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ADVOCACY FOR NEBRASKA CHILDREN WITH
GAY AND LESBIAN PARENTS: A CALL FOR
THE BEST INTERESTS OF THE CHILD TO BE
PARAMOUNT IN THE CASE OF NON-BIOLOGICAL,
NON-ADOPTIVE PARENTS

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**ADVOCACY FOR NEBRASKA CHILDREN
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INTRODUCTION

With increasing frequency, family law practitioners in Nebraska are being called upon to represent gays and lesbians who are neither the biological nor adoptive parent of children with whom they have established parental relationships. The Nebraska Child Custody Jurisdiction Act (hereinafter referred to as the “NCCJA”)¹ provides the statutory basis for the rights of these children to have these relationships protected through the custody proceedings under the Act. Through the application of the equitable doctrine of *in loco parentis*, courts can provide security for these children. This ensures that the best interests of the child are treated as paramount.

Gays and lesbians who have parented children to whom they have neither given birth nor adopted may seek representation after the end of a relationship or upon the death or disability of a partner. As in all cases involving parents, the nature of the relationship to the child can vary. In some situations the client may have been involved from the very decision of her partner to be artificially inseminated for the purposes of parenting a child from birth. In other cases, the couple may have been together only a short time, and both biological parents of the child may be active in the child’s life. The ability of the courts to respond to a broad range of circumstances for children of non-biological/non-adoptive parents is essential if their best interests are to be guaranteed.

The time has come for Nebraska courts to abolish the parental preference doctrine, which gives a superior right to custody to the biological or adoptive parent, in favor of the best interests

of the children test. By applying the best interests of the child standard as is done in dissolution, adoption and juvenile matters, courts can have greater power to meet the needs of children who are raised in non-traditional families. In order to be zealous advocates, attorneys for non-biological, non-adoptive parents must argue the application of the best interests of the child in all cases involving custody or visitation. Attorneys must utilize the NCCJA, urge the application of the doctrine of *in loco parentis* and the best interests of the child standard, and educate judges to eliminate any bias which may exist about the impact of sexual orientation on parenting.

This essay will explore Nebraska statutory schemes as recognizing rights for non-biological, non-adoptive parents. In doing so, this essay will review the statutes that specifically acknowledge the parent/child relationship. First, it will examine Nebraska statutes regarding: marriage and dissolution of marriage, paternity, guardianship, juvenile actions, adoption, and actions under the NCCJA. This essay will posit that non-biological, non-adoptive parents may utilize the NCCJA to request a custody determination be made in the best interests of a child. Second, this essay will then assess the equitable doctrines recognized in Nebraska to preserve and protect parent/child relationships when the parent may or may not be a biological or adoptive parent. This essay will urge that the *in loco parentis* doctrine should be favored in custody and visitation matters and the parental preference doctrine abolished.

Finally, this essay will extrapolate from the statutory review and equitable doctrine evaluation that the best interests of the child is always at the heart of any analytical framework in an action where custody or visitation is at issue. This essay will argue that the best interest of the child require that the sexual orientation of a non-biological, non-adoptive parent have no impact on the rights of that parent or a corresponding custody determination.

A. A REVIEW OF NEBRASKA STATUTES IMPACTING THE PROTECTION OF RELATIONSHIPS

BETWEEN CHILDREN AND THEIR NON-BIOLOGICAL, NON-ADOPTIVE PARENTS.

The status of non-biological, non-adoptive parents in Nebraska is unclear under current statutes and recent case law. A review of Nebraska's statutory schemes regarding parents and children is necessary to first assess how a parent/child relationship may be legally established and under what circumstances a custody determination may be made. This evaluation will indicate whether non-biological, non-adoptive persons have rights or legal mechanisms available to protect and preserve their status as a parent. In doing so, this essay will review the statutes that specifically acknowledge the parent/child relationship. The question is whether under Nebraska law, a non-biological, non-adoptive person can be a legal parent.

