



THE RIGHTS OF CHILDREN
RAISED IN LESBIAN, GAY,
BISEXUAL OR TRANSGENDER
FAMILIES:
A EUROPEAN PERSPECTIVE

ILGA
EUROPE 

Written by Dr Loveday Hodson
on behalf of ILGA-Europe

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ISBN 978-92-95066-02-1

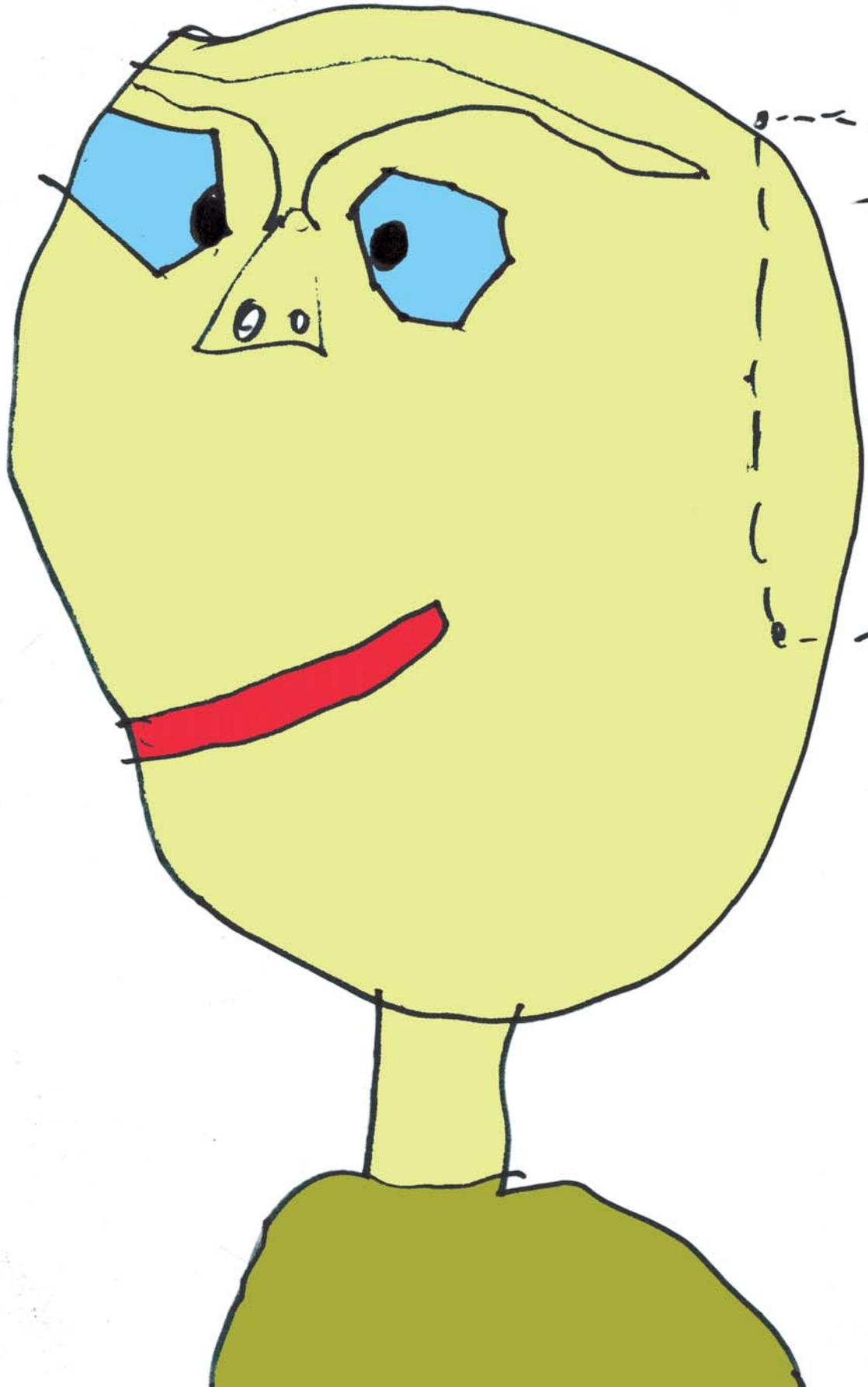
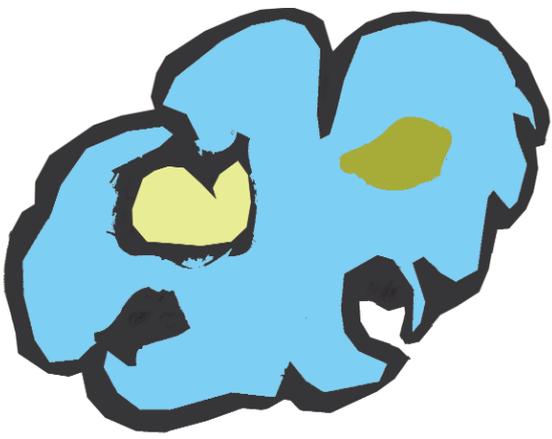


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Summary

A plethora of international and national laws aim to protect family life as a means of ensuring that children are raised in a stable and loving environment. Consequently, the extent to which a child's family unit enjoys legal recognition has a considerable impact on that child's enjoyment of his or her rights. As social acceptance of lesbian, gay, bi-sexual and transgender (LGBT) people improves, so more are entering into parenthood. It is imperative that the human rights of children raised in those families are recognised and protected on a basis of equality.

This paper starts from the simple premise that it cannot be in the best interest of those children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests, simply on the basis of their birth status, or their parents' sexual orientation or gender identity. ILGA-Europe believes that the question of the rights of children raised in LGBT families should form part of the wider dialogue about children raised in relationships based on love and care that fall outside of traditional marriage. The challenge is to ensure that all children enjoy human rights equally.

In Section 2 of this report, we outline the international and European treaties relevant to the protection of children's family rights. We note that the relevant laws are insufficiently clear and fail to offer children raised in LGBT families sufficient and equal protection. A number of European and international treaties recognise that 'the family' unit is central to the happiness and security of children and to the enjoyment of their fundamental rights. However, 'the family' of international law is poorly defined. Although the European Court of Human Rights (ECtHR) has made efforts to define the family in a way that is flexible, and accommodates relationships that are not based on marriage, its approach has tended to be influenced by the traditional nuclear family ideal. In particular, the ECtHR has had little to say about the rights of children raised in LGBT families. Consequently, it has largely been left to States to decide what legal recognition, if any, will be given to LGBT families and what protection children raised in these families will have. The lack of guidance at a European level means that the family rights those children enjoy at the national level vary considerably throughout Europe.

In Section 3, we outline some of the specific problems that the inequalities in national and international laws can cause those children. In simple terms, the discriminatory treatment that the children of LGBT parents experience means for many that they are denied equal enjoyment of the family rights that international human rights law promises to all children equally. This is clearly not consistent with the child's best interests, which the Convention on the Rights of the Child states should be the primary consideration in all actions concerning them.

In Section 4, we make some recommendations that we believe will go some way to address the position of children raised in LGBT families. These call for the Council of Europe to recommend to the Member States that they ensure full respect for the family rights of children in LGBT families by putting in place the necessary legal framework, including

- legal recognition of same-sex partnerships providing, at least, for joint parental responsibility of each partner's children on a basis of equality with opposite-sex marriage, if not also the right of each partner to adopt the other partner's children;
- marriage to be available to transgender people in accordance with the *Christine Goodwin* judgment of the ECtHR.

The author would like to thank Professor Robert Wintemute and ILGA-Europe staff and advisers for their invaluable comments and feedback on this report.

1. Introduction

Protecting children's rights is a central aim of international and European human rights law. All Member States of the Council of Europe are party to the Convention on the Rights of the Child ('CRC'), and all agree upon the fundamental principle that in every decision relating to children, protecting the best interests of the child is a primary consideration. While European states recognise that children enjoy rights in their own name, they also recognise that children are uniquely vulnerable and that the family unit is often central to a child's security, happiness and to the protection of their rights. A plethora of international and national laws thus aim to protect families as a means of ensuring that children are raised in a stable and loving environment. Consequently, the extent to which a child's family unit enjoys legal recognition has a considerable impact on that child's enjoyment of his or her rights.

The traditional idea of 'the family' in Europe is represented by the nuclear family: a married opposite-sex couple and their children. That notion of the family is an ideal type that retains considerable influence in framing national and international laws and policies affecting personal relationships. However, it is becoming increasingly distant from the lived reality of very many European families and their children. Remarkable social developments are taking place that are re-shaping our understanding of the ideal family form. Divorce is now commonplace, leading to a rise in single-parent households and step-families. Growing numbers of couples are choosing not to marry, leading to greater numbers of children born out of wedlock. Increasingly sophisticated reproductive technologies are becoming available which challenge traditional assumptions about parenthood. All of these developments demonstrate that 'the family' is in fact a flexible and adaptable unit – a reality attested to by rapidly-changing national and European regulations governing intimate relationships. There are now concerted efforts at both the national and European levels to recognise alternative family forms and, more particularly, to protect the rights of children being raised outside of traditional marriage-based family units.

