14-05-22.1.

153. *Id.* § 14-09-06.

154. *Id.*

155. *Id.* § 14-09-06.6(3)(b) (2005).

156. *Id.* §§ 14-09-06.6(5)(b); 14-09-06.6(6)(a)-(b).

157. *Id.*

158. *Id.*

159. *Id.* § 14-09-06.6(8).

160. *Lovin v. Lovin*, 1997 ND 55, ¶ 12, 561 N.W.2d 612, 616.

161. *Id.*

162. *See ELROD, supra* note 144, § 4:4 (offering a list of many states, including North Dakota, that focus on the best interests of the child).

163. *Id.*

164. Elizabeth Trainor, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5TH 591, 591 (1998).

165. *See id.* (stating that child custody modifications require a showing that changes have taken place, thus proving that modification will be in the child’s best interests).

Courts tend to follow an additional set of criteria in finding the best interests of the child in both preliminary and custody modification hearings.<sup>166</sup> The criteria include the quality of the child's home environment, the parents' involvement and influence in the child's life, and the wishes of both the parents and child, if the child has reached a sufficient maturity level to offer his or her opinion on the matter.<sup>167</sup> Among the factors that a court may consider in finding the child's best interests, however, the sexual orientation of the parent should not be considered.<sup>168</sup> Courts also should not consider the private sexual conduct of the parent unless it is proven that the child is harmed by such conduct, or that the private conduct interferes with the parent's ability to provide the requisite level of care and nurturing necessary to child development.<sup>169</sup>

The rules set forth above may be applied and analyzed pursuant to North Dakota child custody cases.<sup>170</sup> As introduced in Part II.B, the non-custodial parents in *Jacobson*, *Lapp*, *Schlotman*, and *Damron* sought custody modification due to a change in circumstances.<sup>171</sup> In each case, either the custodial parents' homosexuality was discovered, or the parents' sexual conduct was argued to be a circumstance sufficient to modify a custody order.<sup>172</sup> Although the North Dakota Supreme Court arrived at a different conclusion in *Damron* than its predecessors *Jacobson*, *Lapp*, and *Schlotman*, the court announced the same reason for declining to modify the custody order in *Damron* as in the other child custody cases.<sup>173</sup> The reason offered was that "the function of the court in matters of child custody is to look solely to the best interest[s] of the particular children in the case before the [c]ourt."<sup>174</sup>

The *Damron* result shows that the North Dakota Supreme Court applied the aforementioned criteria regarding the wishes of the child and parent, as well as the child's home environment to reach the conclusion that the best interest of the children would best be served by remaining in their mother's custody; however, *Damron* tended to adapt a slight variation of the rule that the sexuality of the parent may not be considered by the court

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166. ELROD, *supra* note 144, § 4:4.

167. *Id.*

168. *Id.*

169. *Id.*

170. See discussion *supra* Part II.B (analyzing North Dakota cases that illustrate custody determinations and homosexual parenting issues in North Dakota).

171. *Id.*

172. *Id.*

173. *Damron v. Damron*, 2003 ND 166, ¶ 3, 670 N.W.2d 871, 873.

174. *Id.*

in a custody modification hearing.<sup>175</sup> The *Damron* court found that the sexuality of the custodial parent may not be considered as grounds for modifying custody, unless the parent attempting to modify could show that the environment in which the child is living actually endangers the child's well-being.<sup>176</sup> Homosexuality, taken alone, was not to be considered as grounds for modification because it did not establish that a child would be harmed.<sup>177</sup>

The best interests of the child are the most cited considerations in child custody and custody modification hearings.<sup>178</sup> The sexuality of a parent and the parent's private sexual conduct is also often considered, however.<sup>179</sup> The effect that this consideration has on custody results is the focus of Part III.B.<sup>180</sup>

#### B. COMMON LEGAL STANDARDS USED BY COURTS IN CHILD CUSTODY HEARINGS INVOLVING HOMOSEXUAL PARENTS

As discussed in Part III.A, courts generally agree that the best interests of the child are the most important considerations in child custody proceedings.<sup>181</sup> Although courts agree on these factors, courts tend to follow different legal standards when determining the effect that a parent's homosexuality will have on the outcome of a child custody or custody modification case.<sup>182</sup> It may be inferred that the use of these different standards to award or deny custody does not necessarily mean that the courts focus on the best interests of the child as purported.<sup>183</sup> Nevertheless, the various standards, including the per se, middle ground, and nexus approaches, continue to be applied.<sup>184</sup>

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175. ELROD, *supra* note 144, § 4:4.

176. *Damron*, ¶ 12, 670 N.W.2d at 876.

177. *Id.* at 875.

178. See ELROD, *supra* note 144, § 4:4 (stating that Rhode Island, New York, Wyoming, Mississippi, Pennsylvania, West Virginia, North Dakota, and many other state courts look to the best interests of the child).

179. Trainor, *supra* note 164, § 3[a] (citing *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996)). In *Tucker*, the court stated that a mother's cohabitation with her partner demonstrated a lack of "moral example." *Tucker*, 910 P.2d at 1213.

