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Moving Forward Together: The LGBT Community and the Family Mediation Field

Mark J. Hanson*

This is a time of great change for the Lesbian, Gay, Bisexual and Transgender (“LGBT”) community. Members of the LGBT community have gained increased awareness and rights. The United States Supreme Court found state sodomy laws that ban same-sex sexual activity unconstitutional.¹ Thirty-three states have enacted hate crime legislation that protects members of the LGBT community.² Recently from the streets of San Francisco,³ to New Platz, New York⁴ and to Sandoval County, New Mexico,⁵ LGBT couples have received marriage licenses despite being prohibited by state law.

Other states, such as Connecticut,⁶ Massachusetts⁷ and Vermont⁸ have enacted legislation giving LGBT couples either the same or substantially similar marriage rights now enjoyed by opposite sex couples. However,

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1. *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. Hrc.org, Hate Crime Laws: State-by-State, available at http://www.hrc.org/Template.cfm?Section=Laws_Legal_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19987 (last visited Apr. 21, 2005) (Twenty-two of the thirty-three states that have statutes prohibiting hate crimes based on sexual orientation do not protect against hate crimes based on gender identity.).

3. Joe Dignan & Rene Sanchez, *San Francisco Opens Marriage to Gay Couples*, WASHINGTON POST, Feb. 13, 2004, at A01.

4. *Access Denied; Marriage Debate Heats Up After Same-Sex Couples Are Turned Away*, CHICAGO TRIBUNE, Mar. 5, 2004, at 12.

5. T.R. Reid, *Glad to be Wed, If Only One Day; Opposing Edicts Leave New Mexico Gays' Nuptials In Legal Limbo*, WASHINGTON POST, Feb. 22, 2004, at A13.

6. CGA.ct.gov, An Act Concerning Civil Unions, available at <http://www.cga.ct.gov/2005/ba/2005SB-00963-R010379-BA.htm> (last visited Apr. 21, 2005).

7. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that same-sex couples are entitled to the same marriage rights as opposite-sex couples).

8. VT. STAT. ANN. tit. 15, §1201(4)(2003); VT. STAT. ANN. tit. 15 §23 (2003).

despite the recent achievements the LGBT community has enjoyed, there has been a backlash. In 2004, eleven states passed constitutional amendments that preclude LGBT couples from attaining equal marriage rights.⁹ These states joined a total of six other states that have restricted LGBT marriage rights.¹⁰ With all of these events, LGBT issues are now more than ever at the forefront of Americans' minds.

The mediation field is no exception to this increased awareness. Issues have arisen between how the LGBT community and the family mediation field approach each other. This article reviews successes and problems coexisting between the LGBT community and the family mediation field. Section I reviews this article's thesis: that because the American legal system has long been inaccessible to the LGBT community, family mediation has served as the LGBT community's primary choice of dispute resolution. Section II shows that despite the LGBT community's long use of family mediation, major policy issues have arisen of how the LGBT community and the family mediation field address each other.

I. THE LGBT COMMUNITY'S HISTORY OF USING FAMILY MEDIATION

A. *The American Legal System's Hostility to LGBT Interests*

The current American legal system gives opposite-sex couples a legal framework to formalize and dissolve their relationships. LGBT couples are now just beginning to gain recognition of their relationships through the same legal framework whether through marriage rights, civil unions, or domestic partnership rights. Even if LGBT couples do not have access to the American legal system, mechanisms need to be established to dissolve a LGBT relationship. When a LGBT couple ends their relationship, they need to be able to address many issues such as distribution of assets, calculation of possible spousal support, and, if the couple has children, figuring out the child custody arrangements.¹¹ Yet, for most of recent history, LGBT couples were unable to access state courts to dissolve their relationships because state courts have refused to recognize their relationships.

9. CNN.com, *Ballot Measures*, available at <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> (last visited Apr. 23, 2005).

10. See *Proposed State Constitutional Amendments Limiting Marriage and/or Other Forms of Relationship Recognition in 2005*, available at <http://www.hrc.org/Template.cfm?Section=Partners&CONTENTID=25259&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Apr. 24, 2005) (This does not include states that have pending LGBT marriage bans.).

11. Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 91 (2001).

States such as Vermont do allow LGBT couples access to its courts to dissolve their civil unions.¹² However, other states have refused to dissolve LGBT relationships. Dissimilar state laws are currently creating legal havoc. In one instance where a LGBT couple legally married in Vermont sought to dissolve their civil union in a Georgia state court, the Georgia state court refused to recognize their civil union.¹³ As a result, the Georgia state court refused to allow the LGBT couple access to its state court functions in order to resolve issues related to their breakup.¹⁴ In many states, the vast legal framework of family law that deals with dissolving relationships has long been inapplicable to LGBT couples.

