the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Tennessee – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Tennessee's anti-discrimination law, known as the Tennessee Human Rights Act, does not explicitly address either sexual orientation or gender identity discrimination.[1] Further, the state does not provide protection to state or private employees against discrimination based on sexual orientation or gender identity.[2] In addition, no executive orders, local laws or state government personnel policies exist that prohibit job discrimination on either basis. The formal state employee grievance policy addresses discrimination, but does not include these characteristics.

The state lacks a comprehensive statutory scheme for recognizing sexual orientation or gender identity as a protected class in the workplace.[3] As a result, individuals have no method to assert a complaint of discrimination based on either characteristic.

Despite this lack of protection and recordkeeping, documented examples of discrimination based on sexual orientation or gender identity by state and local government employers include:

- A Director/Superintendent of Schools was not selected to continue in his position by the Morgan County School Board because of the public outrage that resulted after he was invited to speak at a church with predominantly gay and lesbian members. In early 2000, Paul Scarbrough was asked by a friend to speak at a convention held by a church. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. Scarbrough agreed to consider the request, but ultimately was unable to accept the invitation and so declined. However, approximately a month later, a newspaper published an article announcing—incorrectly—that Scarbrough would be a speaker at the convention, which was sponsored by a predominately gay and lesbian church. After this article ran, school board members began receiving criticisms and concerns regarding Scarbrough continuing on as superintendent. The board

[1] *See* TENN. CODE ANN. § 4-21-101 (2001). While the Tennessee discrimination law addresses both disability and sex discrimination, it is unclear whether a joint use of these provisions could provide a cause of action for gender identity discrimination. Human Rights Campaign, Tennessee Homepage: Non-Discrimination Law, http://www.hrc.org/your_community/1785.htm (last visited Sept. 3, 2009).
[2] Lambda Legal Tennessee Homepage, http://www.lamdalegal.org/states-regions/tennessee.html (last visited Sept. 3, 2009).
[3] *See* TENN. CODE ANN. § 4-21-101 (2001).

members also questioned Scarbrough's judgment and thought the article undermined public confidence in Scarbrough. In response, Scarbrough provided written statements to two newspapers explaining the inaccuracies of the article and noting that while he did not endorse homosexuality, he would not refuse to associate with gay people. When Scarbrough was then not selected by the school board to continue as Superintendnet/Director, he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit. Scarbrough v. Morgan County Bd of Educ., 470 F.3d 250 (6th Cir. 2007).

- The impact of Tennessee's state sodomy law on employment was mentioned several times in the state court case striking it down. In the opinion, the Tennessee Court of Appeals noted that the identity of one of the plaintiffs (John Doe) had been sealed "due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer."[4] Next, the court notes that the plaintiffs "believe they are threatened with prosecution for violations of the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted."[5]

- Ray Bush, an inmate employee at a state facility, brought suit alleging discrimination based on his actual or perceived sexual orientation. Bush alleged that he was fired from his job in the facility kitchen because he was perceived to be homosexual, and that defendants subjected him to verbal abuse and slander, and placed him in fear of sexual assault because they believed him to be gay.[6] The Sixth Circuit upheld the trial court's dismissal of his claim for lack of a basis in law, stating that "[i]nmates have no constitutional right to a particular prison job and verbal abuse does not constitute punishment which is subject to eighth amendment scrutiny" and "mere defamation does not invoke the guarantee of procedural due process." In Bush v. Potter, 875 F. 2d 862 (6th Cir. 1989).
- In 2007, an employee of a state-supported women and children's center came out to colleagues as lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.[7]

Outside the context of the workplace, gay Tennesseans were subjected to discriminatory treatment in 2007, when a local police department publicized in an unprecedented press release the photographs of 40 men arrested in a public sting operation targeting men having sex with men. While there is no explicit prohibition on same-sex couples jointly adopting or on a same-sex partner petitioning to adopt his or her

[4] *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Court of Appeals of Tennessee, 1996).
[5] *Id.* at 253.
[6] *Bush v. Potter*, 875 F. 2d 862 (6th Cir. 1989).
[7] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

partner's adoptive child, a same-sex partner may not adopt his or her partner's biological child.[8] In sum, there are no express protections ensuring equal treatment of gay parents.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Tennessee has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[9]

B. Attempts to Enact State Legislation

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant legislative bill history.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

Research, including non-exhaustive research into secondary sources, did not uncover any executive orders related to employment discrimination on the basis of sexual orientation or gender identity/expression.

