

SUPREME COURT OF NEW JERSEY

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*MARK LEWIS and DENNIS WINSLOW;
SAUNDRA HEATH and CLARITA ALICIA
TOBY; CRAIG HUTCHISON and CHRIS
LODEWYKS; MAUREEN KILIAN and
CINDY MENEGHIN; SARAH and SUYIN
LAEL; MARILYN MANEELY and DIANE
MARINI; and KAREN and MARCYE
NICHOLSON-MCFADDEN,*

PLAINTIFFS/APPELLANTS,

v.

*GWENDOLYN L. HARRIS, in her official
capacity as Commissioner of the New Jersey
Department of Human Services; CLIFTON R.
LACY, in his official capacity as the
Commissioner of the New Jersey Department
of Health and Senior Services; and JOSEPH
KOMOSINSKI, in his official capacity as
Acting State Registrar of Vital Statistics of
the New Jersey State Department of Health
and Senior Services,*

DEFENDANTS/RESPONDENTS.

CIVIL ACTION

ON APPEAL FROM

*Superior Court of New Jersey
Appellate Division*

Docket No. A-2244-03T5

SAT BELOW

*Hon. Stephen Skillman, P.J.A.D.
Hon. Donald G. Collester, Jr., J.A.D.
Hon. Anthony J. Parrillo, J.A.D.*

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**BRIEF OF NATIONAL ASSOCIATION OF SOCIAL WORKERS AND
NATIONAL ASSOCIATION OF SOCIAL WORKERS NEW JERSEY CHAPTER
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF THE AMICI

The National Association of Social Workers ("NASW") and the National Association of Social Workers New Jersey Chapter ("NASW-NJ") respectfully submit this brief as *amici curiae* in support of the plaintiffs/appellants in this case. NASW and NASW-NJ submit this brief to explain that there is a compelling child welfare aspect to the matter of marriage for same-sex couples.

NASW was established in 1955 as a nonprofit professional association dedicated to the practice and interests of the social work profession. It is the largest social work association in the world, with 153,000 members and chapters in every state and internationally. The New Jersey Chapter has over 7,500 members.

In furtherance of its organizational purposes NASW, *inter alia*, promulgates professional standards and criteria, conducts research, publishes studies of interest to the social work profession, provides continuing education and enforces the NASW Code of Ethics. NASW also adopts policy statements on issues of importance to the social worker profession. NASW's "Family Policy" recognizes that gay and lesbian people are a part of existing families and provide important caregiving to children, as well as other family members. The policy further identifies

discrimination against lesbian and gay parents as undermining the survival of their families.

NASW adopted a policy statement on gay and lesbian issues in 1977, which was subsequently revised and expanded in 1987, 1993 and 1996; that policy prohibits social workers from discrimination on the basis of sexual orientation. In addition, the policy affirms the position of NASW that same-gender sexual orientation should be afforded the same respect and rights as other-gender orientation. In 2004, NASW reaffirmed its policy supporting marriage for same-sex couples.

SUMMARY OF ARGUMENT

In this case the State has not justified its ban of marriage for same-sex couples by reference to child welfare policy. The State does not contend that children reared in same-sex households are raised in a non-optimal environment. In fact, quite to the contrary, the State in this case justifies its ban of marriage for same-sex couples, in large part, by pointing to the variety of legal protections already afforded by the State of New Jersey to same-sex relationships, including legal protections for same-sex couples raising, or wishing to raise, children.

Nonetheless, and although the State has not sought to justify its ban on any child welfare bases, the Appellate Division did find child welfare issues worthy of note and

determined to consider arguments raised not by the State but by a series of *amici* regarding procreation and child rearing to be properly before it. Lewis v. Harris, 378 N.J.Super. 168, 185 n.2 (App. Div. 2005). Furthermore, NASW anticipates that various *amici* filing in this Court will again come forward and urge the Court to inject the child welfare issue into this case as a rationale to hold that the New Jersey constitution does not require legalization of marriage for same-sex couples. Should this Court consider child welfare issues despite the State's wise decision not to rely upon child welfare to justify its ban on marriage for same-sex couples, the Court should consider the whole social science story, which is very different from the tale of woe told by various *amici*.¹ Child welfare policy points decisively toward permitting same-sex couples to marry.

First, the social science literature is unrefuted that marriage is associated with excellent outcomes for child-rearing. Research findings linking parents' marital status with childrens' well-being are very consistent.

¹ The following persons and entities submitted briefs below opposing same-sex marriage and raising child welfare grounds, and it is anticipated that many of these parties will move to submit similar briefing in this Court: The New Jersey Coalition to Preserve and Protect Marriage, The New Jersey Family Policy Council, The New Jersey Catholic Conference, and Mr. and Mrs. David C. Heslinger; Family Research Council; Monmouth Rubber & Plastics Corp. and John M. Bonforte Sr.; United Families International and United Families New Jersey; Alliance for Marriage (collectively referenced herein as "opposing *amici*").