Even if LGBT couples had access to the state courts, there have been many reasons why the LGBT community has avoided using those courts. First, LGBT couples have stayed away from the state courts due to ostensibly homophobic judicial decisions that have either derided or belittled the LGBT community.¹⁵ One recent example of such a homophobic sounding court decision came from the Supreme Court of Alabama, which stated that homosexual behavior “has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our [Alabama’s] laws are predicated.”¹⁶ Homophobic decisions also exist in child custody cases, where courts have refused to grant custody or joint custody to a LGBT parent because of fears: that the child would be molested; the child will become gay; the LGBT parent is mentally ill because they are gay; the child might contract HIV; or the child might be overly exposed to harassment and/or stigmatization because of having a gay parent.¹⁷ Moreover, the LGBT community has experienced instances of outright and overt hostility by court officials; in one such case, a court official stated it was unbecoming to shake the hand of a lesbian.¹⁸ LGBT couples have also avoided the court

12. *Id.* at 101.

13. See Dissolving a Vermont Civil Union, available at http://www.hrc.org/Template.cfm?Section=Civil_unions1&CONTENTID=16944&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Apr. 14, 2005).

14. *Id.*

15. Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1719 (1997).

16. *Ex Parte H.H.*, 830 So.2d 21, 26 (Ala. 2002).

17. Douglas H. McIntyre, *Gay Parents and Child Custody: A Struggle Under the Legal System*, 12 MEDIATION Q. 135, 136-42 (1994).

18. Freshman, *supra* note 15, at 1719.

system in order to maintain their privacy.¹⁹ LGBT couples fear being “outed,” with the potential ramifications of being discriminated against either at work or within public society.²⁰

However, sometimes LGBT couples cannot avoid the court system. One such instance is child custody and visitation suits, which are the most frequently litigated controversy involving sexual orientation.²¹ These child custody cases can be especially emotional for LGBT couples when they have to overcome obstacles such as adoption, surrogacy, or donor insemination in order to have children.²²

LGBT couples must keep potential litigation in mind and plan in advance. In many cases, one of the LGBT partners may have the status of being a non-adoptive or non-biological parent. A prudent course of action for the non-adoptive non-biological LGBT parent would be to adopt the child as his or her own, or seek to have the birth certificate amended.²³ The stakes are high if this is not accomplished. For instance, the United States Supreme Court decision *Troxel v. Granville* stated that the Court would avoid extending parental rights to non-parents.²⁴ Many courts treat a non-adoptive, non-biological LGBT parent as a non-parent or, using a commentator’s term, a “legal stranger.”²⁵ *Troxel* and many courts instead give a custody preference to the biological parent.²⁶ The only way a non-adoptive, non-biological LGBT parent can be granted custody is if he or she can achieve standing as a parent.²⁷ The requirements of such standing vary state by state.²⁸ Additionally, the court must also determine what is in the best interests of the child.²⁹

Non-adoptive, non-biological LGBT parents have used many arguments to obtain custody. Some LGBT parents have argued that custody and

19. William Mason Emmett, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433, 440 (1997).

20. Suzanne Bryant, *Mediation for Lesbian and Gay Families*, 9 MEDIATION Q. 391, 394 (1992).

21. Emmett, *supra* note 19, at 435.

22. JAY FOLBERG ET AL., *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS*, 356 (The Guilford Press 2004).

23. Sonja Larsen, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5TH 54 (1998). See also, *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

24. *Troxel v. Granville*, 530 U.S. 57 (2000). Betsy J. Walter, *Lesbian Mediation*, 41 FAM. CT. REV. 104, 105 (2003).

25. Walter, *supra* note 24, at 105-06.

26. *Id.* at 105.

27. *Id.* at 106.

28. *Id.*

29. *Id.*

visitation statutes should be interpreted broadly to include LGBT parents, and some states do interpret existing statutes in such a manner.³⁰ States such as Maryland, Minnesota, and New Jersey allow a non-adoptive, non-biological LGBT parent to gain custody or joint custody if they can prove they had a “parent-like” relationship with the child.³¹ If the non-adoptive, non-biological LGBT parent can prove the required link, a possibility exists that LGBT parent could be granted custody or joint custody.³² However, there is no guarantee that a state court will find this established link.