For most practitioners and judges, the term “parent” generally refers to biological or adoptive parents. From legal and statutory definitions to legal theories regarding parents, these are most often the persons included as parent and are the persons most commonly referred to as parents. But as the make up of family diversifies and familial relationships continue to transform, the structure of knowledge of what defines a family must be systematically dismantled, starting first with the legal system itself. “Parent” as defined by Black's Law Dictionary is:

The lawful father or mother of someone ... the term commonly includes (1) either the natural father or the natural mother of a child, (2) the adoptive father or adoptive mother of a child, (3) a child's putative blood parents who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree...²

By traditional definition, non-biological, non-adoptive parents are not contemplated as persons who are parents prior to the entry of a court order determining their status as

such.

Accordingly, Nebraska law was enacted by legislatures presuming that non-biological, non-adoptive parents should not be considered or regarded as parents. This is the inherent premise upon which the Nebraska statutes were enacted as each of these statutes specifically defines “parents” as a biological or adoptive parent, with the exception of the NCCJA, which is the focus of the statutory review.³

Family law practitioners in Nebraska must achieve clarity on how to protect the rights of children whose parents are non-biological or non-adoptive parents. It is naive to believe that persons in same-sex relationships are not parenting children, as it is estimated that the number of children in the United States being raised by at least one gay parent is between 1 million and 9 million.⁴ The question that presents itself is if a same-sex relationship fails, how do we protect the best interests of children who have a relationship with a person who has parented them from birth, early childhood or adolescence? How can practitioners advocate to preserve relationships between children and their non-biological, non-adoptive parents whom the children rely on, receive comfort from, and hold close to their hearts?

First, this essay will examine the marriage and dissolution of marriage statutes, second, the paternity statutes and the juvenile code, next it will review the adoption laws and finally it will review the NCCJA. This evaluation will conclude that legal parenthood as defined under the statutes related to marriage, paternity, adoption and the juvenile actions, only recognizes biological or adoptive parents for the purposes of custody determinations and visitation. This essay will propose that non-biological, non-adoptive parents may utilize the NCCJA to request a custody determination be made in the best interests of a child.

1. Divorce and Marriage Statutes Preclude Recognition of Same Sex Relationships

Rights for those who enjoy legally recognized parenthood can be enforced in actions involving dissolutions of marriage, paternity, adoption, neglect or abuse cases involving removing children from a home and terminating parental rights, and jurisdictional custody disputes.⁵ The majority of these actions presume the parties involved to be either biological parents or adoptive parents.⁶

If one is a legal parent to a child, the relationship is statutorily protected and is afforded protection under the United States Constitution, as parents have fundamental rights within the guarantees of the Due Process Clause of the Fourteenth Amendment in the care, custody and control of their children.⁷ This protection is largely due to the legal protection afforded to children born from a marriage, as the right to privacy protected by the Fourteenth Amendment of the United States Constitution includes a right to freedom of choice in marriage and family decisions.⁸

The Nebraska dissolution of marriage statutes most prevalently address the parent/child relationship and custody matters.⁹ Marriage is the sine qua non for legal recognition of parenthood, as legitimacy of children is presumed in marriage.¹⁰ To be legally married in Nebraska, the parties must solemnize their union.¹¹ To solemnize a union, the parties **must** solemnly declare that they take each other as husband and wife.¹² This presumes that only a man and a woman can be legally married.

On November 7, 2000, Nebraska voters adopted Initiative 416, an amendment to the Nebraska Constitution known as the Defense of Marriage Amendment (“DOMA”).¹³ This amendment to the Constitution reads: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same sex relationship shall not be valid or recognized in Nebraska.”¹³

This Constitutional amendment has not yet been challenged in or interpreted by a Nebraska court and the practical applications are not fully understood. As the title of the amendment implies that the intent was the defense of marriage, it may be wholly inapplicable to children. Whether there are any far reaching implications that may impact children who are being raised out of wedlock is unknown. The family law practitioner must be aware of this constitutional amendment and consider possible challenges and interpretations when representing one party in a same sex parenting case.

2. Paternity and Juvenile Matters

The purpose of the paternity statutes is to protect children born out-of-wedlock and preserve the relationship between the biological parent and child.¹⁴ These statutes provide no protection for the relationships of non-biological, non-adoptive parents with their children. Therefore, a critical review of these laws is not applicable to non-biological, non-adoptive parents and is beyond the scope of this discussion.