Amongst those at the forefront of the expansion of the idea of family life in Europe are lesbian, gay, bi-sexual and transgender families ('LGBT families'). The term 'LGBT families' is used rather loosely throughout this report as shorthand to indicate the close and loving relationships established by adults who would define themselves as either lesbian, gay, bisexual or transgender and their children. When addressing matters of concern to people of a range of sexual and gender identities there will inevitably be times when the adopted terminology seems strained. This report nevertheless aims, as far as possible, to apply terminology in an inclusive manner. Consequently, the term 'LGBT families' is adopted throughout this report, even where a particular issue under discussion may not be of equal relevance to people discriminated on grounds of their sexual orientation or gender identity. We adopt the imperfect term 'co-parent' throughout this report to refer to the non-biological parent of a child being raised in an LGBT family.

The distinction between parent and co-parent is significant from a legal viewpoint, even though it may be insignificant in social terms.

While LGBT families have unique characteristics, like all families they are built upon relationships of mutual support, commitment and love. ILGA-Europe believes that the question of the rights of children raised in LGBT families should form part of the wider dialogue about children raised in relationships based on love and care that fall outside of traditional marriage.

As social acceptance of LGBT people improves, so more are entering into parenthood. Offering precise statistical information about the number of children raised in LGBT families in Europe is not possible at present, given the nature of the census data that would be required – but using data drawn from the U.S., Australia and New Zealand, one research report estimates that it is probable that between 15-20% of lesbians have children (Millbank, 2002: 6). Recent data obtained from Statistics Netherlands suggests that about 9% of households headed by a same-sex couple include at least one child, a number that rises to 18% for lesbian households (Steenhof & Harmsen: 242). LGBT individuals or couples may become parents, for example, through donor insemination (known or anonymous), assisted conception, surrogacy, during a prior opposite-sex relationship, or through adoption. Consequently, increasing numbers of European children are being raised in LGBT families, and those children are the heart of this report's concerns.

This report highlights the fact that international and national laws often fail to recognise the reality of these children's familial relationships, potentially jeopardising their legal security. While most children raised in non-traditional families share a degree of legal vulnerability with respect to their family ties, for children in LGBT families, such vulnerability is almost *invariably* a fact of life. In 43 of 47 European countries, there is simply no way that same-sex parents can formalise their family relationships through marriage, and in the majority of countries there is still no legislative provision for recognising and protecting a child's relationship with an LGBT co-parent. Even where the law does provide for some form of co-parent recognition that extends to LGBT families, the family rights and recognition those children enjoy are usually less complete than those enjoyed by children with married parents. Consequently, throughout most of Europe, the legal position of children raised in LGBT families does not accord with their social reality. We suggest that the time is right to address this issue within the Council of Europe, and to articulate a coherent and inclusive vision of family rights that specifically embraces the rights of children raised in LGBT families.

There is no doubt that this is a sensitive and complex issue. Legal recognition of LGBT families challenges the idea that the traditional family unit is the only 'normal' or 'acceptable' one. Most particularly, LGBT families challenge the centrality of the biological element of parenthood. Same-sex couples obviously cannot conceive children on their

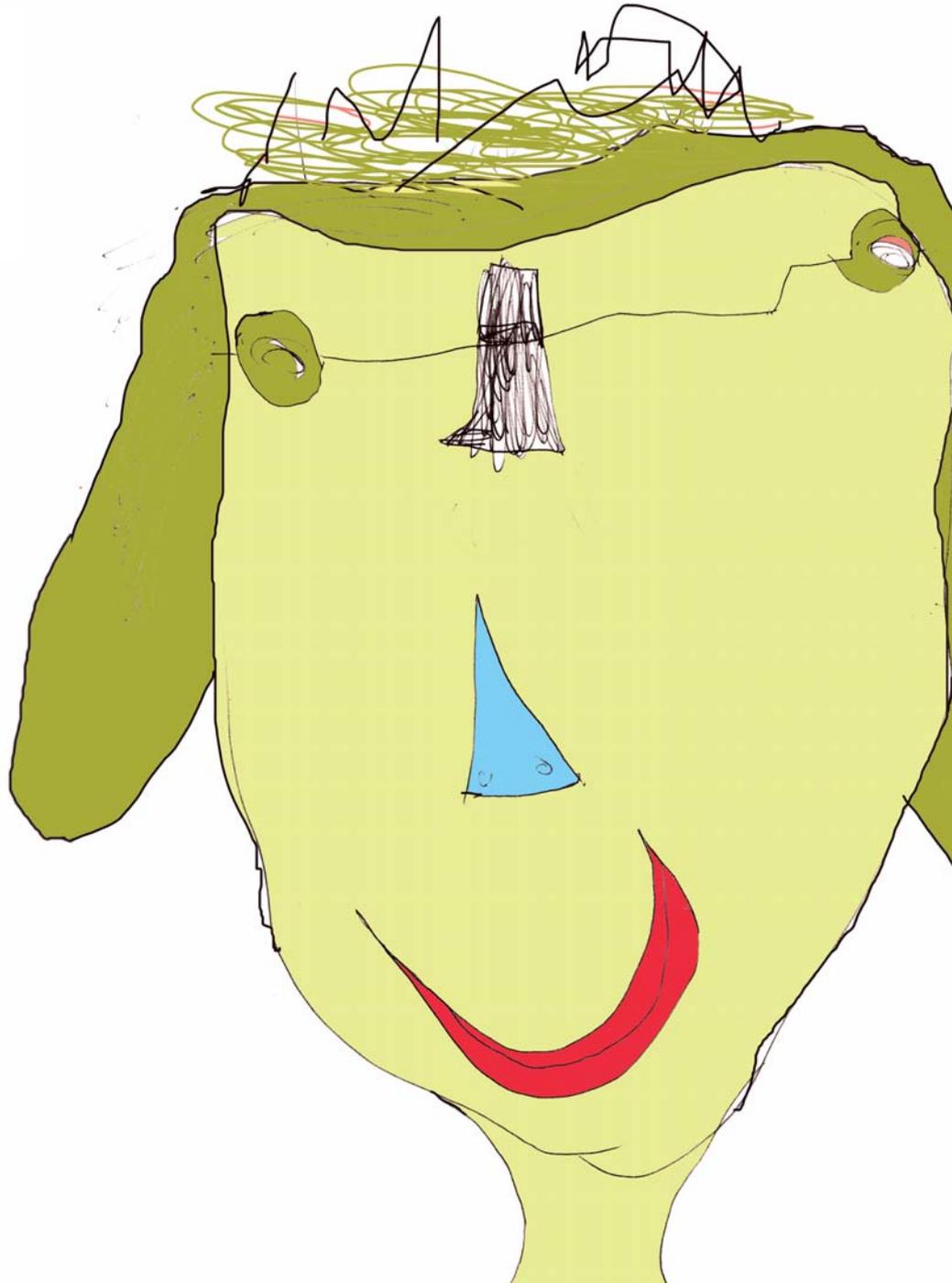
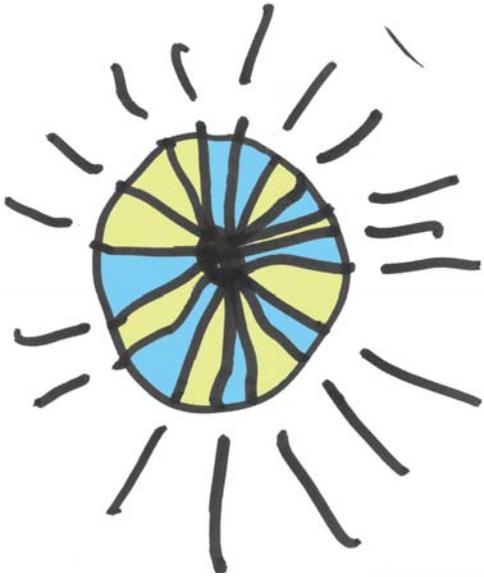
own. Like many different-sex couples with fertility problems (who probably outnumber same-sex couples), they require the assistance of a third party. This means that the issue of LGBT family rights cannot simply be solved by demanding equality with families headed by opposite-sex couples, whether married or not – it requires adopting a forward-looking and expansive view of what parenthood means. Of course in biological terms, the definition of parenthood is (usually) straight-forward. But parenthood is not just a biological function: it also has a social and legal dimension (Patterson: 161-2). While each of these functions of parenthood is obviously important, they are not inevitably all fulfilled by the same person or people. Adoption and anonymous gamete donation are obvious cases in point. The following hypothetical example shows how crucial this distinction between the various aspects of parenting is for LGBT families:

Consider, for example, a lesbian couple attempting to conceive a child using [donor insemination]. There are three adults involved – the two women and the male sperm donor. If a child is conceived, there will be two biological parents... In most states, there will likely be only one legal parent – namely the biological mother. While there will be two social parents, one of them will be a legal stranger to the child... Thus, children brought up in this family will find that the expected correspondence of social, biological and legal aspects of parent-child relations do not hold true for them (Patterson, C., 'Family Lives of Children Born to Lesbian Mothers', in Patterson and D'Augelli, *Lesbian, Gay and Bisexual Identities in Families* (OUP: NY, 1998) at 161-2, cited in Millbank, 2002: 16)

For children of LGBT parents, it is important that their family reality is reflected in laws governing family rights and responsibilities. Quite simply, failing to distinguish in law between biological and social parenting will deny a child being raised in an LGBT family the same rights as children being raised in other family environments.