Alternatively, the non-adoptive, non-biological LGBT parent can seek to be a “psychological parent.”³³ This may allow the LGBT parent to obtain visitation privileges.³⁴ If a trial court judge rules against the LGBT parent, the decision will likely stand because wide deference is given to state trial courts on family law issues.³⁵ Many states do not even grant a third-party LGBT parent any standing in order to gain custody.³⁶ Frequently, non-adoptive, non-biological LGBT parents have been at the mercy of the courts. Because of the negative legal biases against LGBT couples and parents within the American legal system, the LGBT community has long turned to mediation as a preferred way to settle family disputes.

30. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (rejecting the argument that the definition of parent can include a lesbian who does not have a biological relationship with the child).

31. *See e.g.*, *Gestl v. Fredrick*, 754 A.2d 1087 (M.D. 2000); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

32. The third-party partner needs to prove:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child’s care, education, and development, including contributing toward the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

V.C. v. M.J.B., 748 A.2d at 551 (quoting *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995)).

33. *Walter*, *supra* note 24, at 106.

34. *Id.*; *see e.g.*, *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419.

35. *Shaista-Parveen Ali, Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1012 (1989).

36. *See e.g.*, *In re Guardianship of Z.C.W.*, 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999); *Alison D.*, 572 N.E.2d at 27; *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

B. The LGBT Community's Advantageous Use of Mediation

Since the 1970s, LGBT couples have been able to dissolve their relationships without access to the state courts through the use of mediation.³⁷ Gays, who tend to be outside the mainstream of society, are more inclined to pursue mediation because it is outside the legal establishment. Gay rights organization, such as the Gay and Lesbian Advocates and Defenders (“GLAD”), encourage LGBT couples to use mediation as a way to resolve their family disputes.³⁸ By bypassing the courts, LGBT couples have been spared not only the court’s overt biases against them, but also the ramifications of the litigation process.

Litigation, especially in the area of family law, can be a traumatic and stressful experience for everyone involved. Throughout the adversarial process, parties expend significant amount of time and effort building up their destructive feelings.³⁹ In many instances, former LGBT partners use the state’s lack of recognition of their relationship as a weapon against the other LGBT partner. In the case of a child custody dispute, the needs of the children are often ignored because parents and state courts tend in those stressful instances to be less attentive to the needs of the children.⁴⁰ Finally, the cost of litigation can leave LGBT parents financially strained for many years.⁴¹

Because LGBT families have been either unwilling or unable to access the court system, they have achieved a hidden advantage by being confined to mediation. Even when opposite-sex couples or in some limited circumstances, when a LGBT couple is not litigating, family law can still regulate their relationship dissolutions.⁴² Because family law outlines set principles of property distribution and child custody, negotiations that these couples may have would be affected by family law principles.⁴³ If the state

37. Walter, *supra* note 24, at 111.

38. See Protecting Families: Standards for Child Custody in Same-Sex Relationships, available at <http://www.glad.org/rights/protectingfamilies.pdf> (last visited Apr. 21, 2005). GLAD lays out a number of principles that LGBT couples should follow when they enter the dissolution process. *Id.* GLAD encourages couples to consider the dispute from the perspective of the child or children, to maintain continuity for the child or children, and to treat homophobic law and courts as off-limits. *Id.*

39. McIntyre, *supra* note 17, at 135.

40. *Id.*

41. *Id.*

42. Family law affecting LGBT couples varies widely from state to state. FOLBERG, *supra* note 22, at 352-53. As a result, a mediator must be cognizant of how different laws may affect a LGBT couple’s dispute.

43. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979).

family law favors one of the parties, that party could use the law as a weapon against the other party.⁴⁴ Any creative solution might be quashed because the advantaged party would be unwilling to give up the advantages that the law bestows upon them.⁴⁵ But this effect has been frequently inapplicable to LGBT couples because they are not “bargaining in the shadow of the law.”⁴⁶

Because LGBT couples are not “bargaining in the shadow of the law,” they have been freer to explore creative solutions on their own. Mediation has allowed LGBT couples a measure of control over their conflicts, and also has empowered LGBT couples to fashion outcomes appropriate for their lives.⁴⁷ Mediation has allowed LGBT couples to have their resolutions decided by the values of the greater LGBT community.⁴⁸ Courts usually follow state statutes and case precedent that state how a divorced “family” should look like. Instead of a narrow view of what a “family” is, the mediator, in conjunction with the LGBT couple, can creatively figure out how they want their divorced family to look like.