Likewise, actions brought under the juvenile code are limited to the protection and intervention for juveniles.¹⁵ “Parent” as defined under the juvenile code means “one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition.”¹⁶ This definition of parent does not explicitly preclude a non-biological, non-adoptive parent. However, juvenile court actions are limited to juveniles who have committed offenses, juveniles who are homeless, destitute, or without proper support and care, proceedings for termination of parental rights, voluntary relinquishments of juveniles, adoption or guardianship proceedings or paternity proceedings.¹⁷

These statutes do not specifically recognize rights for non-biological, non-adoptive parents with their children if the biological parent maintains a relationship with their children. The

juvenile code does not address custody determinations of minor children beyond the scope of a parent/child relationship where the parent's parental rights or fitness as a parent are in question. The juvenile code as it relates to non-biological, non-adoptive parents seeking legal protection of their relationships when the biological parent is found to be unfit or the biological parent's rights have been terminated, is beyond the scope of this discussion.

3. Adoption and Guardianship

For a non-biological parent, adoption seems the obvious answer to obtain legal protection of a parent/child relationship, thereby establishing and preserving legal rights for both the child and the parent.

An adoption would allow for a myriad of protections and assurances for the minor child and the parent. The benefits inherent in an adoption by a non-biological parent are to:

- X formalize a parental relationship that the child recognizes in fact;
- X assure that the parent is committed to the child;
- X guarantee an ongoing financial responsibility to the child;
- X ensure the child legal access to and support to of the parent;
- X allow the parent to obtain health insurance and other employment related benefits for the child;
- X permit the parent to act in the child's best interests without challenge to their parental authority by third parties such as doctors, hospitals, day cares, school, religious institutions, and camps;
- X protect the inheritance rights of the child in the event that the adoptive parent died without a will, enabling the child would to inherit from the adoptive parent and from the adoptive parent's relatives;

- X allow the child to be eligible for Worker's Compensation and Social Security benefits upon adoptive parent's unemployment, disability or death;
- X create legal standing for the child to bring a wrongful death action and benefit for any "next of kin" privileges; and
- X protect the child in the event of biological parent's death because the adoptive parent would be entitled to a presumptive guardianship of the minor child and thus the family unit would not be threatened.

Nebraska statutes do not explicitly preclude adoptions by homosexual persons as some other states do.¹⁸ The Nebraska statutes allow for any adult person or persons to adopt any minor child.¹⁹ However, in attempting to clear the intricate statutory hurdles, a person in a same-sex relationship with a biological parent falters in securing an adoption as articulated in the recent Nebraska Supreme Court case of *In re* Adoption of Luke.²⁰

The Nebraska Supreme Court recently ruled in the case of *Luke*, that a county court correctly denied an adoption petition where a biological parent and her partner sought to have the partner become an adoptive parent. The court specifically found:

For an adoption to be valid under Nebraska's adoption statutes, the record must show the following factors: (1) the existence of an adult person or persons entitled to adopt, (2) the existence of a child eligible for adoption, (3) compliance with statutory procedures providing for a adoption, and (4) evidence that the proposed adoption is in the child's best interests. Neb. Rev. Stat. § 43-101 (et. seq.) . . . The absence of any one of the necessary factors will preclude the adoption.²¹

The court found that Nebraska law permits a single adult person to adopt a child after all of the necessary consents and relinquishments have been filed.²² However, a biological parent must relinquish his or her parental rights prior to a single adult adopting their child.²³ Therefore, the inference that follows is that "any person" does not include a person in a same-sex relationship

with a biological parent.

The sole purpose of adoption is to serve and protect a child's best interests as every adoption decree entered must be found to be in the best interests of the minor child.²⁴ The presumed intent of the adoption statutes is to protect children by legally recognizing the parent/child relationship.²⁵ Under Nebraska law, one who actively plans for the pregnancy, participates in the pregnancy or birth of the child, serves as a parent from birth, provides the child with a surname, financially supports the child and in all aspects is a parent to the child and is recognized by the child as such, can be prohibited from legally solidifying the relationship with the child. This is an obvious contradiction to the statutory requirement that a finding be made that the adoption be in the child's best interests. This legal conclusion presents an inherent flaw in the law when it is in the best interests of a child that an adoption be granted but is denied on this basis.