Second, marriage presents the best means available to the State to ensure that there are two people (not merely one) who are responsible for a child's care. It clearly is in the best interests of children to have two persons recognized by law as bearing this responsibility and upon whom the child may rely for enforceable rights of support, inheritance, and care.

Third, although this case is about marriage and not about whether same-sex couples should be permitted to become parents, even if we were to back up and re-examine this question (something no one but certain opposing *amici* suggest that we do), the social science research is unrefuted that homosexual people are as good as heterosexual people at the task of raising children. There are no scientifically valid social science studies that establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple. Every one of the major child welfare and mental health professional organizations to address the issue has concluded that restrictions on parenting by lesbians and gay men are contrary to the best interests of children.

Child welfare policy presents no rational basis on which to justify a ban on marriage for same-sex couples. On the contrary, examination of child welfare policy demonstrates the

irrationality of current public policy that makes marriage
unattainable for same-sex couples raising children.

ARGUMENT

I. INTRODUCTION

Today the law and society fully recognize (as well they should) the value of children who join the human family by means of in vitro fertilization, sperm donation, egg donation or surrogacy or who join a new family by way of adoption. It rationally serves no state interest to harm certain of those children by devaluing the immediate families that they have joined.

[Anderson v. King County, 2004 WL 1738447 *9 (Wash. Sup. Ct. Aug. 4, 2004).]

Same-sex couples do, and they will continue to, raise children. They do so in large numbers. According to the Census, there are at least 16,000 couples in New Jersey who identify as same-sex couples,² and that figure is widely considered to be an undercount.³ Almost 5,000 of these same-sex couples are believed to have children.⁴ These families are here to stay:

² Tavia Simmons and Martin O’Connell, U.S. Census Bureau, Married Couple and Unmarried Partner Households: 2000, at 4 (Feb. 2003).

³ “[T]he [Census] count of same-sex couples is certainly on the low side because there are still many people who fear discrimination and harassment and refuse to report that they are part of a gay or lesbian couple.” Ronald Alsop, As Same-Sex Households Grow More Mainstream, Business Takes Notice, Wall St. J., Aug. 8, 2001, at B4.

⁴ This figure is obtained by multiplying the number for each set of households (male and female) by the percentage of those households that have children. Simmons and O’Connell, supra, at 4,9. This may well be a conservative estimate, as evidenced by information submitted below by amicus Human Rights Campaign.

Many, many children are going to be raised in the homes of gay and lesbian partners. Present social trends will undoubtedly continue. Gay and lesbian couples will feel the human instinct to wish to raise children, they will have available either the supportive adoption laws or the technological means to begin raising a family and they will enjoy the increasing public acceptance of such families. All this is certain.

[Andersen, supra, at *10.]

New Jersey does not interfere with reproductive technology that enables individuals within a same-sex relationship to become biological parents. New Jersey also allows same-sex couples to be foster parents and to jointly adopt foster children, and same-sex couples who decide to give birth to a child can have the partner who is not automatically legally recognized adopt the child. The State acknowledged in its brief below that in New Jersey "members of same-sex couples are permitted to adopt their partner's biological children." Db36 (citing In re Adoption by H.N.R., 285 N.J. Super. 1, 6 (App. Div. 1995) (allowing lesbian to adopt biological child of her partner conceived with mutual planning during same-sex relationship), and In re Adoption of J.M.G., 267 N.J. Super. 622, 625-26 (Ch. Div. 1993) (same)). The New Jersey Supreme Court held that "a lesbian was a 'psychological parent' to the children of her former partner, with whom she lived in a 'familial setting,' and accorded her visitation rights." Db36-37 (citing V.C. v. M.J.B., 163 N.J. 200, 224 (2000)). And we

are advised by the State that in 1997, a "Bergen County Judge, with the consent of the State, allowed a gay male couple to adopt a child who was not related to either man but for whom they were State-authorized foster parents." Id. (citing <http://archive.aclu.org/news/n121797.html>). Adoption is not to be impeded in this State based on sexual orientation. See N.J.A.C. 10:121C-4.1(c) (criteria for adoptive home selection) (prohibiting discrimination on the basis of sexual orientation). It is thus the established policy of this State that sexual orientation cannot be a basis for discrimination in connection with the right to parent children.

With respect to the children raised by same-sex couples, the relevant public policy question is whether, and to what extent, marriage would promote the welfare of these children, or whether, and to what extent, marriage is somehow detrimental to the welfare of these children. Where there are children from an adult relationship, the State normally would encourage marriage between the responsible adults. The properly framed question is whether there is a child welfare policy reason to take the completely opposite stance on marriage with respect to same-sex couples, who are indeed raising children together and who will continue to do so without the benefits that are available to opposite-sex couples. Not surprisingly, there is not. Marriage between a child's parents uniformly is good for children.