180. See discussion *infra* Part III.B (discussing the per se, middle ground, and nexus approaches).

181. Huff, *supra* note 2, at 699.

182. *Id.*

183. Rosenblum, *supra* note 26, at 1686-87.

184. Huff, *supra* note 2, at 699.

### 1. *The Per Se Approach*

Perhaps the harshest standard toward homosexual parents in custody and custody modification cases, the per se approach allows the court to deny custody to a homosexual parent simply upon the basis that the parent is homosexual.<sup>185</sup> In using this infrequently applied approach, courts look merely to whether there is sufficient evidence to show that the parent is homosexual when determining the best interests of the child.<sup>186</sup> Upon finding that a parent is homosexual, a court infers that the child's living environment is unfit, and the court either denies initial custody to the homosexual parent or grants the heterosexual parent's motion to modify a previous custody ruling.<sup>187</sup>

*Jacobson* illustrates the premise of the per se approach.<sup>188</sup> Although the North Dakota Supreme Court opined in *Jacobson* that homosexuality was a "significant factor" to deny custody to the homosexual parent, the court ruled that homosexuality was against societal mores, and thus rendered a homosexual parent unfit to provide a healthy living environment for a child.<sup>189</sup> The per se approach is rarely applied by courts in modern child custody matters, however.<sup>190</sup> Many courts instead follow the middle ground approach.<sup>191</sup>

### 2. *The Middle Ground Approach*

Courts that follow the middle ground approach consider a parent's homosexuality as one factor amidst other factors to determine the best interests of the child.<sup>192</sup> Using the middle ground approach, homosexuality alone is not usually a reason to deny custody to a parent.<sup>193</sup> A court may not refuse custody to that parent "without actually finding clear evidence of any detriment to the child."<sup>194</sup> Courts applying this standard often determine that a child will be socially or morally harmed as a result of living with a homosexual parent.<sup>195</sup>

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185. *Id.* at 699-700.

186. *Id.* at 700.

187. *Id.*

188. *See Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (holding that homosexuality is a per se bar to child custody in custody determinations, because the environment provided by a homosexual parent has the potential to harm a child).

189. *Id.* at 80, 82 (emphasis added).

190. Huff, *supra* note 2, at 699.

191. *See* discussion *infra* Part III.B.2 (discussing the middle ground approach).

192. Huff, *supra* note 2, at 699.

193. *Id.*

194. *Id.* at 700.

195. *Id.*

*Schlotman* offers an illustration of the middle ground approach.<sup>196</sup> Although the North Dakota Supreme Court scolded the children's father in *Schlotman* for his bigoted comments about homosexuality and for perpetuating those sentiments among his children, the court allowed the children to remain with their father when their homosexual mother sought modification.<sup>197</sup> The court considered the parents generally equally fit to raise the children despite the father's behavior, but the court allowed the father to retain custody partially because the children would be "embarrassed" by their mother.<sup>198</sup> Thus, homosexuality was a factor that was used to deny custody to the children's mother.<sup>199</sup> While many courts apply the middle ground approach to determine custody matters, yet another standard is applied: the nexus standard.<sup>200</sup>

### 3. *The Nexus Standard*

The nexus standard, potentially the most favorable standard to homosexual parents seeking child custody, requires actual and real evidence of harm to the child as a result of the parent's sexual orientation.<sup>201</sup> Unlike the per se approach, the parent's homosexuality is not the sole deciding factor as to whether custody may be granted.<sup>202</sup> The nexus standard is similar to the middle ground approach in that the homosexuality of the parent is a factor considered among many others.<sup>203</sup> However, the nexus standard is unlike the middle ground approach in that homosexuality is considered as a factor *only if* that factor is deemed and proven to impede the child's best interests.<sup>204</sup>

The nexus standard is viewed as the "most direct application of the traditional 'best interest[s] of the child' standard, because it does not create an inference that a parent's homosexuality itself has a detrimental impact on the child's upbringing."<sup>205</sup> While homosexuality may be viewed as a possible harm to a child's best interests under the middle ground approach, it may not be a reason to deny child custody or custody modification under the nexus standard unless a parent's homosexuality would clearly interfere

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196. See *Johnson v. Schlotman*, 502 N.W.2d 831, 833 (N.D. 1993) (stating that homosexuality may be considered in child custody).

197. *Id.* at 834.

198. *Id.*

199. *Id.*

200. See discussion *infra* Part III.B.3 (discussing the facets of the nexus standard).

201. Huff, *supra* note 2, at 700-01.

202. *Id.*

203. *Id.*

204. *Id.*

205. Rosenblum, *supra* note 26, at 1687.

with a child's well-being.<sup>206</sup> The North Dakota Supreme Court's decision in *Damron* may provide an illustration of the nexus standard.<sup>207</sup>

#### 4. *North Dakota's Standard, as Set Forth in Damron*

The most recent North Dakota child custody case alluding to the use of any one of the standards above is *Damron*.<sup>208</sup> In *Damron*, the North Dakota Supreme Court did not adopt the per se approach.<sup>209</sup> The court explicitly stated that "a custodial parent's homosexual household is not grounds for modifying custody."<sup>210</sup> And, as previously stated, the per se approach allows the court to deny custody to a homosexual parent solely because the parent is homosexual.<sup>211</sup>

Whether the North Dakota Supreme Court followed the middle ground or nexus approach to reach its conclusion in *Damron* is yet to be determined.<sup>212</sup> The court cited decisions of other courts, alluding to use of the middle ground approach, when it stated that "[o]ther courts generally have recognized that, in the absence of evidence of actual or potential harm to the children, a parent's homosexual relationship, by itself, is not determinative of custody."<sup>213</sup> The words "by itself" make it appear as though those courts, in compliance with the middle ground approach, allow homosexuality to be considered as one factor, among others, in determining child custody and custody modification.<sup>214</sup> While the North Dakota Supreme Court alluded to the use of the middle ground standard by other courts, the *Damron* court stressed that evidence of an environment detrimental to the child's best interests is imperative to child custody and custody modification claims.<sup>215</sup> Furthermore, the court repeatedly asserted

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206. *Id.*

207. See discussion *infra* Part III.B.4 (discussing *Damron's* use of the nexus approach, as opposed to the per se or middle ground approaches).

208. *Damron v. Damron*, 2003 ND 166, ¶ 12, 670 N.W.2d 871, 876.

209. *Id.*

210. *Id.*

211. Huff, *supra* note 2, at 699.

212. See *Damron*, ¶ 10, 670 N.W.2d at 875 (overruling the "presumption of harm to children" living under the care of a homosexual parent, and announcing the rules of other courts to determine a more appropriate rule to be applied in *Damron*).