Under the current statutory interpretation, the child's best interests are ignored and an absurd result achieved. A procedural element, which by its very nature contradicts the purpose of adoption, takes precedence over the best interests of the child. A biological parent, who believes it is in the child's best interests to secure an adoption by a second parent, must first terminate his or her own parental rights. To demand that a fit parent relinquish parental rights in order to provide the benefits and security of a second legal parent for the child is in blatant disregard of the child's best interests.

A non-biological, non-adoptive parent may also consider establishing a guardianship on behalf of their child. However, in order to establish a legal guardianship in Nebraska, the parental rights of the biological parents must be terminated or suspended.²⁶ This creates the same Catch-22 that parents in a same sex relationship with a biological parent are facing in adoption cases.

The biological parent must first terminate their parental rights to legally recognize the rights of their partner. Likewise for two non-biological, non-adoptive parents, it may be difficult to ensure that both biological parents' rights are terminated or suspended.

Absent a dissolution action, a paternity action, an adoption, a guardianship, or a juvenile matter, a remaining outlet available to non-biological, non-adoptive parents is to petition for custody under the NCCJA.

4. *NCCJA Provides Protection for Children of Same Sex Parents*

The question arises as to whether non-biological, non-adoptive parents have any statutory relief available to them. One answer lies in the use of the NCCJA.²⁷

The NCCJA does not limit the custody determinations to be made under the Act to biological or adoptive parents. Rather, a non-biological or non-adoptive person has the right to initiate a custody determination under the act. Neb. Rev. Stat. section 43-1202(1) provides: “[c]ontestant shall mean a person, including a parent, who claims a right to custody or visitation rights with respect to a child.”²⁸ The act further states: “Person acting as a parent shall mean a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody”²⁹ Therefore, any person who claims a right may initiate a custody determination. Custody determination means “a court decision and court orders and instructions providing for the custody of a child, including visitation rights, . . .”³⁰

Therefore, there is an opening in the discriminatory screen Nebraska law has crafted for non-biological, non-adoptive parents to preserve their relationships with their children. However, this opening is not without limitations, as there are specific statutory requirements that must be met. In order to bring an action under the NCCJA, Nebraska must be the child’s home state.³¹ Home state is defined as “the state in which the child immediately preceding the time involved

lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months . . .”³² Accordingly, so long as a person acting as parent, who may be a non-biological, non-adoptive parent, has resided in Nebraska with their child for six months, he or she may bring an action under the NCCJA for a custody determination.

Purposes of the NCCJA, in addition to avoiding jurisdictional competitions, are to “discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.”³³ These purposes serve to protect a child’s relationship with his or her parent and to create security and stability for the child in those relationships. The NCCJA allows for a non-biological, non-adoptive parent to bring a custody action before the court for consideration of the minor child’s best interests.³⁴

Practitioners are encouraged to utilize the NCCJA to effectuate this exact purpose — to protect the stability of a home environment and secure family relationships for a child who is raised by a non-biological, non-adoptive parent. Nebraska’s statutory scheme under the NCCJA permits non-biological, non-adoptive parents to petition for a custody determination that would be in the best interests of the child. The NCCJA creates a mold for solidification of those relationships which practitioners must begin utilizing in order to be effective advocates.

B. EQUITABLE DOCTRINES SUPPORT PROTECTING THE RIGHTS OF NON-BIOLOGICAL, NON-ADOPTIVE PARENTS

Various equitable doctrines have been created by courts to address the child’s best interests when a child has been raised by a non-biological, non-adoptive parent. This essay will review both the *in loco parentis* doctrine and the parental preference doctrine which, on the their face, seem contradictory, or at a minimum, irreconcilable for non-biological, non-adoptive parents. This essay will review how a person may stand *in loco parentis* to a child and next assess

Nebraska's parental preference doctrine that stands for the proposition that a biological parent has a superior right to parent his or her child. This essay will conclude that the parental preference doctrine should be vacated in favor of the application of the best interests of the child in all circumstances related to a determination of custody or visitation.

The Nebraska Supreme Court has advanced the proposition that "when the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided ... this is especially true where the third party has cared for a child as his or her own."³⁵ We agree.

