

## **Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective**

by  
Peter Dunne

In recent years, there has been significant progress in advancing lesbian, gay, bisexual, and transgender (LGBT) rights across Europe.<sup>1</sup> At both the national, and supra-national (European Union (EU) and Council of Europe (COE)) levels, LGBT persons increasingly enjoy protections for their private sexual intimacy, ability to access and maintain employment, and state rec-

---

<sup>1</sup> See, e.g., *Schalk & Kopf v. Austria*, 53 Eur. H.R. Rep. 20 (2011) (same-gender couples falling within “family life” under art. 8 Eur. Comm’n H.R.); *Vallianatos v. Greece*, 59 Eur. H.R. Rep. 12 (2014) (equality in the provision of civil partnerships to same-gender and opposite-gender couples); *Oliari v. Italy*, 40 B.H.R.C. 549 (2015) (right to same-gender relationship recognition in Italy); *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18 (2002) (right to legal gender recognition); *Identoba v. Georgia* 39 B.H.R.C. 510 (2015) (protection from homophobic violence and discrimination while demonstrating); *X v. Turkey* (App No. 24626/09, Eur. Ct. H.R., Oct. 9, 2012) (protection from homophobic, inhuman, and degrading treatment in detention); *EB v. France*, 47 Eur. H.R. Rep. 21 (2008) (right for gay, lesbian, and bisexual persons to adopt); *X v. Austria*, 57 Eur. H.R. Rep. 14 (2013) (prohibiting discrimination in non-marital second-parent adoption rules based on sexual orientation); *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (2000) (rights of gay, lesbian and bisexual individuals in the armed forces); *Salgueiro da Silva Mouta v. Portugal*, 31 Eur. H.R. Rep. 47 (2001) (prohibiting discrimination in child custody decisions based on sexual orientation); *Karner v. Austria*, 38 Eur. H.R. Rep. 24 (2004) (prohibiting discrimination in tenancy succession rights based on sexual orientation); *Vejdeland et al. v. Sweden*, 58 Eur. H.R. Rep. 15 (2014) (prohibition on homophobic serious and prejudicial allegations); *Alekseyev v. Russia* (App. Nos. 4916/07, 25924/08, 14599/09 Eur. Ct. H.R., Nov. 21, 2010) (condemning ban on Gay Pride marches).

28 *Journal of the American Academy of Matrimonial Lawyers*

ognition of core identity, including legal affirmation of preferred gender and acknowledgment for loving relationships.<sup>2</sup>

LGBT equality is not, however, being achieved equally across the European continent. In many western countries, same-gender marriage, non-discrimination guarantees and transgender protections are now standard. In 2015, Ireland became the first jurisdiction worldwide to introduce marriage equality by popular vote,<sup>3</sup> and trailblazing countries, such as Sweden, Malta, and Denmark, are redefining international best practice for sexuality and gender inclusiveness.<sup>4</sup> Yet, in other parts of Europe, particularly nations located in the east, LGBT rights are not simply stagnating but, in many cases, are in fast retreat.<sup>5</sup> Anti-gay “propaganda” laws, constitutional bans on gay marriage, and the enforcement of heteronormative “traditional family values” mean that, in jurisdictions such as Lithuania, Hungary, and Rus-

---

<sup>2</sup> For national law developments, see the introduction of same-gender marriage in twelve European states since 2001 (Ireland, the Netherlands, Spain, France, Portugal, Denmark, Sweden, Finland, Norway, Belgium, Luxembourg, Iceland, and certain parts of the United Kingdom). See also movements towards self-determination rights for transgender persons (Ireland, Malta, Sweden, Denmark, and Norway) and the removal of medical intervention requirements (United Kingdom, Portugal, Netherlands, Germany, Spain). In the European Union, see the specific inclusion of sexual orientation non-discrimination protections in article 21 of the Charter of Fundamental Rights of the European Union. The Court of Justice of the European Union has also been instrumental in providing greater legal protections of transgender employees (*P & S and Cornwall CC*, [1996] 2 C.M.L.R. 247), greater benefits for same-gender couples (*Romer v. Freie und Hansestadt Hamburg* [2013] 2 C.M.L.R. 11), *Maruko v. Versorgungsanstalt der Deutschen Bühnen* [2008] 2 C.M.L.R. 32), and fairer asylum procedures for those who flee homophobic persecution (*A, B & C v. Staatssecretaris van Veiligheid en Justitie* (2015) 1 W.L.R. 2141; *X, Y & Z v. Minister voor en Asiel* (2014) Q.B. 1111).

<sup>3</sup> Brian Tobin, *Marriage Equality in Ireland: The Politico-Legal Context*, 30 INT'L. J. L., POL'Y & FAM. 115, 126 -27(2016).

<sup>4</sup> Peter Dunne, *Re-thinking Legal Gender Recognition: Recent Reforms in Argentina, Denmark and the Netherlands*, 2015 1 INT'L FAM. L. 41.

<sup>5</sup> Helen Fenwick, *Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?*, 3 EUR. HUM. RTS. L. REV. 248, 264-67 (2016); see also Ronald Holzhaecker, *State Sponsored Homophobia and the Denial of the Right of Assembly in Central and Eastern Europe: the “Boomerang” and the “Ricochet” Between European Organizations and Civil Society to Uphold Human Rights*, 35 LAW & POL'Y 1 (2013).

sia, LGBT communities remain a marginalised, frequently disempowered, minority.<sup>6</sup>

This section of the article offers a “European” perspective on the rights of non-biological parents when their same-gender relationships come to an end. While the section focuses heavily on the European Convention of Human Rights – a core text which is applicable in 47 State Parties throughout the Council of Europe – the substantive content is strongly influenced by western-centric European norms.

The LGBT jurisprudence of the European Court of Human Rights (ECtHR) is highly contextual. The cases that the Strasbourg court has admitted for review, as well as the force of its individual judgments, often depend on the political climate in each jurisdiction. According to Helen Fenwick, the ECtHR, like other national and international adjudicatory bodies, derives its institutional legitimacy from State Parties accepting, and properly implementing, the judges’ rulings.<sup>7</sup> Therefore, the Court is cautious in recognising greater sexual orientation and gender identity rights in order to “maintain its own credibility and authority which would be threatened if it developed rights to such recognition that a number of states would be likely to greet with hostility and resistance.”<sup>8</sup> Put simply: a statement as to the extensive “family life” rights of non-biological parents in Germany or Belgium is unlikely to encourage meaningful reform for LGBT families in Russia or Ukraine. Indeed, in the ECtHR’s recent landmark judgment, *Oliari v. Italy* (finding a requirement for same-gender civil partnership rights in Italy), the Court was careful to ground its observations on the particular legal and political

---

<sup>6</sup> See generally Philip Ebels, *MEPs Condemn Homophobia in Eastern Europe*, EURO OBSERVER (May 24, 2012), <https://euobserver.com/lgbti/116371>; Fenwick, *supra* note 5; ILGA-Europe, *Rainbow Map 2016*, ILGA-EUROPE (May 10, 2016), [http://www.ilga-europe.org/sites/default/files/Attachments/side\\_b-rainbow\\_europe\\_index\\_may\\_2016\\_small.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/side_b-rainbow_europe_index_may_2016_small.pdf); Graeme Reid, “*Traditional Values*” *Code for Human Rights Abuse?*, HUMAN RIGHTS WATCH (Oct. 17, 2012), <https://www.hrw.org/news/2012/10/17/traditional-values-code-human-rights-abuse1>; *Russia: Anti-LGBT Law a Tool for Discrimination: An Anniversary Assessment*, HUMAN RIGHTS WATCH (June 29, 2014), <https://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination>.

<sup>7</sup> Fenwick, *supra* note 5, at 248.