2. State Government Personnel Regulations

Due to the fact that there are no existing or repealed state statutes related to sexual orientation or gender identity in the employment context, there are accordingly no applicable agency regulations or guidelines related to the subject.

Several of the universities in Tennessee include policies related to sexual orientation discrimination in the academic and employment contexts, including Vanderbilt University, a private university, and Tennessee Technological University,

[8] TENN. CODE ANN. § 36-1-115.; TENN. CODE ANN. §§ 36-1-117(f), 36-1-117(a)(1); Human Rights Campaign, Tennessee Homepage: Tennessee Adoption Law, http://www.hrc.org/your_community/1778.htm (last visited Sept. 3, 2009).

[9] The Tennessee Human Rights Act provides that it is a "discriminatory practice for an employer" to classify employees on the basis of an individual's "race, creed, color, religion, sex, age or national origin." TENN. CODE ANN. § 4-21-401. There is no mention of sexual orientation or gender identity. *See id.*

University of Memphis, East Tennessee State University, Middle Tennessee State University, and University of Tennessee Knoxville, which are public universities.

In the Tennessee Technological University's Human Resource Services Policy on Equal Employment Opportunity, the university declares that neither students nor employees may be discriminated against on the basis of such individual's sexual orientation.[10] The university's policy defines sexual orientation as "the direction of an individual's emotional, physical, and/or sexual attraction to others, which may be the same sex (homosexual), the opposite sex (heterosexual), or both sexes (bisexual)."[11] This policy is limited, however, and does not require the compliance of religious associations or other external organizations.[12] Moreover, an additional limitation is that despite the university's policy, employee benefits are determined by state laws and regulations and are consequently not affected by the university policy.[13]

University of Memphis and East Tennessee State University have nearly identical policies on sexual orientation. Both universities' policies make it clear that they apply equally in the University's programs and activities, recruitment and admissions, and employment practices.[14] It is the policy of these universities that neither their students nor employees be discriminated against on the basis of such individual's sexual orientation.[15] The policies define sexual orientation as "heterosexual, homosexual, or bisexual status," which is a more brief definition than that of Tennessee Technological University.[16] The Middle Tennessee State University's policy is very similar to that of the University of Memphis and East Tennessee State University, except that Middle Tennessee's policy is contained within a larger Policies and Procedures Manual in the Personnel Section.[17]

University of Tennessee Knoxville's nondiscrimination guidelines state that "all qualified applicants will receive equal consideration for employment without regard to race, color, national origin, religion, sex, pregnancy, marital status, sexual orientation, age, physical or mental disability, or covered veteran status" and clearly applies to employment decisions.[18] While this university's policy declares that it is compliant with

[10] TENNESSEE TECHNOLOGICAL UNIVERSITY, HUMAN RESOURCE SERVICES POLICIES AND PROCEDURES, AFFIRMATIVE ACTION, EQUAL EMPLOYMENT OPPORTUNITY AND DISCRIMINATION (2007), http://www.tntech.edu/adminpandp/perspay/pp1.html (last visited Sept. 3, 2009).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] UNIVERSITY OF MEMPHIS POLICY MANUAL: POLICY ON SEXUAL ORIENTATION (1996), http://policies.memphis.edu/12a1205.html (last visited Sept. 3, 2009); *EAST TENNESSEE STATE UNIVERSITY, POLICY ON SEXUAL ORIENTATION* (2000), http://www.etsu.edu/HUMANRES/ppp/PPP-62.htm (last visited Sept. 3, 2009).
[15] *Id.*
[16] *Id.*
[17] MIDDLE TENNESSEE STATE UNIVERSITY POLICIES AND PROCEDURES MANUAL 1:01:10 (2002), at 6, http://frank.mtsu.edu/~iec/Discrimination&Nepotism.pdf (last visited Sept. 3, 2009).
[18] UNIVERSITY OF TENNESSEE GUIDELINES FOR ADVERTISING AND REQUIRED USE OF THE EQUAL EMPLOYMENT OPPORTUNITY/NON-DISCRIMINATION/AFFIRMATIVE ACTION STATEMENT, http://oed.admin.utk.edu/docs/Non-Discrimination_Statement_UT_Knoxville_Searches.doc (Sept. 3, 2009).

all federal nondiscrimination laws in the provision of education and employment programs and services, it is unclear whether the university's policy against sexual orientation discrimination applies equally to student life as it does to employment decisions.[19]

3. Attorney General Opinions

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant attorney general opinions.