II. CHILD WELFARE POLICY STRONGLY SUPPORTS PERMITTING MARRIAGE FOR SAME-SEX COUPLES.

A. Marriage Provides A Beneficial Legal And Social Environment For The Raising Of Children And Social Science Provides No Reason To Doubt That Marriage For Same-Sex Couples Would Be Beneficial For The Welfare Of Children.

1. The Social Science Evidence Is Unrefuted That Marriage Between A Child's Parents Is Consistently Associated With Positive Measures Of Child Welfare.

All parties and all *amici* can and do agree that marriage promotes child welfare.⁵ The social science literature and public policy are settled on this point. "Research findings linking family structure and parents' marital status with children's well-being are very consistent."⁶ "Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents."⁷ Opposing *amici* made this

⁵ While marriage promotes child welfare the law does not require that the parties enter into the relationship with an intention or ability to procreate. No affidavit is required, no physical test for fertility is required, and there is no refusal of a marriage license for couples who obviously are unable to bear children.

⁶ Kristin Anderson Moore, et al., Marriage From A Child's Perspective: How Does Family Structure Affect Children, And What Can We Do About It?, Child Trends Research Brief (June 2002), at 1.

⁷ Id. at 6.

same point in their submissions below. See Brief filed in Appellate Division of Amicus Curiae The New Jersey Coalition To Preserve And Protect Marriage, et al., at 24 (citing Mary Parke, Are Married Parents Really Better For Children? What Research Says About the Effects of Family Structure on Child Well-Being, Center For Law And Social Policy ("CLASP") Policy Br. No. 3 (May 2003) at 6, and citing Mathew D. Bramlett & William D. Mosher, First Marriage Dissolution, Divorce, and Remarriage: United States, CDC Advance Data No. 323 (May 31, 2001)).

(The term "biological parents" used in the cited literature refers interchangeably to biological parents and adoptive parents. CLASP Policy Br., supra, at 7 n.1. "The reference to biological parents is to distinguish between biological/adoptive parents and step-parents. Most studies that include data on adoptive parents include them in the biological-parent category." Id. This is because "[a]dopted children have very similar outcomes to children raised by both biological parents." Id.)

Cohabitation is not the equivalent of marriage. The "married" status itself, for complex reasons, is associated with stability that is recognized to exceed that of couples who lack this status. It seems that marriage serves to fortify committed relationships and may enhance the stable care-taking, permanence, and security that comes from having two available

parents. Comparisons of committed cohabitating couples and married couples demonstrate that the latter group is more likely to stay together.⁸

2. Positive Child-Rearing Outcomes Associated With Marriage Between A Child's Parents Weigh In Favor Of Permitting Marriage For Same-Sex Couples.

With the overwhelming evidence that an intact marriage provides stability for the raising of children, what possible child welfare reason could there be to deprive children of same-sex couples of the same stability and positive effects associated with marriage? The short answer is that there is no reason to do so. We know that marriage serves to fortify committed relationships and that comparisons of committed cohabitating couples and married couples demonstrate that marriage is associated with greater permanency. Yet the State currently denies same-sex couples raising children access to marriage. This can have only a perverse result. As the Massachusetts Supreme Court correctly recognized: "The task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws." Goodridge v.

⁸ See, e.g., Philip Blumstein & Pepper Schwartz, American Couples 307-08 (1983) (only 4% of married couples in sample broke up during an 18-month period, in contrast to 17% of heterosexual cohabitating couples).

Dept. of Public Health, 440 Mass. 309, 334, 798 N.W.2d 941, 963 (2001).

Marriage strengthens bonds and increases stability of families. It advances child welfare to permit - and indeed to promote - marriage where there are children. Judge Downing in a recent Washington state marriage ruling eloquently articulated the lack of logic inherent in the position that marriage of same-sex parents yearning for and ultimately raising children is somehow bad for children. Once one recognizes that present social trends undoubtedly will continue and that many children are going to be raised in the homes of gay and lesbian parents, child welfare policy dictates are clear:

One . . . must try to envision two categories of future children. The first category consists of those whose heterosexual parents will either neglect them or never conceive them because same-sex marriage has been legalized. The second category is those children who will be raised in a home with same-sex adult partners and who would enjoy enhanced family stability and social adjustment if these adults were granted the benefits of civil marriage. The only reasonable conclusion is that the very real second category greatly outnumbers the first theoretical one. Therefore, the goal of nurturing and providing for the emotional wellbeing of children would be rationally served by allowing same-sex couples to marry; that same goal is impaired by prohibiting such marriages.

The above conclusion is inescapable when one looks objectively and dispassionately at the properly framed question. It is the same conclusion reached by the Vermont Supreme Court in 1999. "If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues

the marriage laws are designed to secure against." Baker v. State, 170 Vt. 194, 219, 744 A.2d 864 (1999) (emphasis in original). It is the same conclusion reached by the Massachusetts Supreme Court in 2003. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'" Goodridge v. Department of Public Health, 440 Mass. 309, 335, 798 N.E.2d 941 (2001).

[Andersen, supra, at *10.]