The changing nature of the family in Europe has led to some concerns about the suitability of LGBT families to the task of raising children. Sometimes these concerns are framed in terms of 'the best interest of the child'. But recent research shows that the traditional family form is not the only appropriate unit in which to raise a child. There is considerable social scientific and psychological literature that demonstrates that the successful raising of a child is not dependent upon the gender or sexual orientation of his or her parent(s). The American Psychological Association Policy Statement on Sexual Orientation, Parents, & Children states categorically: "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children (Patterson, 2000, 2004; Perrin, 2002; Tasker, 1999)." However, it is outside of the scope of this ILGA-Europe report to engage with these debates in detail. (For more detailed information, see "Written Comments" in *E.B. v. France*, <http://www.ilga-europe.org>, "Litigation in the European Courts".) The available evidence suggests that increasing numbers of children in Europe are being raised in LGBT families, regardless of the level of legal recognition those families enjoy. This paper therefore starts from the

simple premise that it cannot be in the best interest of those children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests simply on the basis of their parents' sexual orientation or gender identity. The challenge is to ensure that all children enjoy human rights equally.



2. The Framework of Legal Protection for Children's Family Rights in Europe: Is There a Need for More?

2.1 Introduction

In this section we suggest that current international and regional human rights laws do not address the rights of children raised in LGBT families with sufficient clarity. A number of European and international treaties recognise that 'the family' unit is central to the happiness and security of children and to the enjoyment of their fundamental rights. However, 'the family' of international law is poorly defined. Although the European Court of Human Rights ('ECtHR') has made efforts to define the family in a way that is flexible and accommodates relationships that are not based on marriage, its approach has tended to be influenced by the traditional nuclear family ideal. In particular, international human rights treaty bodies, including the ECtHR, have had little to say about the rights of children raised in LGBT families. It has largely been left to States to decide what legal recognition, if any, will be given to LGBT families and what protection children raised in these families will have. Consequently, children raised in LGBT families in Europe currently live under a patchwork of family laws that, almost without exception, fail to provide their families with equal recognition and protection.

2.2 European Laws Protecting Children's Family Rights: A Brief Overview

2.2.1 The 1950 European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights ('ECHR') contains no express mention of the rights of children, with the exception of a few limited references to judicial proceedings. However, it recognises the central importance of close relationships to everyone's human happiness and dignity. To this end, it requires States to provide families with special recognition and respect. The following provisions are designed to maintain the integrity of the family unit and to protect it from disruption:

“...everyone has the right to respect for his private and family life, his home and his correspondence”

(ECHR: Article 8§1); and

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” (ECHR: Article 12).

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution... (ECHR P. 7: Article 5)

Although there is no express reference to the rights of children here, the ECHR’s rights are to be secured to everyone, including children, and the ECtHR has furthermore recognised in its judgments the special importance of family life to children.

The ECHR also prohibits discrimination in relation to the enjoyment of the rights contained within the Convention (ECHR: Art 14). The ECtHR understands Article 14 to prohibit discrimination on the grounds of sexual orientation (*Salgueiro da Silva Mouta v. Portugal*). Protocol No. 12 is a recent addition to the ECHR that came into force in April 2005. Although not all Member States are yet party to this Protocol, it takes the equality provisions of the ECHR further by providing that the “enjoyment of any right set forth by law shall be secured without discrimination on any ground...” (ECHR P 12: Art 1§1). Obviously, such a clause will broaden the range of discrimination issues dealt with by the ECtHR. Although Protocol No. 12 departs from recent trends in international law by not specifically referring to sexual orientation and gender identity as prohibited grounds for discrimination, those grounds are nevertheless implicitly encompassed within the Protocol’s provisions (Explanatory Report: Para. 20).

2.2.2 Other Council of Europe Treaties

The revised European Social Charter 1996 aims to ensure that everyone enjoys a satisfactory standard of living. The Charter makes several references to the special economic vulnerabilities of children – and it also acknowledges the role that families play in meeting children’s economic needs. With this in mind, the Charter requires state parties to take special measures to protect families raising children. Although the provisions of the Charter are lengthy, the following article gives an idea of its approach:

“With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:

1 to take appropriate measures:

a) to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;

b) to take account of their needs in terms of conditions of employment and social security;

c) to develop or promote services, public or private, in particular child day care services and other childcare arrangements;

2 to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;

3 to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.” (revised ESC: Article 27)

Although the Charter’s provisions on family rights tend to refer to the rights of adults, they are clearly designed to ensure the family unit is able to meet the child’s welfare needs.

The European Convention on the Exercise of Children’s Rights 1996 provides for the right of children to participate in proceedings that affect them, including family proceedings (ECECR: Article 1§3). State parties to the European Convention on Contact Concerning Children 2003 recognise that “the welfare of the child is of overriding importance in reaching decisions concerning his custody” (ECCCC: Preamble).

2.2.3 The 1989 Convention on the Rights of the Child (CRC)

The CRC is a specialist UN human rights treaty that more fully articulates the particular rights of children. It sets out the rights that children need in order to develop and reach their full potential. It was opened for signature on 20th November 1989 and came into force on 2nd September 1990. It is the most widely ratified human rights treaty, with 193 States parties. Although not a European treaty, all member states of the Council of Europe are party to the CRC. Furthermore, the ECtHR uses the CRC’s provisions as a yardstick against which to measure the conduct of European states relating to children (*Sahin v Germany: para 39*).

The Preamble to the CRC explicitly recognises that the family provides the most natural and beneficial environment for children to be raised in:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...

Because the CRC recognises that families have the primary role in raising children (CRC: Preamble and Art. 18§1), it contains several references to the child's right to a family life or family environment. In particular, it states that the child has a right to know and to be cared for by his or her parents (CRC: Art 7§1); to preserve his or her family relations (CRC: Art 8§1); to not be unlawfully separated from his or her parents against his or her will (CRC: Art 9§1); and the right to freedom from arbitrary interference with his or her family or home (CRC: Art 16§1).

Although the CRC contains a number of specific references to the child's parents, it nonetheless acknowledges that a child's family may encompass something broader than the nuclear family. The CRC acknowledges, for example, the possibility that legal guardians, as opposed to parents, may have primary responsibility for a child's upbringing (CRC: Article 18§1). Furthermore, while the CRC says that parents have "responsibilities, rights and duties" to help children exercise their rights, it also recognises that this responsibility may be assumed by "members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child" (CRC: Article 5).

The CRC also reiterates the equality provisions of earlier UN human rights instruments. States are obliged to protect children's rights on the basis of equality:

"All State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." (Article 2§1)

Consequently, denying a child the equal enjoyment of his or her family rights based on his or her birth status, or the sexual orientation or gender identity of his or her parent or guardian and without sufficient justification is incompatible with the CRC.

2.3 The Exclusion of LGBT Families from Family Life

The previous section highlighted the importance that European and international human rights laws attach to the protection of children's family life. Family rights are important because they oblige states to have in place a legal framework that ensures family life can be meaningfully enjoyed by a child. In matters relating to the family rights of children, the ECtHR has articulated the following key principles:

- "...the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront." (*X, Y & Z v UK*: para 47).
- "...respect for family life implies... the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family." (*Marckx v Belgium*: para. 31)
- In determining whether an interference with family life is justified, the ECtHR "attaches special weight to the overriding interests of the child..." (*Bronda v Italy*: para. 62).

But in order for those rights to be enjoyed in practice, it must be determined which of the child's caring relationships are deemed capable of establishing family life. For these principles to be of equal benefit to the children at the heart of this report's concerns, it is imperative that the family life envisaged under the ECHR is interpreted without discrimination and in a way that is broad enough to encompass LGBT families.

Because the ECtHR's numerous judgments are widely regarded as offering the most sophisticated and authoritative interpretation of international civil and political rights, what the ECtHR has to say about the scope of 'family life' has considerable and widespread influence. It is therefore reassuring that the ECtHR takes a broad and pragmatic view of which relationships may constitute family life. The ECtHR has noted that "the institution of the family is not fixed, be it historically, sociologically or even legally" (*Mazurek v France*: para. 52). It has also held that the "the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties." (*K and T v Finland*: 150). These statements are indicative of the ECtHR's laudable efforts to adopt a definition of the family that encompasses non-traditional family units. However, an examination of the

relevant case-law shows that despite its efforts to be inclusive, the ECtHR has provided insufficient guidance on the question of LGBT family rights, leaving children raised in those families vulnerable to discrimination and inequality.