213. *Id.*

214. Huff, *supra* note 2, at 700.

215. See *Damron*, ¶ 10, 670 N.W.2d at 875 (offering the rules of other courts regarding the custody of homosexual parents, and stating that the party moving for a child custody change under the applicable North Dakota statutes must show that custody modification is "necessary to serve the best interests of the children").

that the best interests of the child should be the main focus in such proceedings.<sup>216</sup>

The court's persistence in stating that the child's best interests are the main and only focus makes the *Damron* decision one that attaches less stigmatization to homosexual parenting than the *Jacobson* and *Schlotman* analyses.<sup>217</sup> Furthermore, the *Damron* decision and language of the nexus standard are similar to standards used to award custody to heterosexual parents in cases where no homosexual parent is involved.<sup>218</sup> Although the court did not explicitly state which approach it used, the *Damron* decision appears to have been reached using the nexus standard.<sup>219</sup> This conclusion may be drawn because the court discussed the homosexual relationship of the mother as merely one possible factor among many others in modifying custody.<sup>220</sup> Furthermore, the court looked to the homosexuality of the mother only as a possible factor when the children's father specifically argued that the mother's homosexual relationship would be detrimental to the children's well-being.<sup>221</sup> However, the *Damron* court stated that homosexuality may be considered as a factor *only* when the father provides "evidence of actual or potential harm to the children," and the children's father could not offer this evidence.<sup>222</sup> The court's decision in *Damron*, in applying the modern nexus standard, may provide a model to be considered in future custody matters in North Dakota.<sup>223</sup>

#### IV. *DAMRON* AS A MODEL FOR FUTURE NORTH DAKOTA CASES

As previously stated, most courts maintain that the primary focus in child custody cases is the best interests of the child.<sup>224</sup> However, in many custody cases in which homosexual parents are involved, courts also

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216. *Id.*

217. Compare *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality cannot be grounds for custody modification), with *Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (holding that a homosexual relationship may be considered as grounds for modification).

218. See *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that the noncustodial parent did not offer proof sufficient to show that the relationship of the homosexual parent would endanger the children); see also *Lapp v. Lapp*, 336 N.W.2d 350, 353 (N.D. 1983) (stating that a father's cohabitation with a woman did not mandate custody modification absent a showing of detriment to the child's best interests).

219. *Damron*, ¶ 10, 670 N.W.2d at 875.

220. *Id.*

221. *Id.*

222. *Id.*

223. See discussion *infra* Part IV (discussing *Damron* as a model for future child custody cases).

224. See *Damron*, ¶ 3, 670 N.W.2d at 873 (stating that the focus of the court should be the child's best interests); *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981) (enumerating various factors affecting the best interests of the child).

discuss the relationships and sexual orientation of the child's gay or lesbian parent.<sup>225</sup> The fact that a parent is homosexual should not be an issue in child custody cases unless a parent's relationship *in general* directly interferes with the best interests of the child.<sup>226</sup> Likewise, the homosexuality of a parent should not be a factor in the outcome of the custody dispute in making initial custody or custody modification determinations.<sup>227</sup>

The discussion of parents' private lives places great burdens on homosexual parents striving to obtain or maintain custody of their children.<sup>228</sup> The consideration of homosexuality, rather than the ability of an individual to parent successfully, discounts a homosexual parent's ability to raise his or her children.<sup>229</sup> This consideration arguably perpetuates social misunderstandings and fears of homosexuality, because it implies that the parenting skills of homosexual and heterosexual individuals are unequal.<sup>230</sup> While the child's best interests continue to form the basis of courts' custody determinations, so too does the issue of whether a homosexual parent may further those interests.<sup>231</sup> A court's conclusion, therefore, hinges on the acceptable balance between the best interests of the child, and the rights to privacy and to raise children, as shown in *Lawrence* and *Meyer*.<sup>232</sup>

#### A. THE RIGHTS OF THE PARENT

It is true that the child's best interests are important facets in child custody matters.<sup>233</sup> Parents' rights, however, must not be discounted.<sup>234</sup> The fear that a parent may lose his or her child may be one of the most wrenching experiences that a parent faces.<sup>235</sup> In fact, some homosexual

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225. See *Johnson v. Schlotman*, 502 N.W.2d 831, 834 (N.D. 1993) (discussing, at great length, the father's views and societal attitudes toward homosexuality, and how homosexuality may affect children in child custody matters); *Jacobson*, 314 N.W.2d at 82 (opining that the mores of society dictate the need to keep children with the heterosexual parent).

226. Rosenblum, *supra* note 26, at 1666.

227. *Id.*

228. *Id.*

229. Huff, *supra* note 2, at 696.

230. *Id.*

231. *Id.*

232. *Lawrence v. Texas*, 539 U.S. 558, 558 (2003); *Meyer v. Nebraska*, 262 U.S. 390, 398-400 (1923); *Damron v. Damron*, 2003 ND 166, ¶¶ 6-8, 670 N.W.2d 871, 874; see also discussion *infra* Part III.A (analyzing the fundamental rights to privacy and to have and raise children, as supplied by *Lawrence v. Texas* and *Meyer v. Nebraska*, respectively).

233. See *Larson v. Dutton*, 172 N.W.2d 869, 871 (N.D. 1919) (explaining that the child's best interests is the court's utmost concern).

234. See generally D.L. Hawley, 64 AM. JUR. PROOF OF FACTS 3d *Custody and Visitation of Children By Gay and Lesbian Parents* 403 § 19 (2007) ("Sexual orientation alone is not a sufficient basis to modify parental rights and responsibilities.").