Once one accepts this premise that children will be raised in same-sex households, it seems to follow quite easily that controlling and bolstering that child-rearing is an argument that strongly favors marriage. If, as Judge Parrillo stated in his concurrence in the case below, "[m]arriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences," Lewis, 378 N.J.Super. at 197, then the State has a valid and indeed a strong interest in not only permitting but actually in encouraging marriage between partners raising children.

In short, marriage has positive effects for children.⁹ It creates an optimal family environment for the raising of children and it is overwhelmingly associated with positive outcomes for child-rearing. To argue against marriage for same-sex couples on behalf of children is to take an irrational stance on the issue at odds with all we currently know about the subject of marriage and child welfare.

B. Marriage Protects Children By Ensuring There Are Two Adults Who Are Permanently Responsible For A Child's Welfare.

We know that marriage creates a stable family setting for the raising of children and that it is associated with the greatest degree of permanency for the family unit. In the unfortunate event the relationship terminates, either as a result of disagreement or death, marriage also provides an excellent foundation for ensuring continued care for the children.

⁹ The majority decision below framed the concept of marriage providing an optimal environment for child-rearing in a much more narrow manner, specifying "marriage between a man and a woman," which it stated was deemed by society "to play a vital role in propagating the species and in providing the ideal environment for raising children." 378 N.J. Super. at 185. In support of this notion that marriage between a man and a woman is the ideal environment for raising children, the majority referenced, among other articles, William C. Duncan's piece, The State Interests in Marriage, published in 2 Ave Maria L. Rev. 153 (2004). We would point out that this particular publication might be expected to reflect a particular religious perspective on these matters.

The State has certain, limited means available to it to ensure that appropriate adults are permanently responsible for the care of children. When a child is born to a married heterosexual couple, both parties are presumed to be the child's parents, and both are deemed responsible for the care of the child born in the marriage until that child reaches adulthood. Neither divorce nor separation can sever legal responsibility; family law provides for the support of the child upon divorce or separation. Likewise, when a child is born to a single parent as a result of a heterosexual relationship, the State has available means to enforce the responsibility of the second parent to the child during life - principally, child support enforcement based on paternity.

A very different legal landscape currently exists for children who have two parents of the same sex. If the child is born by way of assisted reproduction to one of the two partners, only that partner automatically is recognized in the law as the child's parent. The other is not and in most instances will only be recognized if the other parent successfully employs the costly and time-consuming process of adopting the child.¹⁰

¹⁰ Another option - but also one involving the need for adjudication - is to petition the Court to permit the non-biological same-sex partner to appear on the child's birth certificate. Recently, Judge Talbert in Essex County granted such an application, recognizing that public policy "establishes unequivocally this State's focus on the best interests of

For heterosexuals -- for whom marriage is legally available -- marriage is much more readily accessible than adoption. The barriers to marriage in New Jersey are quite low. In New Jersey, a couple obtains a license to marry upon payment of a fee of \$28 and satisfaction of a small list of criteria, principally satisfying proof of residency (by showing a driver's license), providing social security numbers, and appearing with a witness at least 18 years of age who knows the couple.¹¹

Barriers to adoption, on the other hand, are relatively high. Adoption procedures are lengthy, intrusive, and complicated, as well as expensive. Independent adoptions normally require the retention of an attorney to handle the documentation and to finalize the adoption in court, and private attorney fees easily run in excess of \$3,000 for these services.¹² Before most adoptions may occur in New Jersey, a home study is required to be submitted by a licensed social

children." Judge Talbert was unable to discern any State interest opposed to the wish of the non-birth mother voluntarily to bear legal responsibility for the child. In Re: Child of Kimberly Robinson, Docket No. FD-07-6312-05-A, May 23, 2005, Slip Op. at 11- 12. This decision, of course, does not mandate the listing of both names as parents, nor does it set a statewide standard, nor is it entirely clear what the specific legal ramifications of such steps will be.

¹¹ The legal criteria for obtaining a marriage license are available at www.state.nj.us/wedlic.html.

¹² See Foster Care And Adoption, www.adoptioninstitute.org/proed/forum99.html, at 13.

worker. Not only is this a fairly intrusive process, but, again, it represents a cost to the prospective adoptive parent, with fees typically ranging from \$500 - \$1,000.¹³ Adoption is also time-consuming and it often necessarily involves multiple social worker visits to the home and various stages of action by the Court. In New Jersey, whether or not an approved agency is involved in placing the child in the home initially, in most cases one will be appointed to investigate the home, provide necessary notices of potential adoption, and report to the Court (at the expense of the adopting parent), although in step-parent adoptions the Court may in its discretion take direct evidence in lieu of an agency report. N.J.S.A. 9-3:48. Adoption procedures contemplate both a preliminary hearing and a finalization hearing, although, again, the latter may be waived by the Court in certain cases, including adoptions by certain relatives. Id. If the finalization proceeding is not waived, it is to occur "not less than six nor more than nine months from the date of the preliminary hearing." N.J.S.A. 9:3-48(c). And these costs, intrusions, and procedures are not the only barriers to adoption: unlike marriage, achieving adoption ultimately requires the approval of an adjudicator.