D. Local Legislation

1. Nashville and Davidson County

In August 2009, the Metro Council, the legislative body of Nashville and Davidson County, voted 23-16 to pass an ordinance prohibiting sexual orientation discrimination against city workers. One council member who voted against the ordinance, Jim Hodge, made the following remarks during the debate:

> "As a Christian I cannot endorse a lifestyle that is condemned in both the old testament and new….It doesn't make sense to me….For those constituents and members of our community who are in the homosexual community, who have sat at my dining room table, who have had conversations with me, I cannot support or endorse a lifestyle that is unhealthy. We as a government make many suggestions and recommendations to folks to live a better lifestyle, whether it's menu labeling, whether it's exercising, whether it's recycling, because it's good for the individual or it's good for the community….We ask folks to leave their cigarettes outside….It's not easy to make a lifestyle change but it can be done.
>
> "When I look at the information on this lifestyle, it's not something that we should endorse. Individuals here are eight times more likely to have to seek professional mental health treatment for all manner of reasons. Those in a committed relationship, four times more likely to have multiple partners. That's not stable. Significantly higher rate of STDs, about 60 percent, and shorter lifespan of 14 years. I would think that we as a government should be

[19] *See id.*

> encouraging our folks to make better lifestyle choices than this. I will vote no."[20]

E. Occupational Licensing Requirements

The research, including non-exhaustive research into secondary sources, did not uncover any directly relevant licensing requirements.

[20] Posting of Jeff Woods to Pith in the Wind, *Metro Council Votes to Ban Discrimination Against Gay Workers*, http://blogs.nashvillescene.com/pitw/ (Aug. 18, 2009, 19:58 CST).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

Scarbrough v. Morgan County Bd of Educ., 470 F.3d 250 (6th Cir. 2007).

Paul Scarbrough was elected school superintendent for Morgan County, Tennessee, in 1996. The position expired by law in August of 2000—a new law provided for appointment of a Director of Schools, who would perform the same duties as the superintendent. In early 2000, Scarbrough was asked by a friend to speak at a convention held by a church. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. Scarbrough agreed to consider the request, but ultimately was unable to accept the invitation and so declined. However, approximately a month later, a newspaper published an article announcing—incorrectly—that Scarbrough would be a speaker at the convention, which was sponsored by a predominately gay and lesbian church. After this article ran, school board members began receiving criticisms and concerns regarding Scarbrough continuing on as superintendent. The board members also questioned Scarbrough's judgment and thought the article undermined public confidence in Scarbrough. In response, Scarbrough provided written statements to two newspapers explaining the inaccuracies of the article and noting that while he did not endorse homosexuality, he would not refuse to associate with gay people.

Afterwards, Scarbrough was not selected by the school board as the Director of Schools. Scarbrough brought a lawsuit, alleging, among other things, that the Board violated his rights to equal protection and freedom of speech by denying him the position of Director of Schools in retaliation for the article which reported he would speak at the convention.

The district court granted summary judgment in favor of defendants. Scarbrough appealed to the Sixth Circuit Court of Appeal. The Sixth Circuit reversed the district court's grant of summary judgment as to Scarbrough's First Amendment retaliation claim, and his equal protection claim (it upheld summary judgment on his free exercise and association claims). In reviewing Scarbrough's claim of disparate treatment, the court held that Scarbrough had presented sufficient evidence to create a genuine issue of material fact as to whether the Board was motivated by an animus against homosexuals.[21]

Bush v. Potter, 875 F. 2d 862 (6th Cir. 1989).

Ray Bush, an inmate employee at a state facility, brought suit alleging discrimination based on his actual or perceived sexual orientation. The district court dismissed his claims as frivolous. The Sixth Circuit upheld the decision for lack of an arguable basis in law, stating that "[i]nmates have no constitutional right to a particular prison job and verbal abuse does not constitute punishment which is subject to eighth

[21] *Scarbrough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

amendment scrutiny" and "mere defamation does not invoke the guarantee of procedural due process." Bush alleged that he was fired from his job in the facility kitchen because he was perceived to be homosexual, and that defendants subjected him to verbal abuse and slander, and placed him in fear of sexual assault because they believed him to be gay.[22]

B. Administrative Complaints

The Tennessee Department of Personnel (the "Department") governs employment issues relating to state employees. The Department's Grievance Policy (the "Grievance Policy") establishes the guidelines and procedures for grievances related to the terms and conditions of employment and employee terminations for career and permanent employees.[23] The Grievance Policy does not permit job applicants to take advantage of the procedures.[24]

The Grievance Policy provides that grievances alleging covered discrimination may be appealed directly to the appointing authority, bypassing three of the five steps in the procedure.[25] However, permissible grievances are limited to those discriminatory practices outlined in the Tennessee Human Rights Act and other nondiscrimination statutes, which include race, creed, color, religion, sex, age, national origin and disability.[26] It appears then that sexual orientation and gender identity discrimination are not grievable issues.