Additionally, when LGBT couples choose to resolve their conflicts through their community norms, LGBT couples avoid compromising their personal integrity and dignity by refusing to internalize the biases of the law.⁴⁹ By using mediation as a way to avoid the misconceptions or prejudices of the LGBT community, mediation can be seen as a community-based tool that strengthens the ties of not only the LGBT couple, but also the greater LGBT community.⁵⁰ Instead of validating negative legal precedent that may hinder any advancement of LGBT rights, mediation avoids reinforcing detrimental legal precedent. Mediation, moreover, has been used

44. Telephone Interview with Dan Simon, Private Family Mediator (Mar. 2, 2005).

45. Mnookin & Kornhauser, *supra* note 43, at 968-69. An example of this would be if a state property distribution statute favors one person over the other. The person who is benefited by the state property law would be unwilling to negotiate a settlement that would be less than what they would receive under the law. However, some jurisdictions around the United States have laws that grant LGBT couples rights and obligations upon separation. FOLBERG, *supra* note 22, at 351. In those situations, the LGBT couple would actually be “bargaining under the shadow of the law.”

46. Mnookin & Kornhauser, *supra* note 43, at 968.

47. Emnet, *supra* note 19, at 440-41.

48. *Id.* at 441.

49. *Id.* This situation happens when one of the partners claims for their advantage that the relationship did not exist due to lack of state recognition. This reinforces negative legal precedent for greater LGBT community. *Id.* at 442; *see also*, Walter, *supra* note 24, at 110 (“If lesbians and gay men petition the court against parental rights for non-biological ex-partners, they are creating law contrary to the arguments of the larger gay and lesbian community seeking such recognition.”).

50. Emnet, *supra* note 19, at 442.

to protect members of the LGBT community. For instance, mediation was used to facilitate a dialogue between conservatives and the local LGBT community in Modesto, California, which led to implementing a school policy that protected LGBT student's free speech rights and protected them from harassment.⁵¹

Finally, because the LGBT community primarily uses mediation, they have enjoyed many of mediation's procedural advantages. The mediation process itself not only enhances the chance of a resolution, it also creates an atmosphere where parties are more willing to uphold a mediated agreement. First, a mediator can assist the parties with communication. This encourages understanding between the parties and focuses upon the parties' individual as well as common interests.⁵² Secondly, the mediation process itself gives a LGBT couple a considerable degree of self-determination about whether they want to enter into an agreement or not.⁵³ The LGBT couple will be more likely to adhere to the mediated agreement in which they had self-determination.⁵⁴

Mediation also provides a process that is quicker, costs less, and produces a result that is fair for both parties. Mediation can also build on the natural cooperation that may exist between former LGBT parents. Even when one of the LGBT parents is the biological or adoptive parent, that does not mean that he or she will use that status to their advantage. Many LGBT adoptive or biological parents in a custody dispute are able to place their child's best interest ahead of their own.⁵⁵

As we have seen, the LGBT community's experience with mediation has largely been positive. Instead of the lack of access to state courts being a disadvantage for LGBT couples, mediation has given LGBT couples an advantage over couples whose disputes fall under the province of the courts.

51. See David S. Doty, *Finding a Third Way: The Use of Public Engagement and ADR to Bring School Communities Together for the Safety of Gay Students*, 12 HASTINGS WOMEN'S L.J. 39, 59-60 (2001).

52. Walter, *supra* note 24, at 109.

53. *Id.*

54. *Id.*

55. *Id.* at 110; see also, Freshman, *supra* note 15, at 1756 (In one dispute between a lesbian couple, Amy Oppenheimer noted "I suggested mediation on an agreed-upon principle of equality, . . . 'but the other woman wanted to say that she, as biological mother, had all the rights'. . . ." Oppenheimer characterizes the incident as typical of an ethical question: "just because a person can take a position legally doesn't mean they can take it ethically.") Studies have also shown that having two parents benefits a child's development. The American Academy of Pediatrics released a report that declared children of LGBT couples deserve two legally recognized parents. See AAP News Release: AAP Say Children of Same-Sex Couples Deserve Two Legally Recognized Parents, available at <http://www.aap.org/advocacy/archives/febsamesex.htm> (last visited Apr. 22, 2005). Children that grow up with two LGBT parents function similarly emotionally, socially, cognitively, and sexually as children raised by opposite-sex parents. *Id.*

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However, despite the successes and advantages that mediation has brought, some important issues do remain. There are instances where the LGBT community and the family mediation field have faltered in how they deal with each other.