¹³ See id.

We know that people frequently act when the barriers of time, money, and effort are low, and that they are less likely to act when barriers of time, money, and effort are high. It is reasonable to posit that more children raised in same-sex households would have two legally recognized parents -- and they would be more easily and more swiftly so provided and their family's finances less drained - were their parents permitted access to the institution of marriage.

In the absence of access to marriage, the consequences for a child born to a same-sex couple can be grave should unfortunate events occur in the family. Let us first examine the case of dissolution of the family unit. When a same-sex couple separates, legal responsibilities and protections attendant to divorce or separation of a married couple may not be triggered. If the departing adult is not a legally-recognized parent to the child and chooses not to continue to contribute toward the child, there are not currently developed legal mechanisms to continue to enforce that parent's previously undertaken responsibilities with respect to the child. Leaving to one side the very significant psychological and emotional effects this will have on the child, this can have a devastating impact on the economic welfare of the child and, of course, the entire family unit. We know, for example, that the "low incomes of single-parent families with children are due, in part, to a

widespread failure of non-custodial parents to pay child support."¹⁴ Child support payments, when made, are a major source of lifting the standard of living for the family: "If all the fathers who owed child support had paid in full in 1991, households where mothers were the custodial parent would have had 24 percent more income than if no child support were paid."¹⁵

Similar devastating effects can be expected in the case of the death of a parent. If the family should suffer the death of a parent neither linked to the child by biology nor adoption, and should the deceased parent die intestate, the consequences for the child and the family are extremely grave. Under New Jersey law, heterosexual families are well-protected by background succession law. Surviving spouses and surviving issue share in the deceased's estate (for example, if there are both a surviving spouse and surviving issue of the deceased and the spouse together and no other issue, after the surviving spouse takes the first \$50,000 of the estate, the estate is then divided 50% to the surviving spouse and 50% to surviving issue, *per stirpes*. N.J.S.A. 3B:5-3; 3B:5-4.)

¹⁴ Parenting Our Children: In the Best Interest of the Nation, Report of the U.S. Commission on Child and Family Welfare (Sept. 1996) at 12, available at <http://www.copss.org/research/majority1.htm>

¹⁵ Id.

Consider the difference in outcome upon the death of the non-recognized parent who has been denied the ability to marry the child's legally-recognized parent and who fails to leave a valid will. New Jersey laws of intestate succession provide no protection for any member of this family unit.¹⁶ There are no recognized inheritance rights at all either for the child or for the surviving parent. In the eyes of the law, there is no surviving "spouse" and there are no surviving "issue." The estate devolves to the decedent's parents and then (if there are no parents) to more distant relatives or, if there are none, ultimately to the State of New Jersey. This leaves the child and the child's surviving parent unable to depend upon the decedent in the event of death.

Of course, with proper estate planning, these terrible outcomes can be averted. As a society, however, we recognize the unfortunate reality that not all of our citizens plan carefully and timely; accordingly, we create a legal scheme that strives to serve those dependent upon a deceased person in a way that best reflects reality should this careful planning not occur. In the case of same-sex parenting, our current legal scheme is not up to this task. It functions irrationally and in

¹⁶ Intestate succession issues were not included within the panoply of rights afforded same-sex couples under the Domestic Partnership Act, L. 204, c. 246.

a manner that does not advance the welfare of many of our children.

We know that same-sex couples, in large and vocal numbers, wish to marry. By depriving same-sex couples of access to marriage, the State acts in a manner that has palpable negative consequences - perhaps unintended - on the children of these couples. This is not rational policy and certainly it is not optimal policy. It provides a disservice to a large and very likely growing number of children. Child welfare policy points to extending the availability of marriage to promote security and permanency of the family unit, which has a cascade of positive effects on child development and welfare. And should the unit dissolve due to unfortunate events -- departure or death of a parent -- again, child welfare is best served by marriage, which provides two parents to the child and all the attendant responsibilities and obligations for the continuing care of that child.

C. Gay Parents Can Be And Are Good Parents Who Raise Children Who Are As Well-Adjusted As The Children Of Heterosexual Parents.

1. A Professional Consensus Supports The Child-Rearing Abilities Of Gay Individuals And Couples.

The opposing *amicus* briefs submitted below do not challenge the principles that marriage is good for children generally or that the children of same-sex parents would be better protected

by permitting their parents to access the institution of marriage. They do attempt, however, to undermine the entire notion of same-sex parenting by suggesting that social science data counsels against the raising of children in same-sex family structures. NASW joins amici American Psychological Association and the New Jersey Psychological Association to correct the record on this point, and NASW adds the following comments.