C. Other Documented Examples of Discrimination

1. State-supported Women and Children's Center

State-Supported Women and Children's Center

In 2007, an employee of a state-supported women and children's center came out to colleagues as a lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.[27]

[22] *Bush v. Potter*, 875 F. 2d 862 (6th Cir. 1989).
[23] Tennessee Dep't of Pers. § 1120-11, *et seq.*
[24] *See id.*
[25] *Id.* at §1120-11-.04(9).
[26] *See id.*; see TENN. CODE ANN. § 8-50-103.
[27] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with The Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Tennessee's Homosexual Practices Act (the "HPA") established it as a misdemeanor for any person to engage in consensual sexual penetration with someone of the same gender.[28] In *Campbell v. Sundquist*, the Tennessee Court of Appeals found the HPA violated the right to privacy and was thereby unconstitutional.[29] Tennessee asserted five state interests, reflecting anti-gay animus, that were promoted by the HPA: (1) discouraging nonprocreative sexual activities; (2) discouraging residents from "choosing a lifestyle that is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse;" (3) discouraging gay relationships which are "'short-lived,' shallow, and initiated for the purpose of sexual gratification; (4) preventing the spread of sexually transmitted diseases; and (5) promoting "the moral values of Tennesseans."[30] The court's opinion pointed out how each purported state interest was contrary to established common law, was overly-broad, or lacked sufficient evidence. Despite the defendants' arguments, the Court of Appeals held that the right to privacy encompasses an adult's right to engage in consensual, noncommercial, sexual activities in the privacy of one's home.[31]

B. Housing and Public Accommodations Discrimination

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant information related to sexual orientation or gender identity discrimination in housing.

Research, including non-exhaustive research into secondary sources, did uncover examples of legislation to prevent discrimination on the basis of sexual orientation in public accommodations. The Memphis Code of Ordinances proscribes sexual orientation discrimination in consideration of applications for parades and public assemblies.[32] Similarly, state legislation enacted in 2005 required that no entity within specified resort districts may discriminate against patrons on the basis of sexual orientation, among other

[28] Tenn. Code Ann. § 39-13-510 (1990).
[29] *See Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Sabine Koji, *Campbell v. Sundquist: Tennessee's Homosexual Practices Act Violates the Right to Privacy*, 28 U. MEM. L. REV 311, 331-32 (1997) (hereinafter "Koji").
[30] *Campbell*, 926 S.W.2d at 262; Koji, *supra* note 30, at 329.
[31] *Campbell*, 926 S.W.2d at 266.
[32] Memphis Code of Ordinances § 12.52.08.

bases.[33] There was no mention of gender identity or gender expression as a protected category.

C. **Hate Crimes**

Research, including non-exhaustive research into secondary sources, uncovered legislation to address discrimination on the basis of sexual orientation. However, there are also examples of police practices that exhibit anti-gay animus.

Tennessee's hate crimes law expressly includes as an enhancement factor in the sentencing of a criminal offense when the defendant intentionally selected the victim because of the defendant's belief or perception of the victim's sexual orientation.[34] The hate crimes law does not, however, explicitly include gender identity within the gambit of eligible enhancement factors.[35]

An example of the police practices that exhibit anti-gay animus are the actions of the Johnson City Police Department, which, on October 1, 2007, publicized the photographs of 40 men arrested in a public sting operation targeting men having sex with men.[36] The press release from the police department included photos that were taken at the scene of the sting and was personally approved by the police chief.[37] Of 600 other press releases in the last year by the police department, none pertaining to arrests were accompanied by photos or personally approved by the police chief.[38] Lambda Legal has filed a federal lawsuit based on the incident due to the unequal treatment of these men based on their perceived or actual sexual orientation.[39]

D. **Parenting**

Research into Tennessee family law indicates that gay and lesbian couples and parents are treated with animosity not directed towards other couples or parents, as evidenced by case law and legislation related to adoption, custody, and visitation.