II. THE LGBT COMMUNITY AND THE FAMILY MEDIATION FIELD: BLISS OR BUST?

A. *The Invisibility of the New American Family*

For most of the prior century, America has been living with images of the traditional nuclear family as typified by the 1950s series *The Adventures of Ozzie and Harriet*. Even today, the media constantly shows images of a mother and father with their children. With the recent backlash against LGBT marriage rights, America still seems to yearn to retain the traditional nuclear family structure despite the fact that the nuclear family is now statistically a minority family unit.⁵⁶ If some parts of America seem to have reacted with hostility to the changing picture of the American family,⁵⁷ has the family mediation field reacted similarly?

Recently, the family mediation field has made great strides to enhance its multicultural understanding.⁵⁸ Despite these efforts, LGBT families remain largely invisible within the larger family mediation community.⁵⁹ Invisibility means that family mediation has not included LGBT couples and families within its traditional conflict resolution structure.⁶⁰ The mediation field has little scholarship devoted to LGBT issues.⁶¹ Mediators many times run the risk of limiting their questions, conversations, and agreements during a mediation to models that fit heterosexual notions of marriage and

56. See JASON FIELDS, US CENSUS BUREAU 2004, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2003.html> (last visited Apr. 24, 2005).

57. It is estimated that eight to ten million children are being raised in gay or lesbian households. Emnett, *supra* note 19, at 434.

58. Annette Townley, *The Invisible –ism: Heterosexism and the Implications for Mediation*, 9 MEDIATION Q. 397 (1992).

59. *Id.*

60. *Id.*; see also, Diane M. Felicio & Michelle Sutherland, *Beyond the Dominant Narrative: Intimacy and Conflict in Lesbian Relationships*, 18 MEDIATION Q. 363, 364 (2001).

61. Felicio & Sutherland, *supra* note 60, at 364.

divorce.⁶² Many divorce mediators have had their training and practice focused upon opposite-sex couples.⁶³

Because the LGBT community makes up about 10 percent of the population, family mediators should gain some experience with LGBT issues.⁶⁴ However, whether a family mediator has or will gain experience with the LGBT community or their issues may be influenced by whether the mediator lives in an area with a large LGBT community. How family mediators approach a LGBT family mediation can be critical its success. Interviews with a number of straight family mediators who have mediated LGBT family disputes, revealed that they do not approach a LGBT mediation any differently than an opposite-sex couple mediation.⁶⁵

The mediators routinely stated that in preparing for mediation with the LGBT couple, they do not see or treat a LGBT couple any differently than an opposite-sex couple.⁶⁶ In many ways, this mindset is optimal. LGBT couples will more likely be at ease with a mediator who treats them no differently than as a regular couple. Moreover, the dynamics of the relationship comes not from the parties' gender or sexual orientation, but comes from the parties themselves. The only time these mediators said that there might be a difference in how they would approach mediation occurs when they discuss legal issues.⁶⁷ Because state laws usually do not apply to LGBT couples, complications may arise in how a dispute should be settled.⁶⁸ All the mediators interviewed stated that they try to avoid using legal principles during a mediation because they feel it hinders reaching a resolution.⁶⁹

B. The Practice and Possible Issues of a LGBT Family Mediation

Even in light of the straight mediators' assertion that they do not treat LGBT couples any differently, that does not mean that the larger family mediation field does not need to address the intricacies that LGBT couples might bring to a mediation. When future family mediators are trained, they

62. *Id.* at 366.

63. *Id.*

64. Wikipedia, *Homosexuality*, <http://en.wikipedia.org/wiki/Homosexuality> (last visited Mar. 2, 2006).

65. See Simon, *supra* note 44; Telephone Interview with Jesse, Mediator at North Hennepin Mediation (Mar. 15, 2005); Telephone Interview with Stanley Rodbell, Private Family Mediator (Apr. 15, 2005).

66. *Id.*

67. *Id.*

68. Walter, *supra* note 24, at 436.

69. See Simon, *supra* note 44; Mediators, *supra* note 65.

should be taught how issues of gender and sexual orientation impact mediation. Scholarship within the family mediation field should branch out and look at different non-traditional families and communities. If the family mediation field does not take a proactive approach in engaging the LGBT community, there could be a risk that the larger family mediation field will be unable to effectively resolve the disputes of the greater LGBT community. A mediation involving a LGBT couple has many issues that differ from an opposite-sex couple mediation. The family mediation field needs to be fully aware of those differences.