Over the last twenty years, a considerable body of social science research has established that lesbian and gay parents have parenting skills that are at least equivalent to those of heterosexual parents.¹⁷ Studies consistently show the absence of differences between gay and heterosexual parents on every

¹⁷ See, e.g., David K. Flaks, et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Dev. Psychol. 105, 111 (1994) [hereinafter "Choosing Motherhood"]; David K. Flaks, Research Issues, in Child Welfare League Of America, Issues In Gay And Lesbian Adoption 27 (Anne Sullivan ed. 1995) [hereinafter "Research Issues"]; Charlotte J. Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective, 2 Duke J. Gender L. & Pol'y 191, 198 (1995); Jerry J. Binger & R. Brooke Jacobsen, Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Nongay Fathers, 23 J. Homosexuality 99, 109 (1992); Frederick W. Bozett, Gay Fathers, in Gay And Lesbian Parents 15 (1987); Beverly Hoeffler, Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families, 51 Am. J. Orthopsychiatry 536, 542-543 (1981); Judith Ann Miller, et al., The Child's Home Environment for Lesbian vs. Heterosexual Mothers; A Neglected Area of Research, 7 J. Homosexuality 49, 55-56 (1981).

meaningful measure of parenting ability.¹⁸ Numerous studies conducted by child development researchers consistently show that children raised by lesbians or gay men demonstrate no deficits in intellectual development, social adjustment or psychological well-being in comparison to children raised by heterosexual parents.¹⁹ As one study concluded, "[t]he research

¹⁸ See, e.g., Cheryl A. Parks, Ph.D., Lesbian Parenthood: A Review of the Literature, 68 Am. J. Orthopsychiatry 376, 380, 386 (1998) (a critical examination of 17 peer-reviewed studies published between 1980 and 1992 concluded that "few differences" exist between heterosexual and lesbian mothers); Choosing Motherhood, *supra*, at 111-12 (no differences between lesbian and heterosexual parents); Sally L. Kweskin & Alicia S. Cook, Heterosexual and Homosexual Mothers' Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children, 8 Sex Roles 967, 971 (1982) (lesbian mothers and heterosexual mothers have comparable attitudes towards sex roles); Martha Kirkpatrick, Clinical Implications of Lesbian Mother Studies, 14 J. Homosexuality 201, 210 (1987) (lesbian mothers no different from heterosexual mothers in lifestyle, parenting style, or social support system); K.F. McNeill, et al., Families & Parenting: A Comparison of Lesbian & Heterosexual Mothers, 82 Psycho. Rep. 59 (1998); Ellen C. Perrin, M.D. & the Committee on Psychological Aspects of Child and Family Health, American Academy of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 341, 342 (2002), available at <http://aappolicy.aappublications.org> ('no differences" between gay and heterosexual fathers in providing appropriate recreation, encouraging autonomy, or "dealing with general problems of parenting"); J. Binger & Jacobsen, *supra*, at 99, 109 (almost no differences between gay and non-gay fathers in providing recreation involvement, problem-solving and parenting styles); Mary B. Harris & Pauline H. Turner, Gay & Lesbian Parents, 12 J. Homosexuality 101, 112 (Winter 1985/86) (comparing gay fathers, non-gay fathers, lesbian and non-lesbian mothers and finding no significant differences in the parents' relationship with their children).

¹⁹ See Perrin, *supra*, at 342-43 (citations omitted); Tasker & Golombok, Research Issues, *supra*, at 29; Sharon L.

is extraordinarily clear in its finding about lesbian and gay parents and their children: they look remarkably like their heterosexual counterparts and their children."²⁰

The research also is clear that children of lesbians and gays are socially well-adjusted. For example, there are no significant differences in the quality of peer relationships between children of lesbian and heterosexual parents,²¹ and studies show strong self-esteem and assessments of popularity among adolescent children of lesbians and gays.²²

Huggins, A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers, 18 J. Homosexuality 123 (1989); Martha Kirkpatrick, et al., Lesbian Mothers and Their Children: A Comparative Survey, 51 Am. J. Orthopsychiatry 545, at 547-49.

²⁰ G. Dorsey Green & Frederick W. Bozett, Lesbian Mothers and Gay Fathers, Homosexuality; Research Implications for Public Policy 198 (John C. Gansiorek & James D. Weinrich eds., 1991).

²¹ See e.g., Susan Golombok, et al., Children in Lesbian Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 J. Child Psychol. Psychiatry 551, 567 (1983); see also Tasker & Golombok, supra, at 88 (follow-up study found that children of lesbians did not recall more teasing regarding their families than those raised by single heterosexual parents).