<sup>8</sup> *Id.*

30 *Journal of the American Academy of Matrimonial Lawyers*

characteristics of Italian society.<sup>9</sup> The judges were no doubt aware that such a right, if applied generally across the Council of Europe, would be largely unenforceable.

It is also important to acknowledge, while addressing the relationship of lesbian, gay, and bisexual parents to their children, that the status of young persons – both queer-identified youth and children in LGB families – has been comparatively absent from modern European discourse. While contemporary debates in the United States increasingly explore child-centred topics, such as sexual orientation change efforts<sup>10</sup> and transgender access to school bathrooms,<sup>11</sup> European litigation and legislative strategies have (with notable exceptions discussed below) focused on more traditional adult-centered rights: family life, freedom of assembly, and conditions for obtaining legal gender recognition. To a certain extent, this may be a strategic move. Given historic (and contemporary) mischaracterisations of LGB identities as a threat to children,<sup>12</sup> advocates may prefer to avoid debates about either youth expression of LGB identities or youth exposure to non-heteronormative parental structures.

There is considerable evidence that, while Europe's population is, as a whole, more comfortable with homosexuality and

---

<sup>9</sup> 40 B.H.R.C. 549, ¶¶ 165–187 (2015). See also Andy Hayward, *Same-Sex Registered Partnerships – A Right to Be Recognized?*, 75 CAMBRIDGE L. J. 27, 29-30 (2016); Paul Johnson, *Ground-Breaking Judgment of the European Court of Human Rights in Oliari and Others v. Italy: Same-Sex Couples in Italy Must Have Access to Civil Unions/Registered Partnerships*, ECHR SEXUAL ORIENTATION BLOG (July 21, 2015), <http://echrso.blogspot.ie/2015/07/ground-breaking-judgment-of-european.html>.

<sup>10</sup> John M Satira, *Determining the Deception of Sexual Orientation Change Efforts*, 58 WILLIAM & MARY L. REV. 641 (2016); Jacob M Victor, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532 (2014).

<sup>11</sup> Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER, L. & POL'Y 1 (2016); Jess Bravin, *Virginia School Board Asks Supreme Court to Block Order on Transgender Bathroom Use*, 2016-2017 SUP. CT. PREVIEW 277.

<sup>12</sup> Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 REGENT U. L. REV. 267 (2001-02); Olga Khazan, *Milo Yiannopoulos and the Myth of the Gay Pedophile*, ATLANTIC (Feb. 21, 2017), <https://www.theatlantic.com/health/archive/2017/02/milo-yiannopoulos-and-the-myth-of-the-gay-pedophile/517332/>; Anna L Weissman, *Repronormativity and the Reproduction of the Nation-State: The State and Sexuality Collide*, J. GLBT FAM. STUD. 1, 17 (2016).

formal gay relationships, there remains significant opposition to the construction, and accommodation, of lesbian, gay, and bisexual families.<sup>13</sup> Aware of the particular public sensitivity surrounding “gay parenting,” the UK Parliament introduced a right to same-gender adoption two years in advance of the Civil Partnership Act 2004. Under s. 49 of the Children and Adoption Act 2002 (the Adoption Act), “[a]n application for an adoption order may be made by . . . a couple” which was defined as “two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.”<sup>14</sup> By resolving the parenting rights of LGB persons prior to addressing legal relationship recognition, Parliament was able to politically separate these issues and, thus, avoid the highly-emotive, child-oriented arguments, which dominated relationship recognition campaigns in other European jurisdictions, such as France<sup>15</sup> and Slovenia.<sup>16</sup> In Italy, the recent Civil Unions Act 2016 only secured sufficient parliamentary support when the government agreed to remove adoption entitlements for same-gender couples.<sup>17</sup> Similarly, in Ireland, opponents of the 2015 marriage equality referendum largely avoided discussing same-gender intimacy, preferring instead to target social unease with same-gender parenting. Indeed, the two most prominent organisations campaigning against LGB mar-

---

<sup>13</sup> Pedro Alexandre Costa et al., *University Students’ Attitudes Toward Same-Sex Parenting and Gay and Lesbian Rights in Portugal*, 61 J. HOMOSEXUALITY 1667 (2014); Darrel Montero, *Attitudes Toward Same-Gender Adoption and Parenting: An Analysis of Surveys from 16 Countries*, 15 ADVANCES SOC. WORK 444, 448-52 (2014). Judit Takacs, Ivett Szalma & Tamás Bartus, *Social Attitudes Toward Adoption by Same-Sex Couples in Europe*, 45 ARCHIVES SEXUAL BEHAV. 1787, 1794 (2016).

<sup>14</sup> Children and Adoption Act 2002 (the Adoption Act), § 144(4).

<sup>15</sup> Maxime Larivé, *Understanding France’s Gay Marriage Battles*, US NEWS & WORLD REP. (July 9, 2013), <http://www.usnews.com/opinion/blogs/world-report/2013/07/09/frances-politicization-of-gay-marriage-and-gay-adoption>.

<sup>16</sup> *Slovenia Rejects Same-Sex Marriages in Referendum*, IRISH TIMES (Dec. 21, 2015), <http://www.irishtimes.com/news/world/europe/slovenia-rejects-same-sex-marriages-in-referendum-1.2473602>.

<sup>17</sup> ILGA-Europe, *Important Day as Italy Becomes the 27th European Country to Legally Recognise Same-Sex Couples*, ILGA-EUROPE (May 11, 2016), <http://www.ilga-europe.org/resources/news/latest-news/italy-recognises-same-sex-couples>.

riage rights in Ireland were called “Mothers and Fathers Matter” and “First Families First.”<sup>18</sup>

The failure to more thoroughly address – both nationally and supra-nationally – the status of LGB families – particularly the legal rights of parents vis-à-vis their children – is regrettable and is likely to precipitate significant legal complications. Gay, lesbian, and bisexual persons are increasingly having families in Europe, and they need a legal system that is sensitive and responsive to their needs. As the law currently stands, family law rules – which are grounded in an explicitly heterosexual, opposite-gender norm – are ill-equipped to regulate the increasing numbers of families which, while perhaps *de facto* reproducing stereotypical social parenting, do not follow the same biological and legal patterns that normally exist where there is one mother, who gave birth, and one father, who provided sperm. The fear is that, if parental rights and responsibilities are linked to a duality of law and biology, same-gender persons, who fulfill an extensive social parenting role, but have no legal or biological connection to their children, may fall through the cracks.

This section of the article looks to existing ECHR norms and practice, and considers whether it is possible to identify individual principles and rules that can offer common-sense guidance in defining the contours of same-gender parent rights.

## **I. Formally Recognizing LGB Families in Europe**

For Europe’s non-biological parents, the most direct way to formalise their parental status is to bring their relationship – with both their partner and their children – into a recognised legal structure. Throughout Europe, same-gender couples, whose relationships are acknowledged by the State, enjoy greater rights and have increased opportunity to create legal connections with the children that they are raising (whether biological or not). Where a non-biological parent can prove that there is a formal nexus between both parents and children, it is less likely that state authorities, including the judiciary, will wholly ignore that parent during subsequent custody disputes.

---

<sup>18</sup> Mothers and Fathers Matter, *There’s Far More to Marriage Than Just a Word*, MOTHERS AND FATHERS MATTER, (2015).