1. In loco parentis Applied to Non-biological, Non-adoptive Parents: Russell v. Bridgens

Nebraska law favors the use of the *in loco parentis* doctrine where it is demonstrated that a person has put himself or herself in the role of a parent by assuming all of the obligations incident to the parental relationship.³⁶ The Nebraska Supreme Court found guidance from the Nebraska Parenting Act as to what constitutes the "obligations incident to the parental relationship."³⁷

The Parenting Act enacted in Nebraska articulates the rights, duties, and liabilities considered a part of parental functioning.³⁸ The Parenting Act states:

(2) Parenting functions shall mean those aspects of the parent-child relationship in which the parent makes fundamental decisions and performs fundamental functions necessary for the care and development of the minor child. Parenting functions shall include, not be limited to: (a) Maintaining a loving, stable, consistent, and nurturing relationship with the minor child; (b) attending to the ongoing needs of the minor child, including feeding, clothing, physical care and grooming, supervision, and engaging in other activities appropriate to the healthy development of the minor child within the social and economic circumstances of the family; (c) attending to adequate education for the minor child, including remedial or other special education essential to the best interests of the minor child; (d) assisting the minor child in maintaining a positive relationship with both parents and other family members; (e) assisting the minor child in developing and maintaining appropriate interpersonal relationships; and (f) exercising appropriate support for social, academic,

athletic, or other special interests and abilities of the minor child within the social and economic circumstances of the family.³⁹

The logical conclusion drawn from *Hickenbottom v. Hickenbottom*⁴⁰ is that when a non-biological, non-adoptive person assumed the roles as articulated under the Parenting Act, the *in loco parentis* doctrine should apply.

The Nebraska Supreme Court has articulated the *in loco parentis* doctrine as being applicable to a situation where:

A person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.⁴¹

The Nebraska Supreme Court **applied** the *in loco parentis* doctrine to the visitation rights of a stepparent to a child whom the stepparent had raised since the child was two years old.⁴² The court held that rather than decide rights to a child by blood relations, it is often better for the child to be able to continue the relationship with a party when examined in the light of what is best for the child's continued growth and happiness.⁴³ The court specifically stated:

Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship. Usually such an affiliation is with a natural parent. But it need not be. Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.⁴⁴

In *Russell v. Bridgens*,⁴⁵ the Nebraska Supreme Court recently had the opportunity to specifically apply the *in loco parentis* doctrine in a same-sex custody dispute.⁴⁶ Although this case was ultimately decided on the issue of the burden of proof to sustain a motion for summary

judgment, the concurrence articulated the application of the *in loco parentis* doctrine to a same sex custody dispute.⁴⁷

The facts of *Russell* are as follows: Russell and Bridgens were two unmarried women.⁴⁸ They lived together and raised a child together from 1996 until August, 1999 when they separated.⁴⁹ The child was nine days old when he went to live with parties.⁵⁰ Russell was a stay-at-home mother for the child and was his primary care giver from infancy until he was five years old.⁵¹ Russell was the parent who got up with the child at night, potty trained him, prepared and fed him his meals, comforted him, read to him at night, participated in his religious training and saw to his educational needs.⁵² Russell was the parent who nursed the child after the child's open heart surgery.⁵³ Russell took the child to his cardiologist appointments and administered his medication.⁵⁴

In 1997, Russell and Bridgens secured a second parent adoption in the State of Pennsylvania.⁵⁵ There was a dispute in the case regarding the validity of the co-parent adoption; however, the concurrence in the case stated that regardless of the validity of the adoption, the petition for custody can be maintained under the doctrine of *in loco parentis*.⁵⁶

The facts under *Russell* clearly demonstrate the need and urgency for practitioners to advocate and judges to apply the *in loco parentis* doctrine. The *in loco parentis* doctrine applies precisely to cases in which a person standing in the shoes of a parent is unprotected by legal recognition of the parental role. This doctrine, under equity, legally protects relationships between children and their non-biological, non-adoptive parents.

The application of the *in loco parentis* doctrine under the NCCJA protects the parent who has: maintained a loving, stable, consistent, and nurturing relationship their child; attended to the ongoing needs of their child, including feeding, clothing, grooming, supervising, and engaging in

activities appropriate to the healthy development of their child; attended to education for their child; assisted their child in maintaining a positive relationship with parents and other family members; assisted their child in developing and maintaining appropriate interpersonal relationships; and exercised appropriate support for social, academic, athletic, or other special interests and abilities of their child. The application of the *in loco parentis* doctrine protects non-biological, non-adoptive parents and their children.