235. *Id.*

parents facing child custody issues avoid disclosing the fact that they are homosexual in order to keep their children if they believe that courts will deny them custody.<sup>236</sup> Several constitutional arguments favor the elimination of the additional requirements that gay and lesbian parents face in order to obtain and maintain custody of their children.<sup>237</sup>

The argument that a person has a constitutional right to equal protection was discussed in the appellant's brief in *Damron*.<sup>238</sup> The appellant's brief stated that "where a classification burdens a fundamental right or targets a suspect class, strict scrutiny is applied to ensure that the discrimination is necessary and narrowly[ ]tailored to advance a compelling governmental purpose."<sup>239</sup> It has been debated, however, whether homosexuality is a fundamental right.<sup>240</sup> The United States Supreme Court generally avoids the topic.<sup>241</sup>

Whether a parent is homosexual or heterosexual does not remove that parent's constitutional and fundamental right to bear and raise children.<sup>242</sup> In *Meyer v. Nebraska*, the United States Supreme Court opined that an individual has the right to "establish a home and bring up children."<sup>243</sup> Through *Meyer*, it may be argued today that a right to bring up children allows a parent to raise his or her child whether the parent is homosexual or heterosexual, provided that the upbringing does not interfere with the best interests of the child.<sup>244</sup> Therefore, even if a court would not recognize a person's fundamental right with regard to sexual orientation, a court must recognize a parent's right to raise his or her children in a private home setting.<sup>245</sup>

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236. *Id.*

237. See *Lawrence*, 539 U.S. 558, 565-67 (discussing the rights of homosexuals, but not reaching a conclusion as to whether sexuality is a fundamental right); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 663 (1966) (finding that fundamental rights are protected by the Equal Protection Clause, even though not explicitly stated in the Constitution); *Meyer*, 262 U.S. at 398-400 (asserting that the right to bear and raise children is a fundamental interest); *Rosenblum*, *supra* note 26, at 1696 (citing *Meyer*, 262 U.S. at 399) ("[The] right to 'bring up children' is within the scope of [F]ourteenth [A]mendment protection.").

238. Brief of Appellant, *supra* note 11, at 4.

239. *Id.*

240. See *Lawrence*, 539 U.S. at 584 (holding that a Texas statute criminalizing homosexual sexual acts was unconstitutional).

241. See *id.* (deeming a Texas statute unconstitutional because it criminalized sodomy, but not stating whether a fundamental right exists).

242. *Meyer*, 262 U.S. at 398-400 (holding that individuals have a fundamental right to bear and raise children).

243. *Id.*

244. See *id.* (holding that it is a fundamental right to raise and bear children, but not discussing sexuality in reference to who may or may not raise children).

245. *Id.*

It may further be argued that a classification burdening a suspect class requires either a heightened or strict scrutiny analysis, the most stringent forms of analyses.<sup>246</sup> Suspect classes are so deemed because they are “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>247</sup> Homosexual individuals fit the label “suspect class” because they have long been the subject of discriminatory statutes, such as that seen in *Lawrence*.<sup>248</sup>

Strict scrutiny analysis mandates a necessary and narrowly tailored discriminatory purpose, which furthers a compelling governmental interest.<sup>249</sup> If a court modified a child custody ruling due to a parent’s sexual orientation, and therefore his or her suspect classification, the modifying ruling would trigger heightened scrutiny.<sup>250</sup> Given the history of discriminatory statutes aimed at homosexuals and the statutes’ likewise discriminatory purposes, one might conclude that modifying a child custody order based on homosexuality is discriminatory.<sup>251</sup> The heightened or strict scrutiny analyses’ burdens are difficult to overcome, therefore making the discriminatory purpose less likely to prevail.<sup>252</sup> However, while these rights of parents deserve consideration following the use of heightened scrutiny analyses, the interests of the parent must be balanced with the best interests of the child.<sup>253</sup>

#### B. THE BEST INTERESTS OF THE CHILD IN CONNECTION WITH *DAMRON*

The North Dakota Supreme Court in *Damron* appears to have begun to focus more on the best interests of the child tenet, as it applied the most progressive approach—the nexus standard—to show that homosexuality cannot be a reason to deny custody without proof of actual harm to the child.<sup>254</sup> Homosexuality is still a focus in *Damron*, based on the possibility that a parent requesting modification could somehow show that the child is

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246. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978).

247. *Id.* at 357 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

248. *See Lawrence v. Texas*, 539 U.S. 558, 581-85 (2003) (holding that a Texas statute was unconstitutional because it criminalized sodomy, and opining that it targeted homosexuals).

249. Brief of Appellant, *supra* note 11, at 75.

250. *Id.*

251. *Id.*

252. *Id.*

253. *See* discussion *infra* Part IV.B (discussing the best interests of the child as set forth in *Damron*).

254. *Damron v. Damron*, 2003 ND 166, ¶ 13, 670 N.W.2d 871, 876.

in danger.<sup>255</sup> However, children are best served today in North Dakota through the *Damron* standard.<sup>256</sup>

The legal analysis used in *Damron* is much more attuned to the child's best interests than the standards used in *Jacobson* and *Schlotman*, which focused more on the homosexuality of the parent rather than the best interests of the child.<sup>257</sup> The North Dakota Supreme Court in *Damron* explicitly and frequently discussed the best interests of the child.<sup>258</sup> Moreover, the court focused on the recognition of "a doctrinal aversion to changing the custody of a happy child who has been living with one parent."<sup>259</sup> The court also expressed a need to maintain "stability and continuity in the child's life, without harm to the child."<sup>260</sup> The sentiments declared by the *Damron* court repeatedly expressed a focus on the best interests of the child.<sup>261</sup>

Following the *Damron* decision, North Dakota courts will likely focus more on the best interests of the child tenet in future custody hearings, when confronted with whether to award or deny custody or custody modification to a homosexual parent.<sup>262</sup> Courts will look to the true interests of the child rather than focusing on the private and personal actions of the parents when no danger is presumable.<sup>263</sup> The court's decision in *Damron* sets an example for future custody rulings regarding the homosexuality of a custodial parent, because it focuses much more on what would best serve the child.<sup>264</sup>

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255. *Id.*

256. *Compare Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality was not grounds for modifying child custody because the father did not offer proof that the custodial parent's living environment was unsuitable for their children) with *Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (finding that a homosexual parent engaged in immoral practices was inconsistent with providing an environment suitable for a child, and failing to look at facts proving that the heterosexual parent may indeed provide a better environment).

