

Children are best raised by their natural father and mother – critically analyse

[Family](#), [Father](#)



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Abstract

The increasing importance of human rights within the legal framework of both the UK specifically and Europe generally is significant in terms of the development of the concept of a family unit in law. Increasing acceptance of these rights has led to a number of significant steps toward equality between traditional family units and units parented by same-sex couples. The European Court of Human Rights, as well as domestic courts in the U. K have begun to recognize the inclusion of same-sex couples as deserving equal treatment before the law, upholding Article 8 of the Human Rights Act of the right to family. The increasing recognition of these non-traditional family units is an extension of the existing emphasis placed on determining the best interests of the child above all other considerations. With this as the foremost consideration in child protection and children's rights, the best interests of the child are to have a stable and loving home environment that is characterized by the presence of close personal relationships between their parents, co-parents and legal guardians, rather than the presence of specific traditional parental roles. The best interests of the child demand the presence of these roles regardless of whether they are with same-sex parents or their natural mother and father.

Introduction

Modern society is rapidly changing and the result has been a remarkable development in the way that families are constituted. These developments include higher divorce rates resulting in families with only one parent and the introduction of step-families into the family nucleus, increasing numbers of

parents choosing to remain unwed, sophisticated reproductive technologies resulting in non-traditional parenting situations and the increasing recognition of same-sex couples in the eyes of the law. These demonstrate that traditional conceptions of a family, as being founded on the role of a natural father and mother is becoming increasingly outdated in terms of the realities facing modern society. Alternative forms of family demonstrate that as a unit, a family is flexible and adaptable (Hodson, 2008) with the result that law is now focused on recognizing these alternative forms of family with equal rights. Despite the introduction of alternative forms of family lifestyles, the rights and interests of children still remain paramount in all forms of legal, social and political discourse. The rhetoric of the 'best interests of the child' frequently emerges in public and political debates concerning the changing nature of family and society. As the basis for this rhetoric, a number of international conventions cover basic human rights and the rights of children in a number of human rights and children's right treaties, which form the basic foundation on which domestic legislation is built. These rights share a similar character, which is to determine the best interests of a child through the various legislative protectionist measures. On the one hand therefore, are the rights of same-sex parents to form a family free from discrimination and on the other is the continuous concern of determining what is in the best interests of the child. The central assertion of this paper is that the interests of the child do not dictate that they be raised by a natural mother and father, but rather that the law recognize their status as equal to children who enjoy legal recognition in 'traditional' family units. It will be shown that the concern of the legislature, judiciary and policy-makers

generally is in determining and enforcing the best interests of the child rather than focusing on the exact composition of the family unit with regards to same-sex parenting.

Legislative Framework

In terms of article 14 of the Human Rights Act 1998, the rights contained in European Convention of Human Rights as imported into domestic law by the Act must be applied without discrimination on the listed grounds, which includes inter alia, on sexual orientation. On this basis therefore, the application of Article 8 of the Act providing a right to family life cannot be applied in such a manner as to discriminate on this basis. The application of this article includes the respect for individual sexuality and that there is to be no predetermined model of a family. In practice this means that the law allows a family to be constituted in whatever way the individuals in that family so choose, which allows for a family unit to be comprised of same sex parents, married or otherwise. The foundation therefore for allowing children to be raised outside of what may be classified as a 'traditional' family unit is one founded in the respect for human rights of all persons without exception.

The Convention on the Rights of a Child (CRC) introduced a number of important considerations into the realm of international child protection jurisprudence. Notably, it introduced the concept of 'best interests' into the decision making process for children where the best interests of the child should be the prevailing concern with regards to all decisions made on behalf of or in the name of child protection, which is particularly applicable to

budget, policy and law-makers (CRC, 1989; Article 3). It is recognized that this may require an assessment and reform of the social services, health, legal and educational systems of that country. This also mandates that the government respect the right of parents to direct the lives of their children and in doing so affords the family unit a certain level of autonomy within the guidelines of the convention.

The Children Act of 1989 aimed to provide a consolidated framework for the protection of children in private and public law. It further aims to provide a framework for balancing the rights of children to protection by the state and allowing a framework for parents to challenge the intervention of the state if they feel that there has been an injustice in doing so. There is a strong and clear mandate on inter-agency cooperation, as there is specific mention of increased collaboration between parents and the statutory authorities in the case, and the use of voluntary arrangements to further the rights of children and the protection thereof. The Children Act of 2004 was implemented after a SCR of Victoria Climbié (DoE, 2009), however does not replace or amend the provisions of the original act, rather goes to speak of procedures implemented under this act for the improved protection of Children. This act makes the processes of reporting, and inter-agency consultation and communication a matter of priority under the law. These legislative provisions are essential for ensuring that the state takes a protective stance with regards to the interests of children under the law and in doing so, enforce the rights of children as guaranteed under the international conventions.