2. *Parental Preference Doctrine*

Despite the doctrine of *in loco parentis* and the potential protection it can afford non-biological, non-adoptive parents, there is yet another roadblock to be considered. Nebraska courts continue to apply the parental preference doctrine.⁵⁷ The question remains as to whether this doctrine will be inapplicable or abolished in consideration of same sex relationships where one partner is the legal parent of a minor child and the other partner has actively parented the child.

Nebraska law operates under the presumption that biological and adoptive parents hold a superior right to child custody over unrelated third persons.⁵⁸ The parental preference doctrine stands for the proposition that:

A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.⁵⁹

The parental preference doctrine means that absent a showing of unfitness, the biological parent prevails against an unrelated person when custody is in dispute.⁶⁰ In *Blecha v. Blecha*, the Nebraska Supreme court held that absent a showing of abuse or neglect, the biological father's right to his children trumped the interest of strangers to the parent-child relationship.⁶¹ The "strangers" in *Blecha* were the children's maternal grandmother and maternal aunt.⁶²

The Nebraska Court of Appeals recently modified the parental preference doctrine in cases under the jurisdiction of the juvenile court in *In re Eric O. & Shane O.*⁶³ The court held that the parental preference doctrine did not negate an examination of the children's best interests in a juvenile matter as the hallmark of the juvenile code is the best interests of the child.⁶⁴ The court found that the parental preference doctrine was not applicable or controlling because the juvenile court makes decisions concerning children with the paramount consideration always being the best interests of the child.⁶⁵

For non-biological, non-adoptive parents, the issue will arise as to whether the parental preference doctrine will control or whether a determination of the best interests of the child may prevail. As previously mentioned, any custody dispute between a non-biological, non-adoptive parent and another parent will presumably be brought under the NCCJA, as this Nebraska statute allows a non-biological, non-adoptive parent to pursue a custody determination.⁶⁶

Under the NCCJA, the best interests of the children control custody proceedings and the factors considered in a custody proceeding are those factors prescribed in Neb.Rev.Stat. section 42-364(2).⁶⁷ Therefore, the best interests as the paramount concern to a custody determination under the NCCJA should negate application of the parental preference doctrine in cases brought under this Act. This issue has not been brought before the Nebraska appellate courts and practitioners should draw from the conclusions in *In re Interest of Eric O. & Shane O.*, and put forth the legal analogy to cases considered under the NCCJA. Further, the parental preference doctrine should be abolished in favor of the best interests of the child.

C. BEST INTERESTS OF CHILDREN WITH NON-ADOPTIVE, NON-BIOLOGICAL PARENTS: SAME SEX PARENTING

This essay will first review those considerations that encompass the best interests of the

child and how the best interests test is applied under Nebraska law. Second, this essay will look at empirical data regarding the effects, if any, on children being raised by non-biological, non-adoptive parents in same-sex relationships and finally, this essay will conclude that the best interests of the child require that the sexual orientation of a non-biological, non-adoptive parent have no impact on the rights of that parent or on the right of the child to be parented by a non-biological, non-adoptive parent.

Best interests of children are always at the heart of any analytical framework in an action where custody or visitation is at issue.⁶⁸ The Nebraska Supreme Court supports the proposition that a parent's rights are not absolute, as they must yield to the best interests of the child.⁶⁹ The best interests of the child test is utilized for a number of varying consideration of actions involving children from whether a child should be move across state lines to whether a minor child's name should be changed; the best interests of the child are of paramount concern.⁷⁰

1. Best Interests Defined

The test for the best interests of a child is found in under the dissolution of marriage statute at Neb. Rev. Stat. section 42-364(2) that sets forth the following criteria:

In determining custody arrangements and the time to be spent with each parent, the court shall consider the best interests of the minor child which shall include, but not be limited to:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
- (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
- (c) The general health, welfare, and social behavior of the minor child; and
- (d) Credible evidence of abuse inflicted on any family or household member.⁷¹