2.3.1 'De facto' families

The ECtHR recognises that family ties may be established outside of marriage-based relationships. In one of its earliest and most important decisions about family life, *Marckx v Belgium*, the ECtHR held that Belgian law which discriminated against 'illegitimate' children was incompatible with the right to respect for family life. In this instance an 'illegitimate' child and her mother were found to have a family life, regardless of the status of their relationship under Belgian law. This judgment consequently established a view of 'the family' that is not confined to marriage based relationships. The ECtHR went on to find that States may be required to take certain measures to ensure that family life is respected and to create conditions in which people can lead a "normal family life": "respect for family life", the ECtHR held, "implies in particular...the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family".

The ECtHR recognises that biological ties are not an overriding factor in establishing family life. In a number of cases involving unmarried fathers and their children the ECtHR's approach has suggested that a biological relationship alone is normally insufficient to establish *de facto* family ties. In *Keegan v Ireland*, the applicant complained of an interference with his family life because his daughter (born outside of marriage) had been released for adoption without his knowledge or consent. In recognising the existence of a *de facto* family in this case, the ECtHR took particular notice of the fact that the child had been conceived as a result of a deliberate decision, which was made by parents who had planned to marry. These factors, the ECtHR held, gave their relationship the hallmark of family life. In *Lebbink v Netherlands*, the ECtHR highlighted the importance of evidence of a caring paternal role before Article 8 is engaged:

The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth (para. 36).

Consequently, while the ECtHR appears well disposed towards recognising *de facto* relationships bound by biological ties (even in the absence of cohabitation), some evidence of real and constant relationship will normally be needed before such relationships are afforded the protection of Article 8. The clear message here is that – viewed

from the perspective of a child's best interests - parenting is an important *social* (and not merely biological) function.

The ECtHR recognises the importance of social parenting. Although the above cases demonstrate that the ECtHR attaches considerable weight to biological ties when deciding if family life exists between parent and child, this is by no means the sole characteristic of *de facto* family relations. In *Nylund v Finland*, the ECtHR held, in contrast to its decision in *Keegan*, that there was no family life between a man and a child whom he had never met and with whom he had established no emotional bonds, even though he had been engaged to the child's mother when the child was conceived (although the ECtHR undoubtedly considered it significant that the mother had remarried before the child's birth and had denied Mr Nylund's paternity). The ECtHR held that it was "justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact". Conversely, the ECtHR has recognised that a family relationship may exist between *de facto* parents and their children, even in the absence of any biological or legal connection. In *K and T v Finland*, the ECtHR had little difficulty in finding that that a man who co-habited with a woman and her children from an earlier relationship had established a 'family life' with those children. These cases point to the ECtHR's belief that it may not necessarily be in a child's best interests when defining 'family' to prioritise biological parenting to the exclusion of social parenting.

In sum, the ECtHR recognises *de facto* family ties in its case law and has extended the meaning of family life under the ECHR beyond marriage and relationships of blood to certain long-term committed relationships. Such an approach suggests that the definition of the family under the ECHR is inclusive and based on the social and emotional realities of family ties, and that it does not rely upon definitions of the family found in national laws. In particular, it implicitly recognises that a range of relationships may be important to a child's development, and not necessarily only the relationship with his or her biological parents. This line of reasoning clearly has the potential to be extremely important for children being raised in LGBT families. Unfortunately, however, although the case-law of the ECtHR offers recognition to diverse family forms, it has thus far offered insufficient guidance to states on respecting the family rights of children being raised by LGBT parents. An examination of the ECtHR's judgments to date shows that its approach to non-traditional families has been uneven, and that children raised in LGBT families have been excluded from equal enjoyment of their family rights. This, in turn, has caused national legislators and courts to refuse to recognise that such relationships merit equal protection.

2.3.2 The ECHR case-law on LGBT families

During its existence, the European Commission on Human Rights ('the Commission') consistently held that same-sex relationships could not constitute 'family life'. In 1983 the Commission was given the opportunity to consider the case of a same-sex couple, a Malaysian and British national, who were living together in the UK. A deportation order was made against 'Mr X', which was challenged without success. The applicants complained that this was an interference with their Article 8 rights. The Commission found, "despite the modern evolution of attitudes towards homosexuality", that the applicant's relationship "did not fall within the scope of the right to respect for family life" (*X & Y v UK*) This decision set a precedent which was followed for a number of years and provided a fatal stumbling block to the human rights claims of LGBT families before the Commission. In *S v UK* (1986) and *Rössli v Germany* (1996) the Commission addressed complaints about housing succession laws that treated those in same-sex relationships less favourably than those in (unmarried) opposite-sex relationships. In declaring the application inadmissible, the Commission reasoned that the discrimination in question was justified on the basis that "there is no reason why a High Contracting Party should not afford particular assistance to [heterosexual] families".

The Commission did not recognise the existence of family life even where a same-sex couple in question was raising a child together. In *C & L. M. v UK* (1989), the Commission found once again that same-sex relationships could not establish 'family life', and consequently it said that it would not be contrary to the ECHR for the UK to deport one member of a bi-national lesbian couple to her country of origin. That decision was reached in spite of the fact that the couple concerned had a child conceived by alternative insemination that they were raising together in the jointly-owned family home. In its decision the Commission acknowledged the following:

Since confinement and the birth of the child the first applicant is financially dependent on Ms. E. and parenting tasks are shared between them. In the event of her deportation to Australia with the child, the first applicant would be homeless, destitute, and have to rely on social security payments for the maintenance of herself and her child.

One has to pause and ask how the interests of the child were best served here.

In *Kerkhoven v Netherlands* (1992), the Commission found that a woman in a lesbian relationship might have family life with the child conceived through alternative insemination and born into that relationship (although family life could not be established with her partner), even though she was the non-biological parent. However, it went on to find that Article 8 did not require the State to enable her to be vested with parental responsibility over that child. Again, the Commission did not consider the impact this had on the child's family rights and her close relationships. In

confining same-sex relationships to the realm of private life, the Commission denied children being raised in LGBT families the positive measures of protection that are normally required to respect family life. Furthermore, because the Commission declared all cases that came before it involving same-sex relationships inadmissible, issues of LGBT families could not be addressed by the ECtHR until the Commission was abolished in 1998. Since the Commission was abolished, however, the ECtHR has delivered a small number of judgments relating to LGBT relationships. It is reassuring that the ECtHR is clearly beginning to respond to the legal and social developments that have taken place throughout Europe during the last decade, during which period a number of European states have come to offer LGBT families some form of legal recognition. It is, however, early days and it is fair to say that the ECtHR's approach to date has been somewhat mixed.

The ECtHR recognises that LGBT parents must not be discriminated against. In *Smith and Grady v UK* (1999) – a case which concerned the dismissal of military personnel on the basis of their sexual orientation – the ECtHR held that “convincing and weighty” reasons were required to justify sexual orientation discrimination (para. 94). His prohibition of sexual orientation discrimination extends to all Convention rights – and, indeed, it has been applied to family matters. In *Salgueiro da Silva Mouta v Portugal* (1999), the applicant complained that his request for a parental responsibility order in respect of his daughter (who had been conceived while the applicant was in an opposite-sex marriage) had been denied exclusively on the basis of his sexual orientation. The ECtHR held that this was treatment that amounted to discrimination violating Article 14 in conjunction with the applicant's right to respect for his family life under Article 8. While this judgment is undoubtedly progressive, it is, however, of somewhat limited relevance for LGBT families. In spite of the applicant's sexual orientation becoming a key issue in his custody case, the facts nevertheless related to the applicant's biological child born into an opposite-sex marriage. The ECtHR has long recognised that the relationship between divorced fathers and their children amounts to family life. It therefore breaks no new ground in terms of recognising LGBT family units or addressing the particular needs of children raised in alternative family units.

The ECtHR has yet to articulate a view of the family that adequately protects the rights of LGBT families and the children raised in them. In a 2001 admissibility decision, the ECtHR appeared to adopt the Commission's approach to LGBT relationships, thereby allowing them to be excluded from legal recognition:

The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation (*Mata Estevez v Spain*).

However, it is important to note that Mr. Mata Estevez was not represented by a lawyer, and therefore could not provide reasons why the ECtHR should depart from the Commission's approach. Two short years later, ILGA-Europe intervened in *Karner v Austria* (2003) and explained the rapid changes in legislation in European and other democracies since the Commission's last decision. Citing ILGA-Europe's intervention, the ECtHR signalled its readiness to adopt a different approach to LGBT family matters. Mr. Karner, who had been in a long-term same-sex relationship, complained about discriminatory laws that denied him tenancy succession rights after his partner died. Taking into account social and legal developments at the national and European level, the ECtHR found that the relevant Austrian laws violated Article 14, taken together with the applicant's right to respect for his home (Article 8). In reaching its decision, the ECtHR reiterated that "differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification" (para. 37).