A family mediator should not approach a specific type of mediation with a one-size-fits-all mentality. Although the differences between LGBT couples and opposite-sex couples should not be exaggerated,⁷⁰ a mediator should not fall into the trap that a LGBT couple will be just like their opposite-sex counterparts. A LGBT mediation will have different dynamics from an opposite-sex mediation as would an African-American mediation would have different dynamics from an Asian-American mediation. The LGBT community has different styles of communication and negotiation, different attitudes towards sex and relationships, different expectations of intimacy, and perhaps different expressions of conflict than opposite-sex couples.⁷¹ The family mediation field should be cognizant of these different issues that may come up during a LGBT mediation.

Furthermore, because LGBT couples cannot marry, their relationships tend to be more fluid.⁷² The boundaries between friendship, lovers and partners can be more blurred for LGBT couples than heterosexual couples.⁷³ Straight mediators who are unfamiliar with this relationship style might ask the wrong questions, and risk alienating the couple. Another byproduct of having such fluid relationships is that the barriers to terminate a relationship for heterosexual couples do not exist for LGBT couples.⁷⁴

For LGBT couples, there is no marriage that needs to be ended. Reconciliation can be less likely if the break-up process happens to be quicker. Many times LGBT couples do not confront the institutionalized

70. FOLBERG, *supra* note 22, at 352.

71. Felicio & Sutherland, *supra* note 60, at 366. "Lesbians in many ways are generally freer than heterosexually coupled women to innovate ways of doing gender and sex and to resist patriarchal and constraining prescriptions for loving and living." (quoting J. LAIRD, *GENDER AND SEXUALITY IN LESBIAN RELATIONSHIPS: FEMINIST AND CONSTRUCTIVE PERSPECTIVES* 83 (1999)).

72. *Id.* at 369-70.

73. *Id.*

74. *Id.* at 371.

religious pressures of “death do us part.”⁷⁵ For instance, one of the LGBT partners could come from a family that looks down upon a LGBT relationship, and instead of encouraging the partner to “work it out,” the family may be actively working against the saving the relationship.⁷⁶ Alternatively, some LGBT couples may feel added pressure to make their relationships look stable and normal to general society.⁷⁷ When their relationships fail, a family mediator may need to address such feelings of failure.⁷⁸

One issue that may be common in many LGBT family disputes happens where one of the LGBT partners may not be “out” or have come to terms with their sexuality.⁷⁹ This happens because one of the LGBT partners may feel that society or close family or friends may not be accepting of their sexuality.⁸⁰ One of the LGBT partners may be completely “out” in terms of their sexuality, while the other partner may not. This fact of differing degrees of openness could be the source of conflict that has led the LGBT couple to separate.⁸¹ Family mediators need to be aware that the process of “coming out” can be a lifelong process, and should seek to help the LGBT partner continue their path towards self-acceptance.⁸²

Another important issue that may arise during a LGBT mediation is domestic violence. As many as 25-30% of LGBT relationships reportedly have aspects of domestic violence.⁸³ Domestic abuse also does not necessarily have to be physical. Domestic abuse may arise when one of the LGBT partners threatens to “out” the other partner.⁸⁴ One of the partners may be trying to extort the other partner in order to gain an advantage during the mediation. A mediator should always be cognizant of such abuses.⁸⁵ Moreover, the mediator should carefully address such issues because there will likely be strong emotional feelings when abuse has occurred.

Not only are there issue differences between LGBT and opposite-sex couples, but there can also be issue differences between gay male and lesbian couples. Mediators handling a gay male couple dispute may have to

75. *Id.*

76. *Id.*

77. FOLBERG, *supra* note 22, at 356.

78. *Id.* at 356-57.

79. *Id.* at 355.

80. *Id.*

81. *Id.* at 356.

82. *Id.* at 355.

83. Mediation Doesn't Work When Safety is an Issue, *available at* <http://www.baywindows.co.m/main.cfm?include=detail&storyid=84054> (last visited Apr. 21, 2005).