### A. Access to Marriage

Thirteen jurisdictions within the Council of Europe (as well as England, Wales, and Scotland<sup>19</sup>) permit same-gender marriage.<sup>20</sup> Entering a marital union offers Europe's LGB community the most direct means to formalise links between spouses and non-biological children. Since 2016, when Portugal enacted adoption reforms,<sup>21</sup> all "marriage equality" countries in Europe permit same-gender spouses to jointly adopt children. The European countries that currently permit "gay marriage" are: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, and Sweden (as well as parts of the UK).<sup>22</sup>

Unlike in the United States, where *Obergefell v. Hodges*<sup>23</sup> recognises a general marriage equality right, the European Convention on Human Rights does not require the allowance of same-gender marriage.<sup>24</sup> The ECtHR's current position on LGB marriages was first expressed in *Schalk & Kopf v. Austria*<sup>25</sup>, and has been reaffirmed (with increasing intensity) in numerous subsequent opinions, including *Gas & Dubois v. France*,<sup>26</sup>

---

<sup>19</sup> In Northern Ireland, relationship recognition is a devolved matter. This means that the decision whether to introduce same-gender marriage falls to the Northern Ireland Assembly (located at Stormont Castle, Belfast) rather than the Westminster parliament (the same applies for the Scottish Parliament which introduced same-gender marriage in Scotland in 2014). Despite overwhelming public support among the Northern Irish population, same-sex marriage has consistently been blocked by the region's largest political group, the Democratic Unionist Party. See *Same-sex marriage: Proposal Wins Assembly Majority but Fails over DUP Block*, BBC (Nov. 2015), <http://www.bbc.com/news/uk-northern-ireland-politics-34692546>.

<sup>20</sup> ILGA-Europe, *supra* note 6.

<sup>21</sup> *Portugal Parliament Overturns Veto on Adoption by Gay Couples*, UK Reuters (Feb. 2016) <http://uk.reuters.com/article/uk-rights-portugal-adoption-id UKKCN0VJ1Z0>.

<sup>22</sup> ILGA-Europe, *supra* note 6.

<sup>23</sup> 135 S. Ct. 2071 (2015).

<sup>24</sup> Nicholas Bamforth, *Families but Not (yet) Marriages? Same-Sex Partners and the Developing European Convention "Margin of Appreciation,"* 23 CHILD & FAM. L.Q. 128 (2011); Paul Johnson, "The Choice of Wording Must Be Regarded as Deliberate": *Same-Sex Marriage and Article 12 of the European Convention on Human Rights*, 40 EUR. L. REV. 207, 207-11 (2015).

<sup>25</sup> 53 Eur. H.R. Rep. 20 (2011).

<sup>26</sup> App. No. 25951/07 (Eur. Ct. H.R. Mar. 15 2012).

34 *Journal of the American Academy of Matrimonial Lawyers*

*Hamalainen v. Finland*,<sup>27</sup> *Oliari v. Italy*,<sup>28</sup> and *Chapin & Charpentier v. France*.<sup>29</sup> The Strasbourg court has stated that, while article 12 ECHR (the right to marry) is not inapplicable to LGB couples in all cases, given the lack of consensus surrounding gay marriage, States Parties *currently* retain the right to decide entry requirements for marital unions.<sup>30</sup> In particular, the judges have emphasised that the wording and origins of article 12 ECHR (which provides that “[m]en and women of marriageable age have the right to marry and to found a family”) suggest a clear preference for opposite-gender unions.<sup>31</sup>

Numerous scholars have, however, criticised the existing case law as both historically inaccurate and inconsistent with the Convention’s wider protections against sexual orientation and gender discrimination.<sup>32</sup> Paul Johnson suggests that “the qualification that men and women were entitled to equal rights as to marriage . . . can be understood as the outcome of the decision to give literal expression to the commitment to ensure gender equality in marriage.”<sup>33</sup> While the travaux préparatoires for the International Declaration of Human Rights, which forms the basis of the Convention protections for marriage, suggest a clear intention to establish an expansive and non-discriminatory marriage right (with a specific desire to avoid Nazi era entry-requirements based on race and religion),<sup>34</sup> there is no evidence that the ECHR drafters consciously decided to exclude marriage equality. The drafters may not have positively considered same-gender couples, but they also made no explicit statement against such relationships.

---

<sup>27</sup> 1 F.C.R. 379 (2015).

<sup>28</sup> 40 B.H.R.C. 549.

<sup>29</sup> App. No. 40183/07 (Eur. Ct. H.R. June 9, 2016).

<sup>30</sup> *Schalk & Kopf v. Austria*, 53 Eur. H.R. Rep. 20, ¶ 61 (2011).

<sup>31</sup> *Id.* at 55.

<sup>32</sup> Fenwick, *supra* note 5, at 255-57; Loveday Hodson, *A Marriage by Any Other Name – Schalk and Kopf v. Austria*, 11 HUM. RTS. L. REV. 170, 176-77 (2011); Johnson, *supra* note 24, at 207-08.

<sup>33</sup> Johnson, *supra* note 24, at 215.

<sup>34</sup> Rebecca Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U. J. INT’L L. & POL’Y 644, 700 (1992); Bart van der Sloot, *Between Fact and Fiction: An Analysis of the Case-law on Article 12 of the European Convention on Human Rights*, 26 CHILD & FAM. L.Q. 397, 404 (2014).



## B. Access to Civil Partnership

More than half of the jurisdictions across the Council of Europe offer same-gender civil partnerships.<sup>35</sup> In many jurisdictions, such partnerships were introduced as an alternative to marriage and extended significant marriage-like rights, including pension guarantees, next-of-kin privileges, and tax benefits. In other countries, registered partnerships have a reduced status, and are not considered as parallel with marital unions. The European jurisdictions, which offer “marriage-like” civil or registered partnership structures include: Andorra, Austria, Croatia, Cyprus, Germany, Greece, Hungary, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Slovenia, parts of Spain, Switzerland, and the United Kingdom. In the United Kingdom, Ruth Gaffney-Rhys observes a unique legal situation whereby, following the introduction of marriage equality in 2013, same-gender couples (who may still form civil partnerships) now enjoy greater options to formalise their relationships than heterosexual couples (who may only enter a marriage).<sup>36</sup> Announcing the results of a recent consultation, the British government declined to introduce civil partnership for heterosexual couples, citing a “lack of consensus on the way forward.”<sup>37</sup> While the UK Court of Appeal has recently suggested that the current inequality may constitute sexual orientation discrimination against opposite-gender couples, a majority of the justices favoured affording Parliament additional time to rectify the situation.<sup>38</sup> The European jurisdictions that offer same-gender couples “non-marriage-like” civil or registered partnerships include: Andorra, Belgium, Czech Republic, Estonia, France, Slovenia, and parts of Spain.

A common (and unfortunate) feature of Europe’s civil partnership regimes – both marriage-like and otherwise – is that, where the partnership structure does differ from marital unions,

<sup>35</sup> *Oliari*, 40 B.H.R.C. at 178; ILGA-Europe, *supra* note 6.

<sup>36</sup> Ruth Gaffney-Rhys, *Same-Sex Marriage but not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 Be Extended to Opposite-Sex Couples?*, 26 CHILD & FAM. L.Q. 173, 174 (2014).

<sup>37</sup> Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* 21 (2014).

<sup>38</sup> *Steinfeld & Keidan v. Secretary of State for Educ.*, [2017] EWCA (Civ.) 81, see judgments of Lord Justice Beatsen and Lord Justice Briggs at ¶¶ 133–75.

it generally relates to parenting rights.<sup>39</sup> In Slovenia, registered partnership shares all the features of marriage, except for the right to jointly adopt.<sup>40</sup> As already noted, Italy's Civil Unions Act 2016 faced an unlikely defeat in the national parliament until the government agreed to exclude adoption entitlements for civil partners. Such rules appear to be compatible with the European Convention as the ECtHR has held that, where State Parties extend formal recognition to same-gender couples, they retain a margin of discretion in determining the exact status, including ancillary rights, to be attached to any non-marriage relationship structures.<sup>41</sup> Austria currently has the unique distinction of being the only European jurisdiction to permit joint adoption rights, while limiting marital unions to opposite-gender couples.