²² Huggins, supra, at 131-32 (no significant difference in self-esteem among the two groups of adolescents); Richard Green, MD, et al., Lesbian Mothers and Their Children: A comparison with Solo Parent Heterosexual Mothers and Their Children, 15 Archives Sexual Behav. 167, 178 (1986) (no significant differences between the children of lesbian and heterosexual mothers with respect to the children's self-ratings of popularity of the mothers' descriptions of the children's popularity); Mary E. Hotvedt & Jane B. Mandel, Children of Lesbian Mothers, in Homosexuality: Social, Psychological and Biological Issues 275, 282 (1982) (no differences in peer group relationships among

Lesbian and gay parents are able to raise children who are as well adjusted as those of heterosexual parents because the factors associated with a child's positive adjustment have no relation to the parent's sexual orientation.²³ These factors include, among other things, secure attachments between the parent and child, emotionally stable parents, and authoritative (not authoritarian) parenting style, and parents with realistic expectations, well-developed behavior management, coping and good listening skills, flexible family roles and a strong support network.²⁴ Lesbian and gay parents can and do provide these parental attributes.²⁵

boys of lesbian or heterosexual mothers, and, in fact, daughters of lesbian mothers reported that they were more popular than daughters of heterosexual women).

²³ See Michael E. Lamb, et al., Parent-Child Relationships: Development in the Context of the Family, in Developmental Psychology; an Advanced Textbook 32-42 (4th ed. 1999).

²⁴ See id. at 7-10, 26-29, 42-43.

²⁵ Three early state law decisions incorrectly relied on a snippet from one NASW social work article to deny lesbian mothers custody (or expanded custody) of their children. Collins v. Collins, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988); S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980); Constant A. v. Paul C.A., 496 A.2d 1 (Pa. Super. 1985). The courts erroneously stated that the author of the article concluded that children suffer adverse consequences if raised by lesbian mothers. To the contrary, the author concluded that the "parent's sexual preference does not matter as much as the love, caring, and maturity of the adults and their effort to help their children become self-reliant and self-assured." Karen G. Lewis, Children of Lesbians: Their Point of View, 25 Social Work 198, 203 (1980).

Drawing on this body of research, every medical, psychological, and child welfare organization to have addressed the topic has concluded that children of same-sex parents are as healthy, happy, and well-adjusted as their peers. These experts have examined the social science to reach a consensus that there is no relationship between the sex or sexual orientation of parents and the well-being of their children:

° Present *amicus* National Association of Social Workers ("NASW") (with more than 150,000 members) has stated: "The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to heterosexual parents and their children that were included in the studies." National Association of Social Workers, Policy Statement: Lesbian, Gay, and Bisexual Issues, Social Work Speaks 193, 194 (1997).

° The American Academy of Pediatrics, the nation's preeminent pediatric authority with 57,000 pediatrician members, has this to say about same-sex adoption: "No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents." Ellen C. Perrin, MD, and the Committee on Psychological Aspects of Child and Family Health,

American Academy of Pediatrics Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, Pediatrics Vol. 109 No. 2 (Feb. 2002). "A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual." Id. at 2.

° The American Psychological Association, representing more than 155,000 psychologists, concluded that "[n]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychological growth." American Psychological Association, Lesbian and Gay Parenting: A Resource for Psychologists 8 (1995), available at <http://apa.org/pi/parent.html>.

° The American Academy of Child & Adolescent Psychiatry, which represents over 6,500 psychiatrists, concurs: "Outcome studies of children raised by parents with a homosexual or bisexual orientation, when compared to heterosexual parents, show no greater degree of instability in the parental relationship or developmental dysfunction of children."

American Academy of Child & Adolescent Psychiatry, Policy Statement on Gay, Lesbian and Bisexual Parents (June 1999), available at <http://www.aacap.org/publications/policy/ps46.htm>.

° The American Psychoanalytic Association also has adopted a position statement that notes that "[g]ay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents."

American Psychoanalytic Association, Position Statement on Gay and Lesbian Parenting (May 16, 2002), available at <http://www.apsa-co.org/ctf/cgli/parenting.htm>.

2. Alternative Theories About Harm To Children Are Unfounded.

Against this weighty unanimity of opinion by medical, psychological, and child welfare professional community come the opposing *amici* and their proffered hypotheses. We address some of the most troubling.

° "Biology." *Amicus* Family Research Council posited below that same-sex parenting is bad for children because "a same-sex couple can never provide a child with the advantages of being raised by both biological parents." Br. at 14. *Amicus* New Jersey Coalition to Preserve and Protect Marriage and its co-*amici* made this same point. Br. at 23-24 ("With a broad research consensus showing that children are best served when

raised in a family 'with both their biological parents in a low-conflict marriage,'" the State legitimately promotes unions that can create this biological environment). This suggestion is significantly misleading. While the cited authorities use the term "biological," that term is often a surrogate for both biological and adopted children and a short-hand means to distinguish biological and adopted children, on the one hand, from children raised in step-families, on the other hand. Most social science research treats adopted children together with biological children because adopted children have very similar outcomes to children raised by both biological parents. CLASP Policy Br., cited below by opposing *amici*, supra, at 7 n.1 ("Most studies that include data on adoptive parents include then in the biological-parent category. Adopted children have very similar outcomes to children raised by both biological parents.") The research materials offered by opposing *amici* in fact make no meaningful distinction between adopted children and their biological counterparts. See CLASP Policy Br., supra, at 7 n.1 (cited below by Amicus New Jersey Coalition to Preserve and Protect Marriage at 24).