Karner is clearly a progressive judgment and is certainly an important step towards LGBT families receiving equal protection under international human rights law. It should have important implications for children raised in LGBT families, because the general principle of the judgment should require equal treatment of unmarried same-sex and opposite-sex couples in relation to parental authority, joint or co-parent adoption, and access to donor insemination. Unfortunately, the ECtHR was not yet ready to apply Article 14 in conjunction with Mr. Karner's Article 8 right to respect for his family life with his deceased partner (which would have required an express statement by the ECtHR that same-sex couple without children can enjoy "family life"), and instead applied Article 14 in conjunction with Mr. Karner's Article 8 right to respect for his home. Thus, although the ECtHR has taken important steps to eliminate many forms of sexual orientation discrimination, it has yet to explicitly recognise that people in same-sex relationships without children may enjoy family life. But its failure to do so should not have significant implications for the extent of positive measures of protection that children in LGBT families enjoy under the ECHR. By analogy, the ECtHR's judgment in *X, Y & Z v. UK* (1997) would suggest that when children and two same-sex parents are present, it is impossible to deny the reality of family life.

Furthermore, the ECtHR accepted in *Karner* "that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" (para 40). Even though the ECtHR found on the facts before it that Austria had failed to put forward arguments which justified the discrimination in question, the ECtHR's statement leaves open the question of what differences in treatment of non-traditional families might be deemed acceptable. Arguably, the ECtHR's "necessity test" (*Karner v Austria*: para 41) - i.e. it must be "necessary" to exclude LGBT families from a particular right or benefit in order to protect the traditional family - means that differences in treatment should rarely, if ever, be justifiable. But there remains an urgent need for greater clarity with regard to this matter of vital importance. We would welcome an explicit statement by the Council of Europe confirming that the equality principle and the best interests of the child principle mean that children in LGBT families must enjoy the same level of legal protection and recognition of their family relationships as children in other family forms.

2.3.3 Article 12: the right to marry

The ECtHR now recognises that the right to marry applies to transgendered people (*Christine Goodwin v UK*). However, throughout most of Europe, same-sex couples are unable to take steps to formalise their relationships and to raise their children within a framework of legally-recognised rights and responsibilities. Consequently, they are almost invariably excluded from the remit of laws that specifically aim to provide families - and children in particular - with stability and security. Although the nature of European family life is changing, marriage remains the most common way of formalising family relationships. Article 12 of the ECHR protects the right of men and women to marry. Before *Christine Goodwin*, the right to marry was understood by the ECtHR to refer “to the traditional marriage between persons of opposite biological sex” (*Rees v UK*: para. 49). Since *Christine Goodwin*, the spouses need no longer have been born of opposite biological sexes (for the moment, opposite legal sexes are still required), and the spouses need not be able to procreate, with or without the assistance of a third party:

Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision. (para. 98)

The ECtHR has thus laid the groundwork for the extension of Article 12 to same-sex couples, when more European countries have ceased to exclude them from marriage.

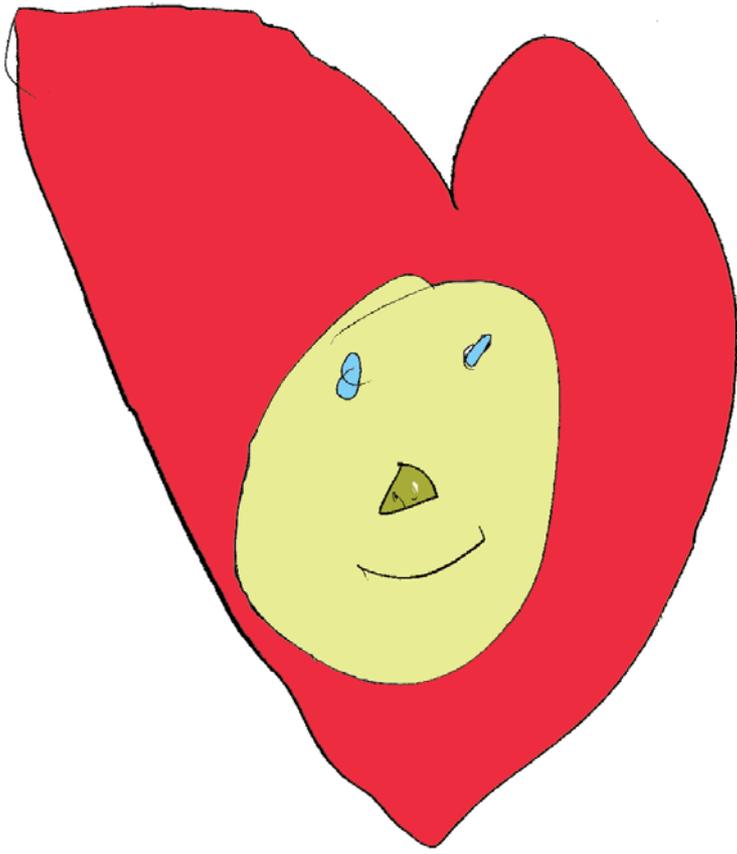
What about situations in which a same-sex couple are seeking only a particular right or benefit (possibly a parental right, such as joint parental responsibility) that is often attached to marriage, but are not seeking the right to marry? In theory, they find themselves in the same position as an unmarried opposite-sex couple, and the ECtHR has said on a number of occasions that distinguishing between marriage-based relationships and other forms of relationships is valid. However, in most European countries, unmarried same-sex couples and unmarried opposite-sex couples are not in the same legal position, because unmarried same-sex couples have not made a deliberate choice to reject the rights and responsibilities of marriage: they are simply unable to take steps to alter their family’s legal status. Only four European countries currently extend marriage rights to same-sex couples (the Netherlands, Spain, Belgium and Norway: a law extending such rights to same-sex couples is expected soon in Sweden). While marriage should clearly not be a pre-requisite for establishing family life, we suggest that it cannot be in a child’s best interests for LGBT parents to be denied the opportunity of formalising their family ties in this way.

In the absence of the right to marry, the ECtHR is still required to address issues raised by the relatively recent

alternative forms of legal recognition that are increasingly available to people in same-sex relationships. Differences between registered partnership laws and marriage laws are most likely to be found in matters relating to children. Some national laws providing for registered partnerships for same-sex couples (such as the French LOI no 99-944 du 15 novembre 1999, relative au pacte civil de solidarité) do not, for example, enable a co-parent to jointly-adopt or obtain parental responsibility over their social (but not legal or biological) child. The obvious danger here is that the creation of registered partnerships for same-sex couples will lead to a hierarchy of family rights, sanctioned at the European level, offering less protection to the rights of children in LGBT families. This cannot be in the child's best interests. In the absence of marriage rights, we suggest that an alternative regime of registered partnership must be available to same-sex couples, and that it must provide equal rights and responsibilities with regard to their children. Any difference in treatment between married and non-married couples in countries where legal marriage is denied to people on the basis of their sexual orientation or gender identity is, we suggest, a form of indirect discrimination contrary to the ECHR. (See "Written Comments" in *Schalk & Kopf v. Austria*, <http://www.ilga-europe.org>, "Litigation in the European Courts".)

2.4 Summary

Children are uniquely vulnerable. A range of international human rights laws aim to protect the family rights of children and recognise that the family often makes a vital contribution to the happiness and security of children's lives. The family is also recognised as an important medium through which children's human rights are protected. There are signs that the ECtHR in particular is gradually taking a more diverse approach to families, and is reflecting in its case-law the changing nature of intimate relationships. The idea that married heterosexual couples and their offspring represent the only valid family form has clearly been put to rest by the ECtHR, replaced by the more nuanced notion of the *de facto* family. While the ECtHR's recognition of *de facto* families is a potentially exciting development that opens up the possibility of recognising a variety of loving and mutually supportive relationships, it nevertheless at present provides too little guidance on matters of family rights and equality for children raised in LGBT families.



3. The Problems faced by Children in LGBT families in Europe

The previous section demonstrated the gaps and uncertainty in European and international human rights laws governing the rights of children raised in LGBT families. The lack of guidance at a European level means that the family rights those children enjoy at the national level vary considerably throughout Europe. In the context of this report we cannot hope to provide even an overview of the relevant national legislation. However, in this section we aim to point to some of the common difficulties that children of LGBT families face in the enjoyment of their family rights in Europe.

3.1 Non-recognition of the Child's Relationship with his or her Co-Parent

In most European countries, a child born to a same-sex couple has only one legal parent (the biological parent). By way of contrast, most European countries would automatically recognise that a child born to a married couple has two legal parents, regardless of his or her biological connection to them and regardless of how he or she was conceived. In all European countries – except France and Italy – a birth mother will automatically have parental responsibility over her child. Throughout Europe, a married father will also automatically have parental responsibility over his child. This will be true whether the child is conceived using assisted conception or donor insemination. Because most same-sex couples in Europe simply cannot enter into a valid marriage, they are denied the automatic presumption of parenthood that normally follows from that legal status.