1. **Adoption**

At this time, Tennessee statutes permit any single person to adopt a child in the state. [40] In the first state case to address the issue of adoption by a lesbian, the Court of Appeals held that a "parent's lifestyle . . . does not control the outcome of custody or

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[33] 2005 Tenn. Pub. Acts Chptr. 212.
[34] TENN. CODE ANN. § 40-35-114 (2001).
[35] *See id.* Some LGBT advocates have proposed that since disability and gender are explicitly included in the hate crime law, it may be possible to prosecute violence motivated by the victim's gender identity using those bases. *See* Human Rights Campaign, Tennessee Homepage: Tennessee Hate Crimes Law, http://www.hrc.org/your_community/1782.htm (last visited Sept. 3, 2009).
[36] Press Release, Lambda Legal, Lambda Legal Files Federal Lawsuit Charging Johnson City Police Department with Bias, (Sept. 30, 2008), *available at* http://lambdalegal.org/new/pr/lambda-legal-files-federal-lawsuit-in-tenn.html.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] TENN. CODE ANN. § 36-1-117; Human Rights Campaign, *supra* note 35.

adoption decisions, particularly absent evidence of its effects on the child."[41] Despite the favorable rule in *In re Adoption of M.J.S.* from 2000, it appears that the court was uncomfortable with non-heterosexual sexuality.[42] The court did not specifically acknowledge the prospective mother as a lesbian and referred to her long-time partner with whom the mother, Langston, had purchased a home, as a "roommate."[43] The court, however, did review evidence that Langston and her "roommate" slept in separate bedrooms and "had ceased their sexual relationship since the child came into the home. [The women] did not rule out the possibility of resuming their sexual relationship at some future date, but their present focus was on parenting their respective children." *Id.* The court's reasoning and holding appear to have been inappropriately influenced by the cessation of the sexual relationship between the "roommates" which bears no relationship to the mother's ability to parent.

It appears that there is at least some movement, however, to restrict the freedom of any individual to adopt.[44] SB 3910 was introduced in the Tennessee State Senate on January 30, 2008 which aimed to prohibit unmarried, "cohabitating" adults in a sexual relationship from adopting.[45] The bill died when the legislature adjourned.[46] While this proposed legislation would apply to both gay and straight couples, it is likely to have been intended to disproportionately impact gay couples, whose marriages are not recognized in the state.

Tennessee currently prohibits an adoption by a same-sex partner of the child's biological parent.[47] This "second parent adoption" is proscribed due to the rule that permits the continuation of a birth parent's rights after an adoption only if the adoption is by the birth parent's spouse.[48] As a result of a lack of change to this law and as long as same-sex marriage is not legally recognized in Tennessee, second parent adoption for same-sex couples is not permissible. Moreover, there is a lack of authority as to whether a same-sex couple may jointly petition to adopt or whether a same-sex partner may petition to adopt a partner's adopted child.[49]

2. Custody and Visitation

Tennessee case law suggests that the state does not view homosexuality as *per se* evidence of parental unfitness, but gay and lesbian parents have been treated with

[41] *Adoption of M.J.S.*, 44 S.W.3d at 57.
[42] *See id.*
[43] *Id.*
[44] Human Rights Campaign, *supra* note 35.
[45] Tenn. SB 3910 (105th Gen. Assembly, 2008) (Sen. Stanley). The bill would prohibit gay and straight unmarried, "cohabitating" couples from adopting a child. *Id.*
[46] Human Rights Campaign, Tennessee SB 3910 Page, http://www.hrc.org/your_community/9670.htm (last visited Sept. 3, 2009). The only ascertainable legislative history is a policy and fiscal summary, consisting of a half-page analysis and a one-page record of the bill history through the various legislative committees.
[47] *See* TENN. CODE ANN. § 36-1-117(f) and 36-1-117(a)(1).
[48] *Id.*
[49] Human Rights Campaign, *supra* note 35.

hostility when seeking custody and visitation of their children.[50] At this time in custody cases, as in adoption cases, the key issue is whether a parent's sexuality has a harmful effect on the child, as determined in a best interests analysis.[51]

In an early case, *Dailey v. Dailey*, a trial court changed the custody arrangement in favor of the father upon evidence that the mother was in a lesbian relationship.[52] The court noted that "there is also proof in the record that [the mother] flagrantly flaunted her relationship with [her partner] in the presence of the minor child."[53] Yet the court still failed to find any harm to the child as a result of being in the mother's custody.[54] But, in deciding to change the custody of the child to the father, the court noted that the father's expert stated that:

> "In his professional opinion it would be damaging to a child whose parents were openly living in a homosexual situation because of peer pressure and social stigma. He stated that homosexuality would be more likely to be learned by one who was exposed to it than by an individual who was not. . . . and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment."[55]

The mother's custody was revoked as a result of the "changed circumstances" of her being a lesbian and her visitation privileges were restricted.[56] Her visitation prohibited her from having her child in the home where she was living with her partner and from having her child in the presence of her partner "or any other homosexual with whom [the mother] may have a lesbian relationship."[57]

In more recent cases, there appears to be less anti-gay animus directed toward biological parents seeking custody and visitation of their children.[58] The Tennessee Court of Appeals upheld a change of custody to a lesbian mother where the mother and her "roommate" had never engaged in "inappropriate sexual conduct or contact" and

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[50] *See In re Price*, No. 02A01-9609-CH-00228, 1997 Tenn. App. LEXIS 435 (Western Section, June 20, 1997) (reversing trial court's award of custody to lesbian mother and giving custody of son to unwed father); 1-8 RICHARDS ON TENN. FAM. L. § 8-3.
[51] *See Massey-Holt v. Holt*, 255 S.W.3d 603 (Tenn. Ct. App. 2007).
[52] *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981).
[53] *Id.* at 393. The court further stated that "[The mother and her lesbian partner] would hug and passionately kiss each other and rub the private parts of their bodies while in the home where the child was." *Id.*
[54] *See id.*
[55] *Id.* at 394.
[56] *Id.* at 392-93, 396; 1-8 RICHARDS ON TENN. FAM. L. § 8-3.
[57] *Dailey v. Dailey*, 635 S.W.2d at 396.
[58] 1-8 RICHARDS ON TENN.FAM. L. § 8-3. *See also Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) (finding no abuse of discretion by the trial court, the judgment of the court of appeals prohibiting the presence of the mother's lesbian partner during overnight visitation was vacated); *Massey-Holt v. Holt*, 255 S.W.3d 603 (Tenn. Ct. App. 1997) (holding that the trial court erred by re-examining the comparative fitness of the parents in light of the mother's sexual orientation when there was no material change on that issue).

where the mother's home was no less fit for the rearing of her child than the father's home.[59] However, the custody order prohibited "inappropriate expression of sexual conduct between Mother and the roommate."[60] The court also included a note that its decision "should not be interpreted as a blanket approval or disapproval of [the mother's lesbian] lifestyle."[61]

For former same-sex partners, the Tennessee courts have been more restrictive in granting visitation rights.[62] Two cases were consolidated in *In re Thompson*, in which each biological mother's former long-term partner sought visitation rights for children for whom the partner planned for, participated in the conception and birth of, provided financial assistance for, and until foreclosed from doing so by the biological mother, acted as a parent to the child borne by her partner.[63] The court relied on the statutory definition of parent which limits parents to the biological mother and a man married to the mother.[64] Rather than applying the doctrines of *de facto* parenthood or *in loco parentis*, the court denied the former partners' standing to seek visitation of the children.[65]

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

The Tennessee constitution limits marriage to male-female couples.[66]

A 1988 Attorney General Opinion stated that a marriage license could not be validly issued to an individual who has undergone gender reassignment surgery and a partner of the same birth sex,[67] because it is statutorily prohibited to change one's sex on a birth certificate, irrespective of a later "sex change surgery."[68]

[59] *In re Parsons*, 914 S.W.2d 889, 894 (Tenn. 1995) (finding that the majority of the child's problems stemmed from his father's influences).
[60] *Id.* A Chancellor in West Tennessee, without being asked by any party, ordered a lesbian couple who had been together for nine years to live separately in order for one of the women to maintain custody of her children under her custody agreement. An evaluation showed that neither of the children were being harmed. *Editorial*, COMMERCIAL APPEAL, Dec. 29, 2008.
[61] *Id.*
[62] *See* 1-9 RICHARDS ON TENN. FAM. L. § 9-4-1.
[63] 11 S.W.3d 913, 914 (Tenn. Ct. App. 1999) (denying appeal).
[64] *Id.* at 917-18.
[65] *Id.* at 923.
[66] TENN. CODE ANN. § 36-3-113.
[67] 88 Op. Tenn. Att'y Gen. 43 (1988); 1-3 RICHARDS ON TENN. FAM. L. § 3-2.
[68] *Id.*; TENN. CODE ANN. § 68-3-203(d).