° "Fatherlessness." The other major hypothesis that opposing *amici* put forth below is that the absence of a father is negative for children and that therefore same-sex parenting is inferior -- many such households necessarily will be

"fatherless." This, again, is a hypothesis that is based on an inappropriate interpretation of the literature. Certainly the literature strongly suggests that children raised in fatherless households are not raised in an optimal environment.

"Fatherlessness" in the referenced studies, however, frequently relates to children growing up with a single parent (who is a mother), or in a step-family, or who is in some disrupted family situation (separation or divorce).²⁶ This is not a meaningful comparison here, where we are talking about just that - creating married two-parent households. There is no valid scientific literature that suggests that children raised with two parents (but both of the female sex) do worse than children with two parents (of opposite gender that would include a father). It is disheartening and intellectually dishonest for opposing *amici* to take a position against marriage of same-sex couples and to do so based on research that tells nothing but the tale of woe experienced disproportionately by children who lack one of their two parents - children born to and raised by a single parent, children who experience the sometimes devastating effects of the divorce of their parents, and children who experience the

²⁶ See, e.g., the lengthy annotated bibliography accompanying the affidavit of Jeffrey B. Sattinomer, appended to the amicus submission of Monmoth Rubber & Plastics Corp, and John M. Bonforte Sr. These annotations capture the unfortunate and distressing plight of children that tends to be associated with the lack of an intact family.

disruptions associated with forming step-families or the cohabitation of their parent with a person to whom the parent is not married. What one overwhelmingly gleans from these studies is that the stability of an intact family with the child's two parents is a very strong predictor of a positive outcome for the child.

Ultimately, opposing *amici* fall back on a position that the existing research of good outcomes for children of same-sex couples is imperfect and untrustworthy. Certainly the literature includes discussions (primarily not peer-reviewed and sometimes authored by law professors rather than social scientists²⁷) pointing out weaknesses in some of the existing studies, and of course there are acknowledged weaknesses in available research studies. But the opposing *amicis'* literature shows that there is no "battle of the experts" on the basic, crucial points. Thus, while Stacey and Biblarz²⁸ disagree with the what they consider an overly simplistic statement that there are "no differences" among children raised by lesbian and gay

²⁷ See, e.g., Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. Ill. L. Rev. 833 (1997); Robert Lerner and Althea K. Nagai, No Basis: What the Studies Don't Tell Us About Same-Sex Parenting, Marriage Law Project, Washington, D.C., Jan. 2001.

²⁸ Judith Stacey and Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter, 66 American Sociological Review 2001 (April: 159-183).

parents as compared with children raised by heterosexual parents,²⁹ there is no debate that children raised by lesbian and gay parents and their children in the studies "display no differences from heterosexual counterparts in psychological well-being or cognitive functioning." Id. at 176. "[E]very relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment[.]" Id. "In fact, given that children with [lesbian and gay] parents probably contend with a degree of social stigma, these similarities in child outcomes suggest the presence of compensatory processes in [lesbian and gay] parent families." Id.

One thing is clear: Against the evidence demonstrating the well-being of children raised by same-sex parents, there is no valid scientific evidence to establish that children are detrimentally affected when raised by same-sex parents.

"Although many may hold strong opinions on the subject, the fact is that there are no scientifically valid studies tending to establish a negative impact on the adjustment of children raised

²⁹ It has been suggested that there may be a weakness in existing literature concerning the possibility or openness of children of same-sex couples engaging in same-sex behavior. See id. at 176-77.

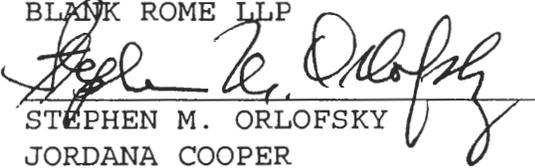
by an intact same-sex couple as compared with those raised by an intact opposite-sex couple." Andersen, supra, at *10. Thus, "[u]nlike the documented impact of children's exposure to domestic violence and substance abuse in the homes of lawfully married heterosexual couples, as to children raised by intact same-sex couples there is no science, only questionable assumptions based on stereotypes." Id. Of course, we do not credit stereotypes in our law. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidotti, 466 U.S. 429, 454 (1984). There is no evidence that same-sex couples do worse than their heterosexual counterparts raising children, and there is strong evidence that they do just as well despite biases that may be faced by their children. To credit the opposing *amicis'* hypotheses, at best, is to credit untested hypotheses based -- impermissibly -- on stereotypes and not on science. At worst it is to credit positions that are the product of bigotry.

CONCLUSION

We are already well past the question of whether same-sex couples should be permitted to parent. The only valid child welfare consideration is how best to advance the welfare of the existing and forthcoming children raised in these households. There can be only one reasonable answer to that question: acknowledge the right of their families to partake of the proven benefits and the proven securities and financial and emotional stability attendant to the institution of marriage.

Respectfully submitted,

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