2. Same Sex Parents and Consideration of Sexual Orientation

The American Academy of Pediatrics issued a policy statement finding that “a growing

body of scientific literature demonstrates that children who grow up with one or two gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes.”⁷² The statement states the “weight of the evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting.”⁷³

The Nebraska Supreme Court has held that in determining a child's best interests, the court may consider the moral fitness of the child's parent and the parent's sexual conduct.⁷⁴ However, the court further holds that absent a showing that the minor child was exposed to the parent's sexual activity or were adversely affected by said activity, a parent's sexual activity does not affect a child custody determination and does not warrant a material change in circumstances sufficient for a modification.⁷⁵

In *Hassenstab v. Hassenstab*,⁷⁶ the Nebraska Court of Appeals addressed whether the aforementioned rule regarding a parent's sexual conduct applied in the context of a parent in a homosexual relationship.⁷⁷ The court found that the minor child was generally aware of her mother's homosexual relationship but no evidence was presented that the child was directly exposed to the sexual activity or harmed by the same sex relationship.⁷⁸ The court found that the lack of any harmful effect on the minor child precluded a modification of a decree to change custody.⁷⁹

Some practitioners may be wary of advocating the use of the *in loco parentis* doctrine to be applied to gay and lesbian parents who are neither the biological or adoptive parent. There

may be a perception that this would open the floodgates to family members, non-biological care takers, and other persons who want to assert a right to parent or be awarded visitation. However, since *Hickenbottom* was decided in 1991, affirming a district court decision granting a stepfather reasonable visitation with his stepdaughter, there have been only a handful of cases pertaining to a person standing *in loco parentis* to a child.⁸⁰ Further, the majority of these cases arise from a biological parent attempting to collect child support from a non-biological, non-adoptive parent by asserting that the person stands *in loco parentis* to the child.⁸¹

This essay advocates the application of the *in loco parentis* doctrine in those cases where it is clearly the intention of the non-biological, non-adoptive parent to be a parent. It is applicable to the parent who is maintaining a loving, stable, consistent and nurturing home environment and providing financial support for the child.

Consideration of a parent's sexual orientation is not in the best interest of a child who has been raised by a non-biological, non-adoptive parent who is in a same sex relationship with the child's other parent. The focus should be on the relationship, on the child's emotional, cognitive, and social development as related to that relationship, and on the child's well-being rather than a preference for blood relations.

CONCLUSION

Nebraska is in a period of both opportunity and challenge in the representation of gays and lesbians who are non-biological, non-adoptive parents. Discouragement can be had in the face of a constitutional amendment declaring their relationships invalid and from the denial of one second parent's adoption in *In re Luke*. Hopefulness is seen the Nebraska Court of Appeals' refusal to allow sexual orientation to impact its ruling in *Hassenstab v. Hassentab* and the Nebraska Supreme Court's decision in *Russell v. Bridgens* to allow a lesbian adoptive mother to proceed

with her custody case under the NCCJA. During this time, family law practitioners with the intention to be zealous advocates must use the tools available to them under the law, educate the judiciary through their advocacy, and support legislative reform consistent with the recognition of the best interests of children. As the state of Nebraska law more fully develops in this area, these actions are essential for all attorneys who believe that children have a right to security and stability in their relationships with those who parent them.

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¹ Nebraska Child Custody Jurisdiction Act (NCCJA), NEB. REV. STAT. §§ 43-1201 to - 1225 (Reissue 1998).

² BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

³ NEB. REV. STAT. ' 42-377 (Reissue 1998); NEB. REV. STAT. ' ' 43-1401(2), 43-1406 (Reissue 1998); NEB. REV. STAT. ' 43-101 to - 165. (Reissue 1998); NEB. REV. STAT. ' 43-245(10) (Reissue 1998); NEB. REV. STAT. ' 43-1202 (Reissue 1998).

⁴ Laumann EO, National Health and Social Life Survey. Chicago IL: University of Chicago and National Opinion Research Center, 1995; *U.S. Pediatricians Argue for Rights of Gay Parents*, REUTER'S NEWS, Feb. 4, 2002, available at <http://www.spectrum.ieee.org/htmcache> at www.religioustolerance.org/horm_pare5htm.