While there is a clear political movement towards (at least) basic legal recognition for same-gender relationships across Europe, it remains uncertain whether the European Convention specifically provides for an *obligation to recognise*. In *Schalk and Kopf*, the European Court of Human Rights did not consider whether Austria's refusal to provide any civil recognition, in addition to prohibiting marriage equality, was incompatible with the ECHR. Subsequent to the applicant's petition, the Austrian government had introduced an alternative form of relationship status.<sup>42</sup> However, in *Valianatos v. Greece*, the Court did hold that while, under article 8 ECHR (private and family life), Greece had no obligation to enact civil partnership. Article 8, read in conjunction with article 14 ECHR (non-discrimination), prevented the introduction of non-marriage recognition which, without particularly weighty reasons, excluded couples on the basis of sexual orientation.<sup>43</sup> In *Oliari v. Italy*, the ECtHR held that Italy had a positive responsibility to permit same-gender registered partnerships (even where opposite-gender partnership did not yet exist).<sup>44</sup> However, Andy Hayward cautions that *Oliari*

<sup>39</sup> ILGA-Europe, *supra* note 6.

<sup>40</sup> Marja Novak, *Slovenia Legalizes Same-Sex Marriage, but not Adoption*, HUFFINGTON POST QUEER VOICES (Feb. 24, 2017), [http://www.huffingtonpost.com/entry/slovenia-same-sex-marriage-law\\_us\\_58ac9f90e4b0e784faa257e0](http://www.huffingtonpost.com/entry/slovenia-same-sex-marriage-law_us_58ac9f90e4b0e784faa257e0).

<sup>41</sup> *Schalk & Kopf*, 53 Eur. H.R. Rep. 20, at ¶¶ 108–09; *Oliari*, 40 B.H.R.C. 549, at ¶ 177.

<sup>42</sup> *Schalk & Kopf*, 53 Eur. H.R. Rep. 20, at ¶¶ 104–10.

<sup>43</sup> 59 Eur. H.R. Rep. 12, ¶ 92 (2014).

<sup>44</sup> 40 B.H.R.C. 549, at ¶¶ 185–87.

may not herald a new Europe-wide right for all LGB couples.<sup>45</sup> Rather, the Court's opinion narrowly responds to the particular complexities of Italian political and social culture – numerous national court judgments requiring civil unions, the Government's consistent failure to consider public support – which ultimately justified an obligation to acknowledge formal relationship recognition.<sup>46</sup> As Judges Mahoney, Tsotsoria, and Vehabovic expressly observed in their concurring opinion, the majority were “careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States.”<sup>47</sup>

### *C. Access to Adoption Rights – Joint Adoption and Second-Parent Adoption Rights*

For Europe's non-biological same-gender parents, formalising one's relationship does not necessarily guarantee automatic parenting rights. In most cases, the non-biological parent will still have to take further steps (although, those steps will often only be possible after entering a marriage or civil partnership). Across the Council of Europe, sixteen jurisdictions permit same-gender couples to jointly adopt children: Andorra, Austria, Belgium, Denmark, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.<sup>48</sup> Eighteen jurisdictions permit a same-gender spouse or partner to adopt their partner's child (so called “second-parent” adoption).<sup>49</sup>

The European Court of Human Rights has long recognised that article 8 of the Convention does not confer a right to adopt.<sup>50</sup> Brian Tobin has criticised what he considers to be an “inconsistent and somewhat incoherent approach in cases where

---

<sup>45</sup> Andy Hayward, *Same-Sex Registered Partnerships – A Right to Be Recognized?*, 75 CAMBRIDGE L. J. 27, 29-30 (2016).

<sup>46</sup> *Id.*

<sup>47</sup> 40 B.H.R.C. 549, concurring Opinion of Judge Mahoney, Joined by Judges Tsotsoria and Vehabovic, at 10.

<sup>48</sup> ILGA-Europe, *supra* note 6.

<sup>49</sup> *Id.* Those countries include: Andorra, Austria, Finland, Slovenia, Belgium, Denmark, France, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and UK.

<sup>50</sup> *Di Lazzaro v. Italy*, App. No. 31924/96, Eur. Comm'n Hum. Rts. (July 10, 2017).

restrictive second-parent adoption laws were challenged by heterosexual cohabiting couples and same-sex partners.”<sup>51</sup> In *Gas and Dubois v. France*, the Court held that there was no unlawful discrimination where French legislation restricted second-parent adoption to married heterosexual spouses.<sup>52</sup> As noted above, the ECtHR considers that entering into a marriage creates a special status for individuals, which means that they are not in a sufficiently comparable situation with unmarried couples – heterosexual or homosexual – for discrimination (within the meaning of article 14 ECHR) to arise.<sup>53</sup> There could be no indirect discrimination (i.e. as all same-gender couples are excluded from marriage, the French rules are more likely to burden LGB persons) because State Parties retained a wide margin of discretion whether to permit LGB marriages.<sup>54</sup> However, in the subsequent decision, *X v. Austria*, the ECtHR accepted that, where a jurisdiction opens second-parent adoption to unmarried opposite-gender couples, it cannot, absent particularly weighty reasons, omit same-gender partners.<sup>55</sup> Similarly, where adoption is open to single persons, a State party cannot withhold permission to adopt simply on the basis of an applicant’s sexual orientation.<sup>56</sup>

#### D. *Medically Assisted Insemination*

Throughout Europe, LGB parents, particularly couples consisting of two female-identified persons, often create families using medically assisted insemination (MAI).<sup>57</sup> Twelve European

---

<sup>51</sup> Brian Tobin, *The European Court of Human Rights’ Inconsistent and Incoherent Approach to Second-Parent Adoption*, 1 EUR. HUM. RTS. L. REV. 59, 59 (2017).

<sup>52</sup> App. No. 25951/07, Eur. Ct. H.R. (Mar. 15, 2012).

<sup>53</sup> *Id.* at ¶ 68.

<sup>54</sup> *Id.* at ¶¶ 66-71.

<sup>55</sup> 57 Eur. H.R. Rep. 14, at ¶¶ 105-53 (2013).

<sup>56</sup> 47 Eur. H.R. Rep. 21 (2008).

<sup>57</sup> Lucia Bussatta, *Could a Common EU Standard of Access to MAR Techniques Be Possible also for LGBT Couples?*, in RIGHTS ON THE MOVE – RAINBOW FAMILIES IN EUROPE CONFERENCE PROCEEDINGS 217 (Carlo Casonato & Alex Schuster eds. 2015); G de Wert et al., *ESHRE Task Force on Ethics and Law 23: Medically Assisted Reproduction in Singles, Lesbian and Gay Couples, and Transsexual People*, 29 HUM. REPRODUCTION 1859 (2014); Tânia Cristina Machado & Ana Maria Brandão, *Regulating Lesbian Motherhood: Gender, Sexuality and Medically Assisted Reproduction in Portugal*, (2013) 2 LAWS 469 (2013); Patrick Prag & Melinda C Mills, *Assisted Reproduc-*

countries allow same-gender partners to access MAI as a partnership: Austria, Belgium, Croatia, Denmark, Finland, Iceland, Ireland, Luxembourg, Netherlands, Spain, Sweden, and the United Kingdom.<sup>58</sup>

Under section 42 of the UK's Human Fertilisation and Embryology Act 2008 ("2008 Act"), where a woman, "at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination," is either married to, or in a civil partnership with, another female individual, the latter person is "to be treated as a parent of the child unless it is shown that she did not consent to the placing in [the recipient of treatment] of the embryo or the sperm and eggs or to her artificial insemination."<sup>59</sup> Sections 43 and 44 of the 2008 Act provide that, if assisted reproduction takes place in circumstances where no man (by virtue of being a husband) or woman (by virtue of being a wife or civil partner) is treated as the child's parent, another woman (with whom the recipient of the reproductive assistance is not within restricted degrees of relationship) may be treated as the parent where (a) both that other woman and the recipient consent thereto, (b) the consent has not been withdrawn and (c) the recipient has not consented to another party being treated as the parent. Julie McCandless and Sally Sheldon have criticised the 2008 Act for reinforcing an outdated (and often artificial) sexual family model. While the 2008 Act opens the possibility for two parents with the same legal gender, it nevertheless affirms that a child can only have one legal "mother."<sup>60</sup> Irrespective of the actual role that she adopts within her child's life (e.g., taking responsibility for tasks that have stereotypically been associated with motherhood), a woman recognised under sections 43 and 44 of the 2008 Act can only enjoy the status of "female parent."<sup>61</sup>

---

*tive Technology in Europe. Usage and Regulation in the Context of Cross-Border Reproductive Care*, 43 FAMILIES & SOCIETIES WORKING PAPER SERIES (2015), <http://www.familiesandsocieties.eu/wp-content/uploads/2015/09/WP43PragMills2015.pdf>.