257. *See Jacobson*, 314 N.W.2d at 82 ("[B]ecause of the mores of today's society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children . . . the best interests of the children will be better served by placing custody of the children with [the father].").

258. *Damron*, ¶¶ 6-8, 670 N.W.2d at 874.

259. *Id.* ¶ 6.

260. *Id.* (internal citation omitted).

261. *Id.* ¶¶ 6-8, 670 N.W.2d at 874.

262. *See id.* ¶ 13, 670 N.W.2d at 876 (establishing a new standard in requiring more evidence to prove that a homosexual parent's living environment would endanger a child).

263. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating that the private lives of individuals must not be interfered with by state statutes); *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality was not grounds for modifying child custody and requiring more proof of harm to a child).

264. *See Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) (holding that homosexuality could be grounds for modifying a previous custody order); *but see Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality was not grounds for modifying a previous child custody ruling).

## V. OBSERVATIONS AND SUGGESTIONS FOR FURTHER CHANGE

At one time, courts both nationwide and in North Dakota denied custody to homosexual parents at the outset of a child custody or custody modification proceeding.<sup>265</sup> Now, actual proof of harm is required if the noncustodial parent seeking modification argues that a child is harmed by a parent's homosexuality.<sup>266</sup> *Damron* requires more concrete evidence of detriment to a child in determining the child's best interests, since the overruling of *Jacobson*.<sup>267</sup> The amount of evidence necessary to modify a custody ruling favoring a gay or lesbian parent is yet to be determined.<sup>268</sup>

This question presented after *Damron*, regarding the amount and level of evidence required to modify a custody ruling in favor of a child's homosexual parent, predicts future changes in North Dakota child custody case law.<sup>269</sup> The North Dakota Supreme Court did not set a standard for the type or amount of evidence required to modify such a ruling.<sup>270</sup> It is similarly not entirely clear what that evidence will mean for homosexual parents in North Dakota in the future.<sup>271</sup> Perhaps the topic of sexual orientation will disappear from custody determinations altogether.<sup>272</sup> Furthermore, perhaps no focus will be placed on the harmful distinctions between heterosexual and homosexual parents, thereby preventing potentially discriminatory court opinions.<sup>273</sup> These questions are discussed in Parts V.A and V.B.<sup>274</sup>

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265. See, e.g., *Jacobson*, 314 N.W.2d at 82 (modifying custody based on a mother's homosexuality and fearing the children may be harmed).

266. See, e.g., *Damron*, ¶ 13, 670 N.W.2d at 875-76 (requiring evidence that proves that a child is harmed due to the environment in which the child resides).

267. *Id.*

268. See *id.* (holding that homosexuality cannot be the basis for custody modification without clear evidence that a child is harmed, but not stating what kind or how much evidence is needed).

269. See discussion *infra* Part V.A (reviewing *Damron* and discussing the type and amount of evidence that *Damron* requires of a parent seeking to modify a previous child custody ruling).

270. See *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that more evidence is required of a non-custodial heterosexual parent requesting child custody modification, but not elaborating on how much evidence is required).

271. See discussion *infra* Part V.A (discussing the evidence that North Dakota courts will require of parents attempting child custody modification).

272. *Id.*

273. *Id.*

274. See discussion *infra* Parts V.A-B (discussing a modified approach that would apply to child custody and custody modification proceedings to eradicate courts' determining homosexual as a limiting factor in obtaining or maintaining custody).

A. COMPARISON OF HETEROSEXUAL AND HOMOSEXUAL PARENTS:  
EVIDENCE COURTS REQUIRE

Recently, the North Dakota Supreme Court asked that the heterosexual parent seeking the modification of a custody ruling provide evidence that a child's well-being is in danger upon remaining with the child's homosexual parent.<sup>275</sup> The heterosexual, noncustodial parent must "establish a significant change in circumstances which adversely affects the child."<sup>276</sup> Moreover, the noncustodial parent has "the burden to show [that] modification [is] necessary to serve the best interests of the children and to show the children's present environment may endanger their physical or emotional health or impair their emotional development."<sup>277</sup> The noncustodial parent must provide evidence adverse to the custodial parent, that the home environment will otherwise harm the child.<sup>278</sup> Perhaps significant to the topic of child custody and custody modification, the court is silent as to homosexuality in these particular rules.<sup>279</sup> The court seems to suggest that there would be no difference in the amount or type of evidence that a parent would need to provide—regardless of his or her sexual orientation.<sup>280</sup> However, while the court is silent on the topic of homosexuality in these particular statements, homosexuality was still discussed in *Damron*.<sup>281</sup>

As *Damron* implies, a homosexual parent seeking the modification of a child custody order, where a preliminary custody ruling favored a heterosexual parent, would not need to prove to the court that the *heterosexuality* of the custodial parent would harm the child.<sup>282</sup> To the contrary, the court stated that a modification may take place if a heterosexual parent provides enough evidence to show that the sexual orientation of the *homosexual* parent will harm the child.<sup>283</sup> The difference in what is asked of the non-custodial parent as to the modification of a previous custody ruling suggests

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275. *Damron*, ¶ 13, 670 N.W.2d at 876.

276. *Id.* ¶ 7, 670 N.W.2d at 874.

277. *Id.* ¶ 11, 670 N.W.2d at 875.