84. Felicio & Sutherland, *supra* note 60, at 372; *see also*, FOLBERG, *supra* note 22, at 363.

85. *Id.*

address issues related to HIV and AIDS.⁸⁶ For example, an issue could arise when one of the partners has HIV or AIDS, and has not disclosed it to the other partner.⁸⁷ A mediator may have duties to disclose this information to the other partner, or at least should address why the infected partner is keeping the illness a secret.⁸⁸

As for lesbian couples, family mediators should be aware that their relationship tends to show higher degrees of equality, companionship, communication and support.⁸⁹ In addition, a lesbian relationship will frequently have the presence of intense intimacy between the lesbian partners.⁹⁰ Because of this, a mediator dealing with lesbians should specifically address the psychological transition from togetherness to independence and autonomy.⁹¹ Mediators have to be aware that a lesbian relationship will generally have different dynamics after the dissolution of their relationship. A mediator that overemphasizes the male-oriented need for autonomy and separateness could implicitly devalue the lesbian relationship in the eyes of one of the lesbian partners.⁹² Many lesbian relationships initially start out as a friendship, and then develop into a relationship.⁹³ Lesbians, for the most part, want to retain the friendship that they had with their ex-partner after the relationship ends.⁹⁴

Heterosexual couples are likely to have different social networks, which they seek out for support during the divorce process. However, lesbians tend to have the same social network.⁹⁵ Lesbians generally have a greater interest in retaining a positive relationship with their ex-partner after the relationship ends in order to maintain their healthy social life. This can be different from a gay male couple who may be more inclined to have a complete termination of their relationship.⁹⁶

LGBT couples have many different dynamics from opposite-sex couples. A mediator has to focus on ensuring that the partners leave the

86. FOLBERG, *supra* note 22, 362-63.

87. *Id.*

88. *Id.*

89. Felicio & Sutherland, *supra* note 60, at 367.

90. *Id.*

91. *Id.* at 368.

92. *Id.*

93. *Id.* at 369.

94. *Id.*

95. Felicio & Sutherland, *supra* note 60, at 368-69.

96. FOLBERG, *supra* note 22, at 359.

mediation with positive rather than negative feelings towards each other. Moreover, because the LGBT community has been ostracized by greater society, maintaining a healthy and supportive social network can be critical. Because of the different dynamics that LGBT couples have, instances have occurred where only a LGBT mediator, rather than allowing a straight mediator, was allowed to mediate a dispute between a LGBT couple. A question then has arisen whether any family mediator, including a straight mediator, is qualified to mediate a dispute between a LGBT couple.

C. Gay or Straight? Does It Matter For A Mediator?

The LGBT community has followed the example of many different ethnic communities, built upon community self-reliance, by starting LGBT community mediation projects.⁹⁷ These mediation projects were formed by and large because of the ignorance and bias of the court system together with difficulties of having straight and uninformed mediators.⁹⁸ When a LGBT couple goes into mediation, they want to be safely assured that the mediator will fully understand what they have gone through. As a result, LGBT couples have stated a preference of having a LGBT mediator assigned to them rather than a straight mediator.⁹⁹ For instance, in California, a West Hollywood LGBT community mediation service went so far as to require that only LGBT mediators handle disputes between LGBT disputants.¹⁰⁰

Commentators have argued that having LGBT community mediation projects are the best way to resolve disputes within the LGBT community.¹⁰¹ One noted commentator has stated that not every good family mediator can mediate disputes that involve LGBT issues.¹⁰² Having a LGBT family mediator may ensure that all participants in mediation have common ground.¹⁰³ When all parties share the same sexual orientation, the parties are

97. There are LGBT mediation projects in San Francisco, New York and Los Angeles. Walter, *supra* note 24, at 112.

98. Isabelle R. Gunning, *Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas McIntyre's Article*, 13 *MEDIATION Q.* 47, 50 (1995).

99. Christopher Honeyman & Lela P. Love, *New York Moveable Feast: Boundaries to Practice*, 5 *CARDOZO J. CONFLICT RESOL.* 147, 150 (2004).

100. Teresa V. Carey, *Credentialing for Mediators – To Be or Not To Be?*, 30 *U.S.F. L. REV.* 635, 637 (1996).

101. Gunning, *supra* note 98, at 50-51; *see also*, Freshman, *supra* note 15, at 1717-18. There is a potential that having a LGBT mediator will enhance the mediation because there would be a lack of bias and inefficiency. *Id.* The mediation would involve less animus because LGBT mediators would not be homophobic. *Id.* The parties will feel that they are in a safe environment, and can talk and negotiate freely. *Id.*

102. Bryant, *supra* note 20, at 394. If a LGBT couple goes to a mediator who is unaware of LGBT issues, they might have to define or justify their lifestyle.

103. Walter, *supra* note 24, at 113.

likely to feel that they are in a safe environment.¹⁰⁴ A LGBT mediator will share many of the personal experiences, prejudices and biases that a LGBT couple has gone through.¹⁰⁵ Moreover, a straight mediator might be incapable of “walking in the shoes” of a LGBT couple. Hence, a LGBT couple might be more likely open up to such a mediator with their positions, interest and agendas.