<sup>58</sup> ILGA-Europe, *supra* note 6.

<sup>59</sup> Human Fertilisation and Embryology Act 2008, §42.

<sup>60</sup> Julie McCandless & Sally Sheldon, *The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form*, 73 MOD. L. REV. 175, 193 (2010).

<sup>61</sup> *Id.*

Twenty-five European jurisdictions permit single persons (irrespective of sexual orientation) to avail of MAI: Armenia, Belarus, Bulgaria, Cyprus, Estonia, Georgia, Greece, Latvia, Macedonia, Moldova, Montenegro, Russia, Ukraine, Belgium, Croatia, Denmark, Finland, Hungary, Iceland, Ireland, Luxembourg, Netherland, Spain, Sweden, and the United Kingdom.<sup>62</sup>

## II. Respect for Family Life

### A. Family Life Under Article 8 ECHR

Within the Council of Europe, article 8 ECHR plays a particularly important role in protecting the rights attached to family life. Article 8(1) provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” Under article 8(2), the right to private and family life may be qualified “in accordance with the law,” where such limitation is “necessary in a democratic society” and serves a legitimate aim, including “the interests of national security,” “public safety or the economic wellbeing of the country,” “the prevention of disorder or crime,” “the protection of health or morals,” and “the protection of the rights and freedoms of others.”

The European Court has stated that, while protection from arbitrary state interference is the essential object of article 8 ECHR, the protection of family life is also capable of giving rise to positive obligations.<sup>63</sup> In *Nazarenko v. Russia*, the ECtHR observed that “[t]hese obligations may involve the adoption of measures designed to secure respect for family life, even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific steps.”<sup>64</sup> According to Conor O’Mahoney, the recognition of positive obligations may be particularly necessary “in cases involving non-traditional de facto families,” including same-gender parents and their non-biological

---

<sup>62</sup> ILGA-Europe, *supra* note 6.

<sup>63</sup> *X, Y & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143, ¶ 41 (1997).

<sup>64</sup> App. No. 39438/13, ¶ 61 (Eur. Ct. H.R., July 16, 2015).

children.<sup>65</sup> For these individuals, particularly in a twenty-first century context, the legal discrimination that they experience is decreasingly related to positive state interventions from which both parents and children must be protected under article 8 ECHR. Rather, for non-normative families, the difficulties they encounter more typically arise from the “absence of [a] legal framework providing recognition and protection of their family life.”<sup>66</sup> In seeking to vindicate their family life under article 8 ECHR, these individuals are effectively asking for their existence to be legally acknowledged.<sup>67</sup>

In the landmark decision of *Marckx v. Belgium*, the ECtHR held that “respect for family life 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.”<sup>68</sup> Caroline Sörgjerd observes that the “distinction between private life and family life”<sup>69</sup> relates to the level of protection guaranteed by the Convention.<sup>70</sup> In many respects, “family life” guarantees offer enhanced rights, including the opportunity to live together, the benefit of national legal protections, and access to social benefits.<sup>71</sup>

#### B. LGB Families Come Within the Scope of “Family Life”

The European Court of Human Rights has adopted an expansive definition of family life. Going beyond the traditional married nuclear family, article 8 ECHR embraces wider “social, moral or cultural relations,” as well as “interests of a material kind.”<sup>72</sup> In *Zaunegger v. Germany*, the Court noted that “the existence or non-existence of ‘family life’ within the meaning of ar-

---

<sup>65</sup> Conor O’Mahony, *Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-traditional Families*, 26 INT’L J. L., POL’Y & FAM. 31, 39 (2012).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 2 Eur. H.R. Rep. 330, ¶ 31 (1979-80).

<sup>69</sup> Aija Valleala Kirjoittaja, Legal Recognition of Same-Sex Family Life in the Jurisprudence of the European Court of Human Rights 28 (unpublished Master’s thesis, University of Helsinki, Mar. 2014).

<sup>70</sup> CAROLINE SÖRGJERD, RECONSTRUCTING MARRIAGE: THE LEGAL STATUS OF RELATIONSHIPS IN A CHANGING SOCIETY 295-96 (Intersentia, 2012).

<sup>71</sup> *Id.*

<sup>72</sup> *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330, ¶ 52 (1979-80).

42 *Journal of the American Academy of Matrimonial Lawyers*

ticle 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.”<sup>73</sup> In *Zaunegger*, a case concerned with fathers’ rights outside of marriage, the Court placed special emphasis on “the demonstrable interest in and commitment by the [parent] to the child both before and after the birth.”<sup>74</sup>

In a number of cases, the ECtHR has affirmed the “family life” protections of *de facto* families living outside formal legal and biological structures. In judgments, such as *Moretti and Benedetti v. Italy*<sup>75</sup> and *Kopf and Liberda v. Austria*,<sup>76</sup> the Court recognised the possibility for family life between “a foster family and a fostered child who had lived together for many months.”<sup>77</sup> Of particular relevance to the question of non-biological same-gender parents, the Court focused on the fact that a “close emotional bond had developed between the foster family and the child, similar to the one between parents and children, and that the foster family had behaved in every respect like the child’s parents.”<sup>78</sup> In *Menesson v. France*, the Strasbourg judges also found family life where two heterosexual parents were raising two children born using the father’s sperm, but also with the benefit of a female egg donor and female surrogate.<sup>79</sup>

In recent years, the European Court of Human Rights has recognised the article 8 ECHR rights of gay, lesbian and bisexual couples. Through a landmark statement, delivered in *Schalk and Kopf*, the Court observed that:

it [is] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would.<sup>80</sup>

In subsequent cases, the ECtHR has elaborated upon, and expanded, its *Schalk and Kopf* reasoning. In *Valianatos v.*

---

<sup>73</sup> 50 Eur. H.R. Rep. 38, ¶ 36 (2010).

<sup>74</sup> *Id.*

<sup>75</sup> App. No. 16318/07 (Eur. Ct. H.R. Apr. 27, 2010).

<sup>76</sup> App. No. 1598/06 (Eur. Ct. H.R. Jan. 17 2012).

<sup>77</sup> App. No. 39438/13, ¶ 57 (Eur. Ct. H.R. July 16, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> App. No. 65192/11 (Eur. Ct. H.R. June 26, 2014).

<sup>80</sup> 53 Eur. H.R. Rep. 20, ¶ 94 (2011).