278. *See id.* (stating that the noncustodial parent must provide "some evidence [that] the custodial parent's custodial environment may endanger the children").

279. *See id.* ¶ 12, 670 N.W.2d at 876 ("[A] custodial parent's homosexual household is not grounds for modifying custody within two years of a prior custody order in the absence of evidence that [the] environment endangers or potentially endangers the children's physical or emotional health or impairs their emotional development.").

280. *See id.* ¶ 13 (explaining that although the heterosexual parent offered testimony challenging the morality of his wife's homosexuality as a basis for parental unfitness, the testimony was insufficient to show that her homosexual relationship was either actually or potentially harming the children).

281. *Id.*

282. *Id.* ¶ 1, 670 N.W.2d at 873.

283. *Id.* ¶ 12, 670 N.W.2d at 876.

that a greater burden is placed on the heterosexual parent to provide additional evidence of actual or potential harm.<sup>284</sup> However, this difference also implies that unwarranted emphasis is still being placed upon the sexual orientation of the custodial homosexual parent, while the privacy of the heterosexual parent, especially with regard to his or her relationships, is preserved.<sup>285</sup>

A court would not ask a homosexual parent to prove that the heterosexuality of the other parent was causing harm to the child, because the morals of heterosexuality have not been stigmatized in the same way as those of homosexuality.<sup>286</sup> A court would also likely find an investigation of the heterosexual parent's sexual orientation to be unnecessary.<sup>287</sup> As United States Supreme Court precedent has stressed, investigation into such private actions would be an invasion of privacy.<sup>288</sup> It is apparent, therefore, that heterosexual and homosexual parents are treated very differently in maintaining or modifying child custody.<sup>289</sup>

As previously stated, a court would not likely urge a parent to investigate the harmful effects that *heterosexuality* would have on a child.<sup>290</sup> However, as to how great the noncustodial heterosexual parent's burden would be to justify modification of a prior custodial ruling favoring a gay or lesbian parent is uncertain.<sup>291</sup> The *Damron* court only states that "there must be *some* evidence [that] the custodial parent's custodial environment may endanger the children."<sup>292</sup> "Some evidence" is clearly an ambiguous measurement of the amount required to modify custody.<sup>293</sup>

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284. *See id.* ¶ 6, 670 N.W.2d at 874 (citing *Lovin v. Lovin*, 1997 ND 55, ¶¶ 16, 18, 561 N.W.2d 612, at 616-17) ("[T]he burden on a noncustodial parent seeking a change of custody is 'daunting' and 'arduous.'").

285. *See Huff*, *supra* note 2, at 701 (noting that courts place much emphasis on the morality of homosexuality when determining that the best interests of a child will be best served with the heterosexual parent).

286. *Id.* at 702.

287. *See Lawrence v. Texas*, 539 U.S. 558, 565 (2003) ("[T]he right to make certain decisions regarding sexual conduct extends beyond the marital relationship.").

288. *Id.*

289. *See generally Damron*, ¶ 11, 670 N.W.2d at 875 (finding that a heterosexual parent seeking to modify a custody order that favors the homosexual parent must provide more evidence when a parent is homosexual); *see also Huff*, *supra* note 2, at 695-96 (arguing that homosexual and heterosexual parents are treated differently in custody cases).

290. *See Damron*, ¶ 13, 670 N.W.2d at 876 (stating that the heterosexual, noncustodial parent must provide "actual evidence," but not elaborating on the meaning of "actual evidence").

291. *Id.*

292. *Id.* ¶ 11, 670 N.W.2d at 875 (citing *In re Thompson*, 2003 ND 61, ¶ 12, 659 N.W.2d 864, at 868) (emphasis added).

293. *Id.*

The court did offer reference as to what evidence had been offered by the noncustodial father in *Damron*, however.<sup>294</sup> The father of the children had offered that the children's mother's homosexuality and homosexual relationship set the wrong moral character example for his children.<sup>295</sup> The court stated that the father, in asserting this, did not provide evidence that the mother's homosexuality or homosexual relationship was causing "actual or potential harm to the children."<sup>296</sup>

As applied, *Damron* requires more evidence in future child custody cases where non-custodial parents wish to modify a custody ruling based on the homosexuality of the custodial parent.<sup>297</sup> The court's silence, however—as to how much or what type of evidence must be presented to justify modification of a previous custodial hearing favoring the homosexual parent—could prove to be very beneficial for homosexual parents in North Dakota.<sup>298</sup> Heterosexual parents seeking modification due to the homosexuality of the custodial parent are burdened to provide evidence to satisfy an ambiguous standard that will convince North Dakota courts that a child is actually or potentially being harmed.<sup>299</sup> The *Damron* court's requirement does not provide a clear definition of "actual or potential harm."<sup>300</sup>

The *Damron* court's requirement of "potential harm" is significant in this regard.<sup>301</sup> The children's father in *Damron* argued that his ex-wife's relationship had the potential to set "the wrong moral character for [his] children."<sup>302</sup> While "potential harm" may be viewed as a relatively easy standard to satisfy, the North Dakota Supreme Court rejected this argument, and required more evidence.<sup>303</sup> The court's rejection of the father's "potential harm" fails to aid the noncustodial parent attempting to modify

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294. *Id.* ¶ 13, 670 N.W.2d at 876.

295. *Id.*

296. *Id.*

297. *Id.*

298. *See supra* notes 275-81 and accompanying text (explaining the ambiguities of *Damron*'s language as to the amount and level of evidence necessary to modify custody and to remove children from the custody of a homosexual parent).

299. *See supra* notes 278-80 and accompanying text (reviewing the language from *Damron* requiring the moving parent to provide "actual or potential harm").

300. *Damron*, ¶ 13, 670 N.W.2d at 876.