In the case of step-families, a married person is normally allowed to adopt the children of their spouse. Adoption invests a non-biological parent of a child with the full range of parental rights and responsibilities. While there is a trend within Europe towards enabling same-sex partners to adopt each other's children (Belgium, Denmark, Germany, Iceland, Netherlands, Norway, Sweden, Spain, and the UK have relevant laws in force), most European countries still prohibit LGBT co-parents from doing so. It is true that many LGBT co-parents feel that they should not be required to adopt their partner's child, preferring instead that their parental responsibilities should be automatically recognised from the moment of the child's birth. Indeed, automatic recognition is more consistent with the child's best interests, because a co-parent could die before an adoption can be arranged, thereby depriving the child of potential succession, pension or other rights. Nevertheless, we suggest that enabling co-parents to adopt

their partner's child is a useful means of ensuring that the child can enjoy the obvious benefits of having two parents invested with rights and responsibilities towards him or her.

For many children whose biological parents are unable to care for them, adoption is the best way to become integrated into a family and to have legally-recognised parent(s). For many of those children, however, finding an adoptive family can prove to be extremely difficult. Conversely, many LGBT individuals and couples would be more than willing to integrate a parentless child into their own family. It is therefore somewhat ironic that only seven European countries currently allow same-sex couples to jointly adopt a child that is not biologically related to either of them. Many more European states have laws that allow individuals to adopt, and the ECtHR has recently confirmed that individual LGBT people should not be denied the possibility of adopting a child through discriminatory interpretation of those laws (*E.B. v France*). While this is an important judgment, it does not yet affect state laws that prohibit unmarried couples from adopting a child jointly, or from adopting each other's children.

Article 7 of the recently adopted Revised European Convention on the Adoption of Children provides that couples (of different sex) who are married or in a registered partnership and single people *shall* be permitted to adopt. It further provides that States *may* extend adoption to unmarried same-sex couples and to different-sex couples. We would concur with the ECtHR's view that this treaty signals a "growing recognition" within the Council of Europe's member States for adoption by co-parents, regardless of marital status (*Emonet v Switzerland*: para. 84). We would also argue that national laws that prohibit LGBT couples from adopting jointly, or from adopting each other's children, which actually benefit no-one, are in fact contrary to the child's best interests because they effectively ensure that any child adopted into (or born into) an LGBT family has only one legal parent. In this respect it is interesting to note a 2002 judgment of the South African Constitutional Court, in which legislation preventing joint adoption by same-sex couples was held to be contrary to the Constitution's provisions on children's rights: "excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the [paramountcy of the best interests of the child]" (*Du Toit and De Vos v Minister of Welfare and Others*: para 22).

Not all couples choose to enter into formal relationships, a reality that national and international laws have begun to address. The law must ensure that *all* children raised in such circumstances enjoy equal recognition of their family rights. An unmarried father can in most European countries be vested with parental responsibility: the law may provide for this to happen automatically, or through agreement, or by court order. The same legal options to establish legal ties with a child are often simply not available to a same-sex co-parent. Some countries enable LGBT co-parents to obtain some form of recognition, but this will often fall short of offering full recognition to a child's family. For example, a Parental Responsibility Agreement in the UK, which invests a co-parent with full parental responsibility

over a child, simply comes to an end when that child reaches his or her 18th birthday (it should be noted, that since the 2002 Adoption and Children Act came into force, same-sex couples in England and Wales have been able to jointly adopt). Many more European countries simply do not provide any means at all of formally recognising a child's relations with his or her same-sex co-parent. This belies the social reality of that child's family and denies that child his or her full enjoyment of family rights. Even where recognition of a co-parent's parenting role is possible, it can be an arduous and lengthy process before a child's family is recognised in law. It is important that the process of gaining parental responsibility is simplified as far as possible. It is not in a child's best interest for parents to face unnecessary difficulties in establishing legal bonds with their child.

For children in LGBT families, legal recognition of social parents raises the most urgent need. Research shows that same-sex couples who raise a child together usually both play very active parenting roles from birth, and that they adopt roles that are usually more flexible than those played by opposite-sex parents. For example, research shows that lesbian co-parents are far more likely to undertake part-time work than fathers (Millbank, 2008: 155). It is illogical to have a social parent – who may be acting as the main carer – prevented from accepting legal responsibility for a child when he or she is willing to do so, and it is certainly not in the child's best interests. We argue that denying a child a legal relationship with his or her social parent(s) violates that child's right to identity (CRC: Articles 7 & 8; ECHR: Article 8) and right to respect for his or her family life (ECHR: Article 8). It also violates the obligation to support and promote the common responsibilities of both parents in raising a child (CRC: Article 18).

We would like to see the Council of Europe offering a lead in this area, not least because there is now a discernible trend in democratic countries elsewhere towards recognising in law the role of LGBT co-parents. In a 2006 judgment the Ontario Superior Court of Justice held that the "notion of parentage should be interpreted broadly to include not only biological parents, but also social parents" (*M.D.R. v Ontario*: para 32). The Court held that an Act which prevented the inclusion of both lesbian parents on the Statement of Live Birth of their child born by alternative insemination was contrary to the Canadian Charter of Rights and Freedoms (paras. 11-15). More recently, the Court of Appeal for Ontario, in a case concerning an application for a declaration of parenthood for a same-sex co-parent, held:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The [relevant legislation], however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide (*A.A. v B.B.*: para. 35).

In *J and B v Director General of Home Affairs & Others*, the South African Constitutional Court held unconstitutional a national law that prevented both members of a lesbian couple from being registered as the parents of twins conceived by artificial insemination. We believe that it is in the child's best interests for the broadest range of parental relationships to be open to recognition. It is both contrary to a child's best interests, and discrimination on the ground of birth or other status, if relevant national laws place undue emphasis on biological parenthood to the exclusion of other forms of parenthood.

One vital step towards achieving equality for children in LGBT families would be for all European states to enable all couples, regardless of their gender or sexual orientation, to enter into a legal partnership that provides full and equal protection for a child's family rights. Ideally, this should be through extending marriage rights to same-sex couples. Marriage is the most effective way of protecting a child's family ties, not least because it is specifically protected under the ECHR and under many national constitutions, and is recognised in almost every country in the world. While marriage should not be the only means of establishing a legally-recognised relationship between a child and his or her parents, we believe that no parent should be prevented from creating legal ties with his or her child through marriage, if he or she so chooses. As mentioned above, a child of married parents would normally have their relationship with both parents fully recognised in law, regardless of whether or not they are biologically related: this would obviously be of considerable and particular benefit to children of LGBT parents. We believe that the time is not far off when the ECtHR will explicitly recognise that same-sex couples have the right to enter into marriage, or at least the right to enter into an equivalent union with exactly the same rights and responsibilities. The ECtHR held in *Karner*:

In cases in which the margin of appreciation... is narrow, as ... where there is a difference in treatment based on ... sexual orientation, the principle of proportionality does not merely require that the measure chosen is... suited for realising the aim sought. It must also be shown that it was **necessary** in order to achieve that aim to exclude... persons living in a homosexual relationship... (para. 41) (emphasis added)

We suggest that the necessity test is very hard to satisfy in relation to the exclusion of same-sex couples from access to marriage or an equivalent legal institution, particularly when the best interests of the child are taken into consideration. In this respect it is interesting to note developments in the European Union. In a 1994 Resolution, the European Parliament called on the Commission to draft a Recommendation seeking to end "the barring of lesbian and homosexual couples from marriage or from an equivalent legal framework" and guaranteeing "the full rights and benefits of marriage, allowing the registration of partnerships." In 2001 it called on Member States to "legally recognise same-sex marriages" and to "decrease the discrimination between opposite-sex marriages and same-sex life partners." Even more recently, in 2006 the European Parliament adopted a Resolution that condemned constitutional amendments explicitly to prohibit same-sex unions as a form of homophobia and also referred to the widespread

disadvantage and discrimination suffered by those in same-sex unions. It urged Member States to enact laws “to end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, tax, social security etc.” It is, as the ECtHR noted in *Christine Goodwin*, surely no coincidence that the right to marry contained in the EU Charter of Fundamental Rights makes no reference to “men” or “women”.

While securing the rights of same-sex couples to enter into marriage is the best means of protecting the rights of children in LGBT families, we recognise that it is not the only means of doing so. Where an alternative legal framework to marriage is offered, it must ensure that the children of LGBT families enjoy the same rights and recognition available to children in other families. In the absence of extending the right of marriage to same-sex couples, denying children with same-sex parents the same rights and recognition as children of married parents is, we suggest, a form of indirect discrimination contrary to Article 14 of the ECHR. In *Thlimmenos v. Greece*, the ECtHR held that “...the right not to be discriminated against in the enjoyment of [ECHR] rights... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (para. 44). That reasoning, we suggest, applies to an LGBT family that seeks a right attached to marriage, such as the right of a child to have his or her relationship to both parents – regardless of biological connection – automatically recognised in law. The ECtHR has not yet dealt with this question, but we suggest that indirect discrimination that denies any child full recognition of his or her family rights on the basis of his or her parent’s legal status is contrary to both the ECHR and the CRC. Under *Thlimmenos*, governments must exempt LGBT families from the marriage requirement or provide an alternative means of proving the existence of a committed relationship between the child’s same-sex parents.