Greece, the Court held that stable same-gender couples fall within the notion of family life even where, “for professional and social reasons,” the partners do not live together: “the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8.”<sup>81</sup> Furthermore, having previously held that transgender parents, who identify with opposite genders, enjoy the protection of family life,<sup>82</sup> the Court has recently expanded its case law to equally include those transgender families where both parents identify with the same gender.<sup>83</sup> At the national level, the fact that unmarried same-gender couples fall within the notion of family life has been recognised by courts in, among other jurisdictions, Germany,<sup>84</sup> the United Kingdom<sup>85</sup> and Spain.<sup>86</sup>

In *Gas and Dubois* – where an unmarried couple were raising a child, which one partner had conceived through assisted reproduction – the ECtHR ruled that, although unmarried couples were not entitled to second-parent adoption, *Gas*, *Dubois*, and their child undoubtedly enjoyed “family life.”<sup>87</sup> This was so irrespective of whether *Gas* had any legal or biological connection to the child. A similar result was achieved in *X v. Austria*, where the first applicant enjoyed family life with her female partner, the third applicant, and the latter’s child from a previous heterosexual relationship.<sup>88</sup> In both cases, while the same-gender couple might not have been entitled to the specific rights reserved for marital unions, there was a positive obligation on the French and Austrian states to adopt appropriate measures to preserve and reinforce existing family life. In the context of non-biological parents, and post-relationship custody disputes, there is an arguable

<sup>81</sup> 59 Eur. H.R. Rep. 12, ¶ 73 (2014).

<sup>82</sup> *X, Y & Z v. United Kingdom* 24 Eur. H.R. Rep. 143, ¶ 42 (1997).

<sup>83</sup> *Hamalainen v. Finland*, 1 F.C.R. 379, ¶ 60 (2015).

<sup>84</sup> 1 BvL 1/11 (Fed. Const. Ct., Feb. 19, 2013) (Germany).

<sup>85</sup> *G (A Child) (Same-sex Relationship: Family Life Declaration)*, [2015] Fam. 133, ¶ 54.

<sup>86</sup> Cristina Gonzales Beilfuss, *All or Nothing? The Dilemma of Southern Jurisdictions*, in *THE LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE 50* (Katharina Boele-Woelki & Angelika Fuchs eds., 2d ed. Intersentia 2012).

<sup>87</sup> App. No. 25951/07, ¶ 37 (Eur. Ct. H.R. Mar. 15, 2012).

<sup>88</sup> 57 Eur. H.R. Rep. 14, ¶ 96 (2013).

#### 44 *Journal of the American Academy of Matrimonial Lawyers*

case that, irrespective of biological and legal ties, if the parent has established family life with the child(ren) being raised within the relationship, there is a requirement that state authorities facilitate – for the benefit of the child and the non-biological parent – the continuing enjoyment of family ties.

#### C. *Margin of Appreciation*

As noted, the right to respect for family life under article 8 ECHR is not absolute. It may be limited “in accordance with the law” for a number of “necessary” reasons, including “public safety,” “the protection of health or morals,” and “the protection of the rights and freedoms of others.” In general, State parties must seek to strike a proportional balance between the rights of the individual and the interests of affected third persons or the wider community.<sup>89</sup> In making that determination, countries enjoy a margin of appreciation,<sup>90</sup> which will widen or narrow depending on a number of factors (many of which have a direct bearing on the question of non-biological parents).

State parties enjoy a wider margin of appreciation in respecting family life where, first, there is a lack of consensus throughout the Council of Europe, and, second, national law or practices concern economic and social strategy. The European Court of Human Rights is less likely to condemn state restrictions on family life if there is little agreement among European nations on the legitimacy of such restrictions.<sup>91</sup> The Court is particularly loathe to substitute its own judgment for national decision-making processes where there is a question of ethical or

---

<sup>89</sup> *Gaskin v. United Kingdom*, 12 Eur. H.R. Rep. 36, ¶ 40 (1990).

<sup>90</sup> Yutaka Arai, *The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights*, 16 NETH. Q. HUM. RTS. 41 (1998); Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, 15 HUM. RTS. L. REV. 745 (2015). In effect, the margin of appreciation refers to the level of deference which the European Court of Human Rights will afford to State Parties when determining whether a rule, policy or decision is compatible with the European Convention on Human Rights. Where the Court expands the margin of appreciation, this means that it will be more likely to accept and defer to the judgement made by the State. A narrower margin of appreciation results in a stricter review of the State Party's actions.

<sup>91</sup> *S.H. et al. v. Austria*, App. No. 58813/00, ¶ 94 (Eur. Ct. H.R. Nov. 3, 2011).

moral judgement.<sup>92</sup> Perhaps the paradigm modern example of consensus review can be seen in the ECtHR's consistent unwillingness to declare a right to same-gender marriage under the Convention.<sup>93</sup> In the recent *Oliari* judgment, having regard to the prior case law, the Strasbourg judges dismissed the claimants' marriage-focused arguments as "manifestly ill-founded."<sup>94</sup> Where only twelve jurisdictions have equal marital laws across the Council of Europe, it would be premature (and, as noted above, institutionally detrimental) for the Court to expand the definition of marriage in all other (thirty-five) State Parties. In the same way, the question of same-gender parenting rights remains particularly sensitive across the Council of Europe, with different states adopting radically different positions in terms of adoption and responsibility entitlements. It is therefore likely that the Court would be less likely to intervene where national rules interfere with non-biological parents' parental rights.

State Parties also enjoy a wider margin of appreciation where they implement social or economic strategies.<sup>95</sup> The Court shows greater reluctance to intervene where the result is a significant burden on the national treasury or where any judgment would short-circuit ongoing national debates on social policy. In *A, B and C v. Ireland*,<sup>96</sup> despite "a clear consensus among European states on the question of how to balance the mother's rights with those of the foetus,"<sup>97</sup> the ECtHR refused to "decisively narrow" Ireland's margin of appreciation to legislate on the socially contentious issue of abortion.<sup>98</sup> Since adoption and custody rights may also fall within the scope of social policy, it is arguable that the Court would offer a wider margin of appreciation in determining non-biological parents' rights.

On the other hand, national authorities enjoy a narrower margin of appreciation in respecting family life where state ac-

---

<sup>92</sup> *X v. Austria*, 57 Eur. H.R. Rep. 14, ¶ 148 (2013).

<sup>93</sup> *Schalk & Kopf*, 53 Eur. H.R. Rep. 20, at ¶ 58.

<sup>94</sup> 40 B.H.R.C. 549, at ¶ 194.

<sup>95</sup> *Gas & DuBois v. France*, App. No. 25951/07, ¶ 60 (Eur. Ct. H.R. Mar. 15, 2012).

<sup>96</sup> 53 Eur. H.R. Rep. 13 (2011).

<sup>97</sup> Sanjivi Krishnan, *What's the Consensus: The Grand Chamber's Decision on Abortion in A, B and C v. Ireland*, 2 EUR. HUM. RTS. L. REV. 200, 203 (2011).

<sup>98</sup> 53 Eur. H.R. Rep. 13, at ¶ 236.

tion impinges upon an “important facet of an individual’s existence or identity.”<sup>99</sup> A restriction on family life, which limits a core aspect of a person’s identity, will encourage the European Court of Human Rights to apply stricter scrutiny. In *Goodwin v. United Kingdom*, a 2002 case, the United Kingdom’s failure to recognise Christine Goodwin’s preferred female gender was a significant interference with an important facet of her identity, and thus the court extended only a narrow margin of appreciation.<sup>100</sup> In *Menesson v. France*, the ECtHR held that “an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned.”<sup>101</sup> Thus, “[t]he margin of appreciation afforded to the respondent State . . . needs to be reduced.”<sup>102</sup> State action, which limits the family life between non-biological parents and their children, restricts that parent’s identity and should require the Court to undertake a more rigorous review.

One final consideration is how the particular type of proceeding may influence the margin afforded to State Parties. *Sommerfeld v. Germany* suggests that, where national authorities are resolving a custody dispute, they generally enjoy a wider margin of appreciation.<sup>103</sup> However, that margin significantly narrows where there are “any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life.”<sup>104</sup>

#### D. *Aims of Article 8 ECHR*

In determining the proportionality of a restriction on family life, a primary consideration is whether the State’s action pursues a legitimate aim. Limiting the rights of non-biological parents does not satisfy the requirements of article 8 ECHR if it is not necessary to achieve an appropriate state interest.<sup>105</sup> In seeking

<sup>99</sup> *Martinez v. Spain*, 60 Eur. H.R. Rep. 3, ¶ 125 (2015).