Still, the LGBT community has throughout history been ostracized by general society. Why should the LGBT community ostracize a mediator just because they are straight? Ideally, if the LGBT community wants to live in a gender-neutral society, then a mediator’s sexual orientation should be irrelevant. If the straight mediator has become familiar and sensitive to LGBT issues, they are just as qualified to handle a mediation between a LGBT couple.¹⁰⁶ A straight mediator may also provide some positive benefits.

First, a straight mediator might be more unbiased than a LGBT mediator. This is because the straight mediator would probably not be overwhelmed by the norms within the LGBT community, which could happen for a LGBT mediator.¹⁰⁷ Many times for LGBT couples, there is diversity within diversity. A straight mediator might be more likely to point out diversity issues besides those related to sexual orientation. A LGBT couple’s diverse characteristics such as class, race and ethnicity may be more critical in how a dispute started and could be resolved.¹⁰⁸ Despite the fact that there is little mediation literature on the topic of diversity within LGBT couples,¹⁰⁹ both straight and LGBT mediators should become educated of how diverse characteristics can impact a LGBT mediation.

Finally, a straight mediator might be able to bring to the LGBT couple’s attention a number of different alternatives to resolve their dispute. One

104. Freshman, *supra* note 15, at 1731. A LGBT couple may have a better therapeutic experience during the mediation if the mediator is also of the LGBT orientation. *Id.* As a result, the mediator will explore the hidden psychological dynamics that led to the couple’s dissolution, and might point out areas of reconciliation.

105. Gunning, *supra* note 98, at 50-51 (stating there is no substitute for personal experiences). When a straight couple divorces, at least they have had the experience of society’s recognition of their relationship. However, not only does a LGBT couple go through the experience of separation, but also they endure the pain of having no recognition to begin with.

106. Walter, *supra* note 24, at 113.

107. Freshman, *supra* note 15, at 1754-57 (showing that some mediators want to advance an agenda such as lesbian feminist norms).

108. *Id.* at 1758.

109. Felicio & Sutherland, *supra* note 60, at 364.

commentator called this process “community-enabling mediation,” which uses a concept known as “active neutrality.”¹¹⁰ Active neutrality means that the mediator introduces a wide range of values and encourages the parties to consider how those values, or a combination of them, might fit their needs. The LGBT couple may accept some of those values, reject others, modify many, but they will at least have an idea of different alternatives. The LGBT couple can then incorporate these diverse experiences within their own resolution.

At bottom, the choice of a mediator is personal. No decision may be more critical for a mediation’s success than a LGBT couples’ choice of a mediator. While having a LGBT mediator might put a LGBT couple more at ease, the couple should not foreclose a mediator just based on sexual orientation. Mediators can offer a plethora of ideas that might help the couple overcome obstacles to a resolution. The LGBT community should not follow in the steps of the American legal system, and differentiate mediators based on their sexual orientation.

III. CONCLUSION

As we have seen, the LGBT community and the family mediation field have been moving forward together. While the LGBT community usually has been unable to access the court system to resolve their disputes, they have not necessarily been disadvantaged. The LGBT community has actually enjoyed a hidden advantage where they have been forced to use mediation to resolve their disputes instead of litigation. Thus, LGBT couples have avoided the stresses and strains that go along with litigation. Instead, LGBT couples have enjoyed the benefits of mediation that produces resolutions that come about quicker, cheaper and fairer.

However, while there have been successes, work still needs to be done. The family mediation field needs to take into consideration today’s diverse family structures. Whether members of the family mediation field are training future family mediators or engaging in scholarship, they should explore issues pertaining to the LGBT community. On a positive note, straight mediators do not appear to treat a LGBT couple any differently than their opposite-sex counterparts. Instead of ignoring the diversity of LGBT couples, these mediators treat LGBT couples with respect by focusing on the relationship dynamics rather than the sexual orientation dynamics.

However, these mediators should be cognizant that they should not approach a mediation involving a LGBT couple with a one-size-fits-all mentality. A LGBT couple will bring to a mediation different issues and

110. Freshman, *supra* note 15, at 1762.

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dynamics than their opposite-sex counterparts. With this in mind, every mediator, regardless of whether they are straight or gay, can be successful. While the family mediation field should embrace the new diversity of the American family, the LGBT community should embrace the diversities of their mediators. Any mediator, straight or gay, can mediate a dispute between a LGBT couple. It is by embracing this diversity, mediation, unlike the courts, can be so successful in resolving LGBT family disputes.