Finally, in the case of relationships between children and parents (same-sex or different-sex) who cannot agree to marry or register, or neglect to do so, or choose not to do so, we would also argue that all families must be treated on a basis of equality. Since the 1970s, for example, the Netherlands has increasingly granted same-sex and different-sex cohabiting partners legal rights in such areas as rent law, social security, income tax, immigration rules, inheritance tax, state pension, and death duties. Almost all the legal consequences of marriage are currently also available to cohabitants. We suggest that because such rights are extended to opposite-sex and same-sex equally, this is an example of compliance with the ECtHR’s judgment in *Karner*. Unfortunately, however, many national laws that offer some protection to unregistered or unmarried cohabitants do not extend to children’s rights (although such laws are nonetheless often of economic benefit to the family as a whole). Interestingly, however, the ECtHR has recently suggested that efforts to justify discriminatory treatment on the basis that married parents offer children greater stability than co-habiting parents are “not necessarily relevant today” (*Emonet v Switzerland*: para. 81). Where *de facto* families are offered recognition and protection under national and international laws, these laws must extend to all families and, in particular, must not depend upon the existence of a biological connection between parent and

child – which is an unhelpful distinction for many children. Instead, concern with the best interests of *all* children requires the law to adopt a forward-thinking and inclusive view of family life and parenthood that can reflect the reality of all children's family ties.

3.2 Why does the absence of recognition matter?

The discrimination and disadvantage suffered by children in LGBT families can take various forms, and it is impossible to list them all. However, the following examples give some idea of the problems that can arise when children are denied legal recognition of a parental relationship:

- In the absence of legal recognition, LGBT co-parents will experience difficulty in performing what would otherwise be straightforward every-day actions, such as travelling abroad with their children. Co-parents will also be denied the possibility of being involved in making important decisions relating to, for example, the child's medical treatment, education, and religious affiliation.

The non-recognition of a co-parent's right to take part in such decisions may be detrimental to family unity and, consequently, contrary to the child's best interests. Fiona Nelson, in a study of Canadian lesbian mothers, reported that "several non-biological mothers reported difficulties in getting children admitted to hospital or in to see a doctor because they could not prove their maternal identity or their legal right to make medical decisions for the child" (Fiona Nelson, *Lesbian Motherhood: An exploration of Canadian Lesbian Families*, University of Toronto Press, Toronto, 1996 at 85. Cited in Millbank, 2002: 25). Consequently, denying a co-parent recognition may even be detrimental to the schooling and medical care that a child receives.

- Parental responsibility includes the right to represent the child in legal matters. It is in a child's interests to ensure that all people who play a parenting role can exercise this function on their behalf.

- In the absence of legal recognition of parental relationships, a child may have no legal relationship with his or her siblings. This may be true even if they are, for example, genetically related through a known or anonymous sperm donor. This will have social implications for the child – and it may also impact on areas such as their education if, for example, a school operates an admission policy that favours siblings.

- Unmarried same-sex bi-national parents are often not recognised for immigration purposes. LGBT families members who are unable to marry can be denied the right to live together in one of their national countries, even if they are raising a child together. Denying bi-national LGBT couples the right to make a home together

clearly interferes with the child's family life in a most fundamental way and interferes with the child's right to be raised by his or her parents.

- Immigration problems extend to the EU, where free-movement for third country national LGBT families members is guaranteed only in limited terms. A 2004 Directive on the free movement of family members provides that, for the purposes of the Directive, the term "family member" includes registered partners where these are treated as "equivalent to marriage" by the host Member State. Although that provision is strictly limited to those in particular forms of registered partnerships, the Preamble to the Directive and Article 3(2) ask Member States to consider granting residence to a person who does not automatically fall within the Directive's definition of "family member"; "taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen." That requirement, which clearly applies to those in long-term same-sex relationships, is much less comprehensive than the rights afforded to married couples.
- Many LGBT families do not enjoy equality under property laws that offer the family home particular protection. Although the ECtHR judgment in *Karner* eliminates discrimination between co-habiting opposite-sex and same-sex couples, succession rights limited to spouses, for example, are not addressed in that judgment. A child may, therefore, suddenly find he or she is homeless if a biological parent dies and the family home was leased in that parent's name. This represents an interference both with the child's family life and his or her right to a home.
- Employment laws recognise that families have certain special needs. Family members in many countries are offered benefits such as parental leave, to ensure that they are able to balance work and raising their children. In the absence of recognition of co-parents, these employment benefits are usually not equally available to LGBT families. When such benefits are denied to LGBT families, they are discriminated against both in their enjoyment of their family life and economic rights. At least with regards to registered partnerships that are similarly situated to marital relationships, any difference in treatment with regards to employment rights and benefits would contravene European Employment Directive 2000/78/EC (*Maruko v. Versorgungsanstalt der deutschen Bühnen*).
- All European states provide financial benefits for parents which are designed to ensure that children are raised with adequate means. The way that a family is defined in law has a considerable impact on the financial and work-related benefits to which they are eligible. Of course, many of these benefits are intended to ensure that children are not raised in poverty. Many countries support family life by offering income tax benefits,

typically to married couples and parents of minor children. Other State-provided benefits are often made available to families when a family member dies or is injured. LGBT families obviously suffer discrimination and additional financial burdens when such benefits are not extended to them. When such benefits are denied to a certain group on the basis of their sexual orientation or gender identity, they are discriminated against in their enjoyment of their family life.

- Many countries have in place intestacy rules which ensure that children automatically benefit if a recognised parent dies without making a will. Such laws recognise the simple propositions that most families have shared finances and that most people expect that their family will inherit their money. Furthermore, many countries provide an inheritance tax exemption for married couples, ensuring that the family can maintain itself financially after the death of one partner. Denying LGBT families legal recognition and family status in these circumstances can obviously leave family members financially vulnerable, and discriminates against them in respect of their enjoyment of family life and home.

- Family relationships are usually placed in a legal framework that determines financial support and how property is to be divided in the event of divorce or separation. Such laws are designed to ensure that vulnerable family members, particularly children, enjoy continued financial security. Without such a legal framework, when LGBT families break up, they are often left to make informal arrangements in the event of separation. Without adequate legal protection, children and home-makers are particularly vulnerable in such situations.

The parent with whom he or she has contact, and the parent who has custody of him or her, will be of primary concern to a child in the event of a breakdown of his or her parents' relationship. *Salgueiro da Silva Mouta v Portugal* (1999) clearly prohibits sexual-orientation discrimination in relation to custody of children conceived during marriage, but it is not so clear that non-biological and non-legal co-parents must be treated with equality in custody decisions. The ECtHR's tendency in its judgments to favour biological and marriage-based parental relationships is, in this respect, unhelpful and may blind national courts to the paramount consideration – that is, the best interests of the child. As such, the law should concern itself only with *quality* of parenting, and recognise that gender identity and sexual orientation play no part in determining this. It should also recognise that successful social parenting does not depend upon a biological connection between parent and child.

- A child with only one legal parent will usually only have that one parent recorded on his or her birth registration documents. The omission of a social parent on a birth certificate, we suggest, is a violation of a child's family life and identity rights (ECHR: Article 8; CRC: Article 7).

It may be considered best practice that information about a child's biological parents is normally recorded on his or her birth registration documents. However, it should be possible for biological information to be recorded in this way without any legal presumption arising from it. In any event, national legislators should be guided by the best interests of a child.

- Where legal parenthood does not correspond to social parenthood, the consequence for the family concerned can be social discrimination or oppressive secrecy. For children of LGBT families, filling in administrative forms which ask for family information and negotiating events such as Fathers' Day or Mothers' Day can be a social trial. For the law to recognise that LGBT families are of equal value would send these children a strong signal of support. The cost of this discrimination in personal terms cannot easily be counted, but the damage caused to a child by having the legitimacy of loving relationships denied is well documented. There is an inevitable psychological stress that arises from having your most significant relationships viewed as shameful and secretive. As the Canadian Supreme Court so eloquently explained, not recognising same-sex relationships "perpetuates disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence" (*M v H*: para. 73). Undoubtedly, a lack of legal recognition has contributed to the destruction of many loving LGBT families.