<sup>100</sup> 35 Eur. H.R. Rep. 18, ¶ 90 (2002).

<sup>101</sup> App. No. 65192/11, ¶ 80 (Eur. Ct. H.R. June 26, 2014).

<sup>102</sup> *Id.*

<sup>103</sup> 38 Eur. H.R. Rep. 35, ¶ 63 (2004).

<sup>104</sup> *Id.*

<sup>105</sup> *Campbell v. United Kingdom*, 15 Eur. H.R. Rep. 137, ¶¶ 62-64 (1993).

to justify interferences with family life, State Parties have, with varying degrees of success, claimed to promote a spectrum of goals that legitimise curbing article 8 ECHR protections.

### 1. *Protecting the Traditional Family*

In the sphere of LGB rights, particularly discrimination against non-heterosexual partners and parents, State Parties have rationalised unequal treatment as preserving traditional family structures. In *Karner v. Austria*, a case concerned with tenancy succession rights for same-gender couples, the ECtHR accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment”<sup>106</sup> based on sexual orientation. Thus, to the extent that providing express legal rights for non-biological same-gender parents may undermine the traditional heteronormative family model, the existing case law (at least facially) would support national restrictions.

In recent years, however, the Strasbourg judges have more strictly reviewed the question of whether LGB rights do weaken traditional family structures, and whether state intervention actually promotes (or is necessary to promote) the orthodox family model. In *Karner*, while the ECtHR conceded that protecting the traditional heterosexual family is a legitimate interest, the Court ultimately concluded that Austria had failed to prove that it was specifically necessary to exclude same-gender couples from tenancy succession rights in order to protect the traditional family.<sup>107</sup> In *Karner*, it was clear that tenancy succession rights for same-gender couples would have no effect on traditional families. There was no question that, because the State recognised such rights, heterosexual Austrian couples were now going to forgo marriage in favour of homosexual cohabitation. It was clear, therefore, that the exclusion of tenancy succession rights was disproportionate and lacked an objective, or reasonable, justification.

In *Vallianatos v. Greece*, the majority held that, while the indirect strengthening of traditional marriage is a legitimate Convention aim, the Court will not automatically accept that a partic-

---

<sup>106</sup> 38 Eur. H.R. Rep. 24, ¶ 40 (2004).

<sup>107</sup> *Id.* ¶ 42.

ular state law or policy pursues that goal.<sup>108</sup> In *Vallianatos*, registered partnerships solidified the legal relationship of a child, born outside of wedlock, to both of his or her parents. The Greek government argued, therefore, that registered partnerships indirectly protected the institution of marriage because they ensured that couples, who would otherwise choose to cohabit, do not marry simply to secure parent-child rights.<sup>109</sup> These considerations did not arise in the case of homosexual couples, who could not biologically reproduce, and therefore there were objective justifications for excluding same gender couples from the law. However, the Court noted that the Greek government had also extended registered partnership rights to heterosexual couples without children.<sup>110</sup> Like gay and lesbian persons, there was no fear that these couples would only marry to secure their parent-child relationship, yet they were still beneficiaries of registered partnerships. In such circumstances, there was a clear doubt as to the extent to which the total exclusion of homosexual couples was a real or necessary objective.

The reasoning in both *Karner* and *Vallianatos* is instructive for the question of whether State Parties should extend greater parental rights to individuals who, with a same-gender partner, are raising non-biological children. The standard “traditional family” defence would suggest that, by reducing non-heterosexual family rights to the greatest extent possible, national laws disincentivize non-traditional family structures, prioritize heterosexual marriage relationships, and encourage individuals into a socially optimal family model. However, as in *Karner*, such an argument would be intellectually weak (not to mention wholly removed from social reality). Severing the legal connection between gay, lesbian, and bisexual parents and their non-biological children does not persuade such individuals to enter an opposite-gender heterosexual marriage. A woman who cannot obtain legal rights over the children that she is raising with her female partner will not disavow her identity and marry a man because she finds herself in legal limbo. Rather, instead of reinforcing the *de facto* social superiority of traditional families, the absence of LGB family rights has no appreciable impact on heterosexual mar-

---

<sup>108</sup> 59 Eur. H.R. Rep. 12, ¶ 83 (2014).

<sup>109</sup> *Id.* ¶ 62.

<sup>110</sup> *Id.* ¶¶ 86–90.

riage, but significantly impedes lesbian, gay, and bisexual family life.

## 2. *Developing Family Ties*

In *Kroon v. Netherlands*, the ECtHR stated that “where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established.”<sup>111</sup> In a series of cases, the Court has consistently affirmed that “the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.”<sup>112</sup> Where a non-biological parent establishes a family tie with children raised in the family, article 8 may require state authorities, where the parents’ relationship terminates, to create sufficient legal structures for the continued development of the parent-child ties.

## III. The Best Interests of the Child

In *Valianatos v. Greece* and *X v. Austria*, the European Court of Human Rights stated that, when defining the contours of articles 8 and 14 ECHR, “[i]t goes without saying that the protection of the interests of the child is . . . a legitimate aim.”<sup>113</sup> Across Europe, both at the national and supra-national levels, there is a general consensus that, for parent-child relationships, including the determination of status, responsibility, and custody, the best interests of the child should be the “paramount” consideration. Under article 24(2) of the European Charter of Fundamental Rights (given legal effect under the Treaty of Lisbon), “[i]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”<sup>114</sup>

---

<sup>111</sup> 19 Eur. H.R. Rep. 263, ¶ 32 (1995).

<sup>112</sup> *K & T v. Finland*, 36 Eur. H.R. Rep. 18, ¶ 151 (2003); *NTS v. Georgia*, App. No. 71776/12, Eur. Ct. H.R. Feb. 2, 2016).

<sup>113</sup> *X v. Austria*, 57 Eur. H.R. Rep. 14, ¶ 138 (2013); *Vallianatos*, 59 Eur. H.R. Rep. at ¶ 83.

<sup>114</sup> Charter of Fundamental Rights of the European Union, § 24(2).

In *Plaza v. Poland*, the ECtHR ruled that “in matters relating to their custody the interests of children are of paramount importance.”<sup>115</sup> Similar sentiments have been expressed in *Kearns v. France*<sup>116</sup> (determining when a parent can revoke consent to adoption); *Wagner and JMWL v. Luxembourg*<sup>117</sup> (considering the legitimacy of a refusal to register a child born in a foreign country to a surrogate mother); and *K and T v. Finland*<sup>118</sup> (concerning the placement of children in state care). The best interests of the child (or the welfare of the child) is also the standard generally adopted by national legislation and case law across Europe (see, e.g., Children’s Act 1989, s. 1 (UK); Civil Code, art. 1685 (Germany); Civil Code, arts. 371-373 (France); decision of the Stockholm Court of Appeals, Oct. 7, 2014 (Sweden)).

In determining the rights of non-biological same-gender parents, particularly as against the biological or legal parent of a child, policy makers and the courts should be primarily guided by the best interests of the young person. Where there is evidence that a child’s interests are best served through continued contact, or even continued residence, with a non-biological parent, the absence of a genetic or legal connection should not deter the court. Just as article 12 of the U.N. Convention on the Rights of the Child requires that a child’s best interests be determined through hearing the voice of the child, so too the ECtHR agrees that “as children mature and become, with the passage of time, able to formulate their own opinion on their contact with the parents, the courts should give due weight also to their views and feelings.”<sup>119</sup>

The “best interests” principle can offer significant protection to individuals who, while engaging in full social parenting, do not share a biological link with their children. There are compelling reasons to believe that a presumption against the rights (e.g.,

---

<sup>115</sup> App. No. 18830/07, ¶ 71 (Eur. Ct. H.R. Jan. 25 2011).