301. *Id.*

302. *Id.*

303. *Id.*

custody due to the homosexuality of the custodial parent.<sup>304</sup> The court did not further define how “potential harm” might be satisfied.<sup>305</sup>

As *Damron* shows, immorality as related to homosexuality and raising children is no longer accepted as an argument in North Dakota child custody hearings.<sup>306</sup> As opposed to previous North Dakota child custody cases, custody modification based on homosexuality alone will not occur.<sup>307</sup> Much more evidence is required to show that the best interests of the child are jeopardized.<sup>308</sup> While a child’s best interests might more easily be satisfied by North Dakota’s *Damron* standard, perhaps the existing standard might benefit from further adaptations.<sup>309</sup>

#### B. PROPOSAL FOR THE ADOPTION OF MORE FAVORABLE LEGAL STANDARDS IN NORTH DAKOTA

As discussed, courts have traditionally applied either the per se, middle ground, or nexus standards to child custody cases involving homosexual parents.<sup>310</sup> *Damron* appears to have applied the nexus approach, as homosexuality was not grounds to modify custody without evidence of actual or potential harm to the child.<sup>311</sup> While the nexus approach is likely the most favorable standard applied to modern custodial rulings, it is also true that it continues to factor in homosexuality, albeit in a much less emphasized manner.<sup>312</sup> Courts should not focus on homosexuality when determining the best interests of the child.<sup>313</sup> Placing emphasis on homosexuality allows a court to disservice a homosexual parent’s ability to raise a child.<sup>314</sup> Emphasizing homosexuality also discounts a child’s true best

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304. *See id.* (showing that the father testified that the children’s mother’s homosexual relationship was detrimental to the children’s wellbeing, but stating that this testimony was not enough to satisfy even the requirement of showing potential harm).

305. *See id.* (providing that “potential harm” may be offered, but rejecting the father’s argument, and leaving the question open as to when “potential harm” may be satisfied).

306. *Id.*

307. *See id.* ¶ 9, 670 N.W. at 875 (overruling *Jacobson*, which created a presumption that a showing of homosexuality was alone enough to justify a custody modification).

308. *Id.* ¶ 13, 670 N.W.2d at 876.

309. *See discussion infra* Part V.B (discussing possible future adaptations of the *Damron* standard).

310. *See discussion supra* Part III.B.1-3 (discussing the nexus, middle ground, and per se approaches); Huff, *supra* note 2, at 699 (stating that courts apply either the per se, middle ground, or nexus tests to child custody determinations involving homosexual parents).

311. *Damron*, ¶ 11, 670 N.W.2d at 875.

312. *See generally* Huff, *supra* note 2, at 695-96 (arguing that courts place too much emphasis on homosexuality, but that the child’s best interests may be well served by living with the homosexual parent).

313. *Id.* at 699.

314. *Id.*

interests, because a homosexual parent may indeed provide a better environment than a heterosexual parent.<sup>315</sup>

The best legal standard to apply to child custody matters is one that is silent on the topic of sexual orientation, to ensure both the best interests of the child and rights of the parents.<sup>316</sup> The rights of gay or lesbian parents would be recognized because their sexual orientation would not be addressed, thus preserving their right to privacy.<sup>317</sup> Courts should recognize that “[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual’s liberty.”<sup>318</sup> Parents’ privacy and right to raise children, therefore, should not be intruded upon unless the child’s best interests are harmed.<sup>319</sup> In addition to preserving parents’ privacy, there would be no difference as to the evidence that a homosexual or heterosexual parent might provide to modify a custody ruling.<sup>320</sup>

The best interests of the child factors, upon which judiciaries so often purport to center their custody rulings, would also be benefited if courts adopted a standard ignoring the sexual orientation of the parents.<sup>321</sup> Like the North Dakota Supreme Court in *Damron*, future child custody and custody modification determinations would be based solely on “maintaining stability and continuity in the child’s life.”<sup>322</sup> Future custody determinations using this modified standard would also spare “children the ‘painful, disruptive, and destabilizing’ effects of repeat custody litigation” that arise in modification proceedings.<sup>323</sup>

The North Dakota Supreme Court’s finding in *Damron* suggests that a heterosexual noncustodial parent may still show that homosexuality has the potential to, or actually will, adversely affect a child.<sup>324</sup> However, the

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315. *Id.*

316. *See generally* *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (regarding privacy as a fundamental interest, thereby inferring that private homosexual conduct may not be treated differently than heterosexual conduct); *Goodridge v. Dep’t of Pub. Health Mass.*, 798 N.E.2d 941, 956 (Mass. 2003) (opining that same-sex couples have the right to marry, thereby allowing them the same benefits to child custody that heterosexual couples have).

317. *See Lawrence*, 539 U.S. at 559 (finding that privacy is a fundamental interest).

318. *Goodridge*, 798 N.E.2d at 959.

319. *Id.*; *Damron v. Damron*, 2003 ND 166, ¶ 3, 670 N.W.2d 871, 873.

320. *See* discussion *infra* Part V.A (discussing the amount of evidence that a parent seeking custody modification must offer); *see generally Damron*, ¶ 13, 670 N.W.2d at 876 (failing to elaborate on whether a homosexual parent pursuing modification must show that homosexuality will endanger the child’s well-being).

321. *Damron*, ¶ 6, 670 N.W.2d at 874.

322. *Id.*

323. *Id.* (citing *Quarne v. Quarne*, 1999 ND 188, ¶ 9, 601 N.W.2d 256).

324. *See id.* ¶ 13, 670 N.W. 2d at 876 (requiring the moving party to present evidence of actual or potential harm to the children).