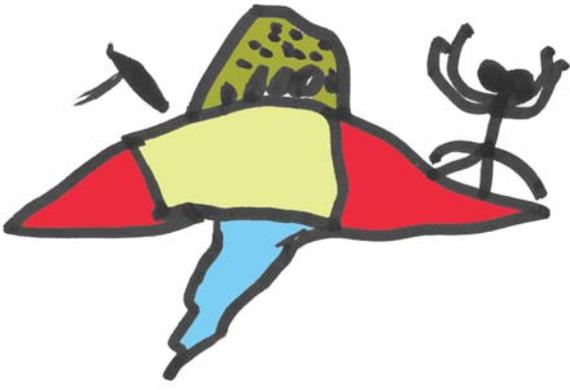
In practical terms, homophobia can also impact on the quality of social services that a child of LGBT parents receives. Jenni Millbank reports that:

In the US National Lesbian Family Study (of 84 families) 23% of mothers reported that they had encountered homophobia from health professionals during pregnancy – usually a refusal to acknowledge the role of the co-mother. Furthermore, 8% reported difficulty in finding good child care because of their sexuality and 4% had changed childcare facilities due to homophobia (Millbank, 2002: 50-51)

Such interruptions to the medical services and care that a child receives simply cannot be in his or her best interests.

3.3 Summary

In simple terms, the discriminatory treatment that the children of LGBT parents experience outlined in the section means that they are denied equal enjoyment of the family rights that international human rights law promises to *all* children equally. Children raised in LGBT families may be denied their right to live with their parents and to have the integrity of their family life respected. Ultimately, we cannot but avoid the conclusion that the children of LGBT people face widespread discrimination in the enjoyment of their family rights, which is contrary to the promise of equality contained in each and every human rights treaty. This is clearly not consistent with the child's best interests, which the CRC states should be the primary consideration in *all* actions concerning them. It is highly unsatisfactory that the children of LGBT men and women have their family rights recognised to a varying extent throughout the member states of the Council of Europe. It is futile to ignore the reality of children who are born into or raised by LGBT families. It serves not to make the reality of their existence disappear, but rather to deny those children the full enjoyment of their rights.



4. Conclusion and Recommendations

“We are determined to effectively promote the rights of the child and to fully comply with the obligations of the United Nations’ Convention on the Rights of the Child. A child rights perspective will be implemented throughout the activities of the Council of Europe and effective coordination of child-related activities must be ensured within the organisation.”

Plan of action adopted at the Third Summit of Heads of States and Governments (Warsaw, May 2005)

Council of Europe member states are required by international human rights law to ensure that they respect human rights on the basis of equality, without discrimination. Moreover, in all matters relating to children, the best interests of the child must be a primary consideration.

As this report has shown, many member states are failing to fulfil these requirements in the case of children in families where the parents are of the same sex, or where one or both parents is/are transgender.

It is important therefore that the Council of Europe gives a lead to member states through a Recommendation by the Committee of Ministers that they ensure full respect for the family rights of such children by putting the legal framework and policies in place to enable them to enjoy the same rights and legal protection as enjoyed by children in families where the parents are of the opposite sex.

States should:

- ensure that no child experiences discrimination in their enjoyment of family rights on the basis of their birth status, or the sexual orientation or gender identity of their parent(s);
- eliminate any restrictions on the rights and responsibilities of parents based on sexual orientation or gender identity;
- ensure that all children can enjoy a relationship with their parent(s) that is recognized and protected in law, regardless of whether they share a biological link with their parent(s);
- ensure that children are never separated from their parent(s) solely on the basis of their birth status, or the sexual orientation or gender identity of their parent(s).

The above should be effected through provision for:

- legal recognition of same-sex partnerships taking a form that provides for parental responsibility on a basis of equality with marriage;
- different-sex marriage to be available to transgender people in all Council of Europe member states in accordance with the *Christine Goodwin v United Kingdom* ruling, and for the removal of any discriminatory provisions placing pre-conditions on the right of transgender people to marry a person of the sex opposite to their legal sex;
- the possibility of adoption of the child by his or her co-parent, without discrimination based on the child's birth status or the parents' marital status, sexual orientation or gender identity. Co-parent adoption should not be dependent upon the severance of other parental ties;
- the rights and responsibilities vested in parents in *de facto* relationships to be vested in *all* parents, regardless of sexual orientation or gender identity;
- financial and work-related benefits to be made available to all families without discrimination based on a child's birth status or the parents' sexual orientation or gender identity;
- The Council of Europe should also support member states by documenting and promoting best practice in the field. It should also work actively to promote the rights of children in LGBT families within the framework of the programme "Building a Europe for and with children".

Table of Cases

A.A. v B.B., 2007 ONCA 2.

Bronda v Italy, 9 June 1998, 1998-IV, 77

C & L. M. v UK Application no. 14753/89, Cm Dec. 9 October 1989

Du Toit and De Vos v Minister of Welfare and Others, Case CCT 40/01

E.B. v France, ECHR, Application no. 43546/02, 22 January 2008

Emonet v Switzerland, Application no. 39051/03, 13 December 2007

Christine Goodwin v UK, 11 July 2002, 35 EHRR 18

J and B v Director General of Home Affairs & Others (2003), CCT 46/02

Johnston v Ireland, 18 December 1986, 9 EHRR 203

K and T v Finland, 12 July 2001 [Grand Chamber judgment], 36 EHRR 18

Karner v Austria, 24 July 2003, 38 EHRR 528

Keegan v Ireland, 26 May 1994, 18 EHRR 342

Kerkhoven v Netherlands, ECHR, Application no. 15666/89, Cm Dec. 19 May 1992

Lebbink v Netherlands, 1 June 2004, 40 EHRR 18

M.D.R. v Ontario (Deputy Registrar General), [2006] O.J. No. 2268

Marckx v Belgium, 13 June 1979, 2 EHRR 330

Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06 (ECJ, Grand Chamber, April 1, 2008)

Mata Estevez v Spain, ECHR, application no. 56501/00, Dec. 10 May 2001

Mazurek v France, 1 February 2000, 42 EHRR 9

Nylund v Finland, ECHR, Application No.27110/95, Dec. 29 June 1999

Rees v UK, 25 September 1986, 9 EHRR 56

Röösli v Germany, ECHR, Application no. 28318/95, Cm Dec. 15 May 1996

S v UK, ECHR, Application no. 11716/85, Cm Dec. 14 May 1986

Sahin v Germany, 8 July 2003 [Grand Chamber judgment], 36 EHRR 765

Salgueiro da Silva Mouta v Portugal, 21 December 1999, 31 EHRR 47

Smith and Grady v UK, 25 July 2000, 31 EHRR 24

Thlimmenos v. Greece, 6 April 2000, 31 EHRR 411

X & Y v UK, ECHR, application no. 9369/81, Cm Dec. 3 May 1983

X, Y & Z v UK, 22 April 1997, 24 EHRR 143

Bibliography

ILGA-Europe's 'Marriage and Partnership Rights for Same-sex Partners: country-by-country survey', available at

[www.ilga-](http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country)

[europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country](http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country)

Millbank, J. (2002), *Meet the Parents: A Review of the Research on Lesbian and Gay Families* (The Gay & Lesbian Rights Lobby). Available at www.girl.org.au/publications/major_reports/meet_the_parents.pdf

Millbank, J. (2008), 'The Limits of Functional Family: Lesbian Mother Litigation in the era of the Eternal Biological Family', *International Journal of Law, Policy and the Family*, 22, 149-177.

Paige, R. U. (2005), *Proceedings of the American Psychological Association, Incorporated, for the legislative year 2004. Minutes of the meeting of the Council of Representatives July 28 & 30, 2004, Honolulu, HI.*

Patterson, C.J. (2000), 'Family relationships of lesbians and gay men', *Journal of Marriage and Family*, 62, 1052- 1069.

Patterson, C.J. (2004), 'Lesbian and gay parents and their children: Summary of research findings', in *Lesbian and gay parenting: A resource for psychologists* (Washington, DC: American Psychological Association).

Perrin, E. C., and the Committee on Psychosocial Aspects of Child and Family Health (2002), 'Technical Report: Coparent or second-parent adoption by same-sex parents', *Pediatrics*, 109, 341 - 344.

Tasker, F., & Golombok, S. (1997), *Growing up in a lesbian family* (New York: Guilford Press).

Tasker, F. (1999), *Children in lesbian-led families - A review*, *Clinical Child Psychology and Psychiatry*, 4, 153 - 166.

Stacey, J. & Biblarz, T.J. (2001), (How) Does sexual orientation of parents matter? *American Sociological Review*, 65, 159-183.

Steenhof, L. & Harmsen, C. (2004), 'Same-sex couples in the Netherlands', in Digoix, M. & Festy, P. (eds), *Same-sex couples, same-sex partnerships, and homosexual marriages: A Focus on cross-national differentials* (Documents de travail n°124, Ined), 233-243. Available at: www-same-sex.ined.fr/WWW/04Doc124LiesbethCarel.pdf

Van Bueren, G. (2007), *Child Rights in Europe* (Council of Europe Publishing: Strasbourg).

Wintemute, R. and Andenas, M. (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart: Oxford, 2001).