<sup>116</sup> 50 Eur. H.R. Rep. 33, ¶ 79 (2010).

<sup>117</sup> App. No. 76240/01 (Eur. Ct. H.R. June 28, 2007).

<sup>118</sup> 36 Eur. H.R. Rep. 18, ¶ 154 (2003).

<sup>119</sup> *NTS*, App. No. 71776/12, at ¶ 72.



contact, custody, shared parental responsibility)<sup>120</sup> for non-biological parents does not serve the best interests of children. In its decision affirming the right to successive second-parent adoption (i.e. where a same-gender partner becomes a second legal parent to the other partner's adopted child), the German Constitutional Court held that removing all rights from non-biological parents, upon the breakdown of a relationship, compromises a child's "emotional attachment" and also increases both legal and financial insecurity.<sup>121</sup>

One note of caution, however, relates to the fact that, while the ECtHR has a clear preference for "best interests" reasoning, it has not applied the principle consistently to LGB families. This reflects a much wider political phenomenon – noticeable both across Europe and beyond – where the protection of children has been consistently invoked to resist greater LGBT rights, both individually (e.g., specific custody determinations) and collectively (e.g., opposition to gay marriage and adoption rights).<sup>122</sup> In dissenting from the majority judgment in *Gas and Dubois*, Judge Villiger referred to the negative effects which refusing joint parental rights would have on the couple's child.<sup>123</sup> However, *Gas and Dubois v. France*,<sup>124</sup> along with *X v. Austria*,<sup>125</sup> is a primary example of an ECHR case in which, although the outcome of the litigation clearly would have significant impact for children, the Strasbourg judges failed to consider how the children's best interests would be negatively affected by prohibiting greater parental rights.<sup>126</sup> Indeed, even when the ECtHR has expressly used

---

<sup>120</sup> Kari J. Carter, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209 (2006).

<sup>121</sup> 1 BvR 3247/09, ¶ 85 (Fed. Const. Ct. Germany Feb. 19, 2013).

<sup>122</sup> *Russia: Anti-LGBT Law a Tool for Discrimination: An Anniversary Assessment*, HUMAN RIGHTS WATCH Website (June 29, 2014), <https://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination>.

<sup>123</sup> App. No. 25951/07, (Eur. Ct. H.R. Mar. 15, 2012)(Villiger, J., dissenting) ("The judgment focuses on the adults, but not on the children who are nevertheless an integral part of the applicants' complaints.).

<sup>124</sup> App. No. 25951/07 (Eur. Ct. H.R. Mar. 15, 2012).

<sup>125</sup> 57 Eur. H.R. Rep. 14 (2013).

<sup>126</sup> Gabriel Alves de Faria, *Sexual Orientation and the ECtHR: What Relevance Is Given to the Best Interests of the Child? An Analysis of the European Court of Human Rights' Approach to the Best Interests of the Child in LGBT*

“best interests” analysis in its reasoning for LGBT considerations, there have been questions as to whether the standard was either objectively or appropriately applied. While, in *Frette v. France*,<sup>127</sup> the Court did make significant reference to “best interests,” the judges appeared to ignore the substantial body of evidence which already existed on the desirability of same-gender parenting.<sup>128</sup>

#### IV. The Role of Biological Parenting

Considering the paramountcy of “best interests” in parental rights decisions, what role should biological links play? In the highly-publicised United Kingdom decision, *In Re G (Children)*, Baroness Hale, for the House of Lords, stated that, while child welfare was the ultimate determinant in allocating parenting responsibility and residence rights, “the fact that [the biological parent] [was] the natural mother of these children in every sense of that term . . . is undoubtedly an important and significant factor in determining what will be best for them now and in the future.”<sup>129</sup> In *Re G*, their Lordships overturned a decision to award primary residence rights to the children’s non-biological same-gender parent. The decision was controversial and, among lower courts, led to a presumption that biological parents should be preferred in parental responsibility disputes.<sup>130</sup> In 2009, the now UK Supreme Court was required to intervene again and, with Lord Kerr giving judgment for the Court in *Re B (a Child)*, affirmed that:

---

*Parenting Cases*, FAMILY AND LAW §§ 4, 5 (2015), <http://www.bjutijdschriften.nl/tijdschrift/fenr/2015/04/FENR-D-15-00002.pdf>.

<sup>127</sup> 38 Eur. H.R. Rep. 21 (2004).

<sup>128</sup> *Id.* at ¶ 36; *What Does the Scholarly Research Say About the Wellbeing of Children with Gay or Lesbian Parents?*, WHAT WE KNOW WEBSITE (Feb. 2016), <http://whatweknow.law.columbia.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>.

<sup>129</sup> [2006] UKHL 43, ¶ 44.

<sup>130</sup> Alan Inglis, *Children and Same-Sex Parents*, 11 SCOTS L. TIMES 53, 56 (2015); Alison Diduck, “*If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved*”: *Law, Identity and Parenthood*, 19 CHILD & FAM. L.Q. 458 (2007); Kim Everett & Luck Yeatman, *Are Some Parents More Natural than Others?*, 22 CHILD & FAM. L.Q. 290 (2010).

All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. This is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim. There are various ways in which it may do so, some of which were explored by Baroness Hale in *In re G*, but the essential task for the court is always the same.<sup>131</sup>

The Spanish Supreme Court has come to a similar conclusion.<sup>132</sup> In a case where two female partners were raising a child, conceived by one of the partners through donor insemination, the Court held that the biological mother could not block the child's contact with her former partner. The parents and child were a *de facto* family and, having regard to the best interests of the child as the paramount consideration, it was appropriate that the non-biological mother be afforded the same rights as arise from the legal status of motherhood.<sup>133</sup>

In *Nazarenko v. Russia*, the European Court of Human Rights held that a male applicant, who had raised a child for a number of years before discovering that he was not the biological father, "must not be completely excluded from the child's life."<sup>134</sup> Conversely, in *Schneider v. Germany*, the ECtHR stated that "a mere biological kinship between a natural parent and a child, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8."<sup>135</sup>

## Conclusion

The European Court of Human Rights has not yet addressed the specific issue of non-biological same-gender parents who, upon the dissolution of a relationship with their children's biological parent, seek to maintain access to, and rights over, those children. Recognising the family life of same-gender couples, and specifically enhancing entitlements to both individ-

---

<sup>131</sup> [2009] UKSC 5, ¶ 37.

<sup>132</sup> S.T.S., May 12, 2011, 2676/2011 (Spain). See Beilfuss, *supra* note 86, at 50.

<sup>133</sup> Beilfuss, *supra* note 86, at 50.

<sup>134</sup> App. No. 39438/13, ¶ 67 (Eur. Ct. H.R. July 16, 2015).

<sup>135</sup> 54 Eur. H.R. Rep 12, ¶ 80 (2012).

54 *Journal of the American Academy of Matrimonial Lawyers*

ual and second-parent adoptions, the ECtHR has undoubtedly taken steps to ensure that gay, lesbian, and bisexual families are not total strangers to the law. In many respects, the Court's recent progressive case law merely aligns with its consistent approach that national law should "take account of the social reality of the situation" in which individuals live.<sup>136</sup> However, at the same time, the Strasbourg judges are increasingly aware of their own institutional (il)legitimacy, and on sensitive or moral issues, such as abortion and same-gender marriage, the ECtHR has been less willing to introduce radical reform. As this section of the article has illustrated, there is much in the ECtHR's existing jurisprudence to support wider legal recognition for non-biological same-gender parents. Whether the judges would be willing to enact meaningful protections may ultimately rely more upon considerations of political science than legal analysis.

---

<sup>136</sup> 19 E.H.R.R. 263, ¶ 40 (1995).