The Best Interests of the Child

The concept of 'best interests' is one that is firmly rooted in both private and public law around the world (Lundy, 2007). As a starting point for legal thinking and intervention concerning children, best interests has evolved as a concept and therefore understanding whether the same-sex parents or carers may be detrimental to a child by comparison to a 'traditional' family unit, it is important to determine what the best interests of the child are. Indeed, the importance of this consideration as of paramount importance was explained by the Supreme Court in *ZH (Tanzania)* (2011). Whilst this case concerned a matter of immigration for the children, the Supreme Court was at lengths to emphasize the importance of this factor as having greater weight than other factors in the decision making process and further that it should not merely feature as one consideration in the balance. Indeed, Lady Hale went further by categorically stating that what is determined to be in the best interests of the child should customarily dictate the outcome of such cases. This echoed the groundbreaking earlier decision of *In R (Williamson)* (2005) and acknowledges that often in these disputes; the court tends to focus rather on the failure of the parent in the situation, rather than the best interests of the child. In paragraph 21, Lady Hale goes on to state that interpretation of the best interests must take account of other general principles of international law and as such articles of the CRC are of fundamental importance in interpreting domestic provisions of law.

To this extent, the European Court of Human Rights (ECtHR) determined that using the sexual orientation of a parent as a determinative factor in deciding

the interests of a child was contrary to Article 8 read with Article 14 of the ECHR. In *Salgueiro Da Silva Mouta v Portugal* (1999), the ECtHR overruled a decision by the Court of Appeal to grant full custody to the mother of a minor child where the father was a homosexual and in order to secure access rights to the child he was advised to hide his homosexuality as it was considered abnormal. It stands to reason therefore that in determining the best interests of the child, the sexual orientation of the parent is not a decisive factor and therefore should hold no significant influence over a determination thereof. The significance of this decision was in the fact that it did not consider the sexual orientation of the parent in this case to be a factor against the interests of the child, which arguably indicates that the court does not consider the best interests of the child necessitating a family life consisting of a natural mother and father.

Family Life and the Best Interests of the Child

The CRC can be described as progressive in its incorporation of broader principles with regards to the composition of a family nucleus, as it recognizes the concept of legal guardians as being primarily responsible for the upbringing of children as opposed to their natural parents (article 18). In doing so, the CRC recognizes the changing norms of society and rather than being prescriptive of the precise structure of the family unit, it seeks to establish the best interests as the benchmark provision. In *Mazurek v France* (2000), the ECtHR confirmed this position by noting that “ the institution of the family is not fixed, be it historically, sociologically or even legally” (para 52). In *K and T v Finland* (2001), the ECtHR noted that the existence of a

family is an inquiry of fact which seeks to establish the existence of close personal relationships, rather than the existence of certain prescriptive roles within the family unit.

Hodson (2008) notes that a severe implication for children raised in same-sex parent households is the lack of legal recognition for family units of this nature and the implications that this may have for the children in these households. International and domestic laws exist in abundance with the aim of protecting families as a means of ensuring that children are raised stable and loving environments as this is essential to their development as well-rounded members of society. In order to ensure that equal opportunities exist for children of same-sex parents, it is essential that these family units are afforded the same rights as children of heterosexual parents. That equal rights exist in these circumstances is essential to the best interests of the child. Recently, in *Re: Compatibility of the Adoption Order NI 1987 with the ECHR*, the Northern Ireland High Court declared the incompatibility of the Adoption Order 1987 preventing same-sex couples from adopting. The issue came before the U. K Upper Tribunal in *Catholic Care v Charity Commission* (2012) where the tribunal refused to allow an adoption agency from discriminating on the grounds of same-sex couples in adoption procedures. This confirmed the earlier decision of the ECtHR in *Karner v Austria* (2003) which stated that there need be significant and convincing reasons for discriminating against same-sex couples. It is clear therefore that moving towards a non-discriminatory society which recognizes equal rights for same-

sex couples with regards to family life is a right which is currently seeing significant attention.

In the judgment of *X, Y & Z v UK* (1997), the ECtHR held that in determining whether a specific relationship may amount to “family life”, there is the need to consider a number of relevant factors. These factors include whether the couple cohabit, the duration of their relationship and whether there is a demonstrated measure of commitment to one another by the parents by having children together or any other demonstrable means. This was confirmed in the judgment of *Fitzpatrick v Sterling Housing Association* (1999) the court recognized that establishing the existence of a family life required the examination of factors such as the mutual inter-dependence between spouses, a commitment to sharing of lives together, the existence of caring and love-filled relationships, mutual commitment and the support that is rebuttably presumed to exist in marriage type relationships. The existence of a family life therefore that is necessary for the determination of the best interests of the child, is one which does not necessarily include traditional parental roles, but rather the de facto existence of close personal relationships which define the relationship between a parent and a child. It stands to reason that the existence of these relationships will be best for the child, regardless of whether they exist in a same-sex parented family.

Conclusion

The question of whether it is in a child’s best interests to be raised by their natural mother and father is one which is currently a topic of widespread

debate, particularly with regards to the question of adoption by same-sex couples. It is clear that the echoes of legal discrimination of same-sex couples is a topic that is garnering significant attention and the injustices that remain are being challenged and abolished. The significance of these decisions cannot be understated for the purposes of children's and family law, as essentially this serves as a paramount recognition by the judiciary, based on legislated grounds of human rights, that a family unit does not necessarily consist of a natural father and mother to the exclusion of same-sex parented families. The essential inquiry in this regard is into the best interests of the child and although there is still a measurable amount of discrimination against same-sex couples, it has been shown that same-sex parents are not contradictory to these interests. Providing a stable and loving environment for raising children is in the best interests of a child and whether this is provided by same-sex parents or heterosexual parents is of little consequence by comparison to the factual personal relationships that exist in these families.

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