*Damron* ruling is based largely upon requiring that, regardless of the custodial parent's sexual orientation, the noncustodial parent show "some evidence" of danger to the child's well-being.<sup>325</sup> Future courts should focus on the *Damron* standard in this regard, while eliminating any discussion of how homosexuality itself will endanger the children involved.<sup>326</sup>

## VI. CONCLUSION

The notion that homosexual parenting may be harmful to children has long been debated and may continue to be debated for years to come.<sup>327</sup> Recent child custody decisions have perpetuated arguments surrounding morality and professed differences between the parenting of homosexual and heterosexual individuals.<sup>328</sup> However, scholars and courts have also noted that there is no difference between the parenting skills of homosexual and heterosexual parents.<sup>329</sup> The emphasis on homosexuality in child custody determinations, therefore, has changed greatly in recent decades.<sup>330</sup> Courts are moving away from an emphasis on homosexuality and more to parents' rights to bear and raise children, to protection of privacy, and to true observance of the best interests of children.<sup>331</sup>

North Dakota courts have followed this pattern, largely focusing on the best interests principle and ignoring arguments that homosexuality will

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325. *Id.* ¶ 11, 670 N.W.2d at 875.

326. *See id.* ¶ 13, 670 N.W.2d at 876 (holding that homosexuality cannot be grounds to modify custody); Huff, *supra* note 2, at 695 (stating that courts should not look to the homosexuality of a parent in determining child custody matters, because homosexual parents provide an adequate upbringing regardless of their sexuality). Both parents' and children's rights will likely be best served in this capacity because the court does not place focus on the sexuality of the parent, which only speculatively would have an effect on the child. *See generally* Huff, *supra* note 2, at 695 (proposing that a fairer outcome would be reached if courts would cease their focus on the homosexuality of parents in child custody matters).

327. *See* Huff, *supra* note 2, at 696 ("[A] homosexual parent is as able as a heterosexual parent to raise a well-adjusted child" and that "courts should not find a distinction between homosexual and heterosexual parenting").

328. *See* *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (stating that social ideals of homosexuality cannot be ignored when making a custody decision).

329. *See* *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality is not a reason to modify custody where the children appear happy and healthy in their current environment); Huff, *supra* note 2, *passim*.

330. *See* *Jacobson*, 314 N.W.2d at 82 (stating that homosexuality may be a significant factor in denying custody); *but see* *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality cannot be grounds for modifying child custody).

331. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (discussing the right to privacy); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (holding that the right to bear and raise children is a fundamental right); *Damron*, ¶ 13, 670 N.W.2d at 876 (requiring more evidence for custody modification to ensure the best interests of the child).

endanger a child's well-being or moral upbringing.<sup>332</sup> The changing focus of custody rulings and custody modifications will likely continue to affect jurisdictions that have not adopted the contemporary nexus rule.<sup>333</sup> These changes may thereby prompt the adoption of a further-modified nexus standard as homosexual parents continue to press courts to eliminate the emphasis of sexual orientation.<sup>334</sup>

A change may be seen in future North Dakota cases, as well.<sup>335</sup> The *Damron* ruling has opened doors for future custody rulings.<sup>336</sup> Although homosexuality was considered as a factor in modifying custody in *Damron*, provided enough evidence was shown to justify the modification, the North Dakota Supreme Court's decision did not place a clear minimum on the amount of evidence that must be provided by the noncustodial parent.<sup>337</sup> This ambiguity places a heavy burden on a heterosexual noncustodial parent, and implies that a noncustodial parent will unlikely succeed in his or her endeavors to remove children from the custody of a homosexual parent, based on sexual orientation.<sup>338</sup>

United States Supreme Court precedent shows that ending discrimination based on sexual orientation has been an arduous endeavor.<sup>339</sup> When Supreme Court Justices agree with society's notions and fears of homosexuality, and likewise enunciate these mores and values in Court decisions, the task of alleviating the stigmatization of homosexual individuals becomes even more daunting.<sup>340</sup> Courts have steadily departed from approving of discriminatory statutes and practices, however.<sup>341</sup> This conclusion is evidenced by North Dakota Supreme Court custody rulings within the past twenty-five years.<sup>342</sup> Courts that once focused on

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332. See, e.g., *Damron*, ¶ 13, 670 N.W.2d at 876 (holding that homosexuality is not a per se bar to custody, and stating that the best interests of the child should be the focus of the court in child custody matters).

333. Gill, *supra* note 6, at 362.

334. *Id.*

335. *Damron*, ¶ 11, 670 N.W.2d at 875.

336. *Id.*

337. *Id.*

338. *Id.*

339. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (denying readmission of a former Boy Scouts member to the organization via the New Jersey public accommodation statute, because the private organization, although alleging it followed a set of mores and standards disallowing homosexual members, did not fall under the statute).

340. *Id.*

341. See generally *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (opining that the state cannot interfere with the private acts of individuals); *Dale*, 530 U.S. at 678-79 (Stevens, J., dissenting) (stating that the Court should not allow an organization to discriminate against a homosexual male); *Damron*, ¶ 13, 670 N.W.2d at 876 (not setting a clear standard for the amount of evidence heterosexual noncustodial parents must bring to modify custody).

342. *Damron*, ¶ 13, 670 N.W.2d at 876.

homosexuality to justify removing children from their parents now make modification based solely on homosexuality nearly impossible.<sup>343</sup> Changes are necessary to further ensure that homosexuality is not considered in custody rulings, thus compelling courts to determine only the best interests of the child.<sup>344</sup> Courts in North Dakota and nationwide are almost certainly moving in this direction, and will adopt standards that mirror these considerations in the very near future.<sup>345</sup>

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343. *Id.*

344. Gill, *supra* note 6, at 362.

345. *See generally Damron*, 670 N.W.2d at 876 (using a standard much closer to the nexus standard, which focuses less on homosexuality as a factor determining custody); *see also Huff*, *supra* note 2, at 695 (arguing that homosexuality should not be a factor considered in determining custody, because courts should not recognize a difference in the parenting abilities of homosexual and heterosexual parents).

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