⁵ NEB. REV. STAT. ' 42-377 (Reissue 1998); NEB. REV. STAT. ' ' 43-1401(2), 43-1406 (Reissue 1998); NEB. REV. STAT. ' 43-101 to -165 (Reissue 1998); NEB. REV. STAT. ' 43-245(10) (Reissue 1998); NEB. REV. STAT. ' 43-1202 (Reissue 1998).

⁶ NEB. REV. STAT. ' 42-341 to -344 (Reissue 1998); NEB. REV. STAT. ' 43-1401 to -1418 (Reissue 1998); NEB. REV. STAT. ' 43-101 to -165 (Reissue 1998); NEB. REV. STAT. ' 43-245 to -2.127 (Reissue 1998); NEB. REV. STAT. ' 43-1201 to -1225 (Reissue 1998).

⁷ Santosky v. Kramer, 455 U.S. 745, 753 (1982).

⁸ Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

⁹ NEB. REV. STAT. ' 42-341 to -344 (Reissue 1998).

¹⁰ NEB. REV. STAT. ' 42-377 (Reissue 1998).

¹¹ NEB. REV. STAT. ' 42-104 (Reissue 1998).

¹² NEB. REV. STAT. ' 42-109 (Reissue 1998).

¹³ NEB. CONST. art. I, ' 29 (2000) (adopted 2000, Initiative measure No. 416).

¹⁴ NEB. REV. STAT. ' 43-1401 to -1418 (Reissue 1998).

¹⁵ NEB. REV. STAT. ' 43-246 (Reissue 1998).

¹⁶ NEB. REV. STAT. ' 43-245(10) (Reissue 1998).

¹⁷ NEB. REV. STAT. ' 43-247 (Reissue 1998).

¹⁸ FLA. STAT. ch. 63.042(3) (1997); N.H. REV. STAT. ANN. ' 170-B:4 (1990). New Hampshire has struck the homosexual exclusion from its statute. N.H. REV. STAT. ANN. § 170-B:4 (2001). The 2001 version of the statute does not contain such language. *Id.*

¹⁹ NEB. REV. STAT. ' 43-101 (Reissue 1998).

²⁰ *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

²¹ *Luke*, 263 Neb. at 369, 640 N.W.2d at 378.

²² *Id.*

²³ *Id.*

²⁴ NEB. REV. STAT. ' 43-109(1) (Reissue 1998).

²⁵ NEB. REV. STAT. ' 43-110 (Reissue 1998).

²⁶ NEB. REV. STAT. ' 30-2608 (Reissue 1998).

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- ²⁷ NEB. REV. STAT. ' 43-1201 to -1225 (Reissue 1998).
- ²⁸ NEB. REV. STAT. 43-1202(1) (Reissue 1998).
- ²⁹ NEB. REV. STAT. ' 43-1202(9) (Reissue 1998).
- ³⁰ NEB. REV. STAT. ' 43-1202(2) (Reissue 1998).
- ³¹ NEB. REV. STAT. ' 43-1203(1)(a) (Reissue 1998).
- ³² NEB. REV. STAT. ' 43-1202(5) (Reissue 1998).
- ³³ NEB. REV. STAT. ' 43-1201(1)(d) (Reissue 1998).
- ³⁴ NEB. REV. STAT. ' 43-1201to -1225 (Reissue 1998).
- ³⁵ *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 588, 477 N.W.2d 8, 14-15 (1991) (quoting *Collins v. Gilbreath*, 403 N.E.2d 921, 923 (Ind. App. 1980)).
- ³⁶ *Weinand v. Weinand*, 260 Neb. 146, 152-53, 616 N.W.2d 1, 6 (2000).
- ³⁷ *Weinand*, 260 Neb. at 153, 616 N.W.2d at 6.
- ³⁸ *Id.*
- ³⁹ NEB. REV. STAT. ' 43-2903(2) (Reissue 1998).
- ⁴⁰ 239 Neb. 579, 588, 477 n.W.2d 8, 14-15 (1991).
- ⁴¹ *Weinand*, 260 Neb. at 152-53, 616 N.W.2d at 6 (citations omitted).
- ⁴² *Hickenbottom*, 239 Neb. at 581, 477 N.W.2d at 10.
- ⁴³ *Id.* at 592-93, 477 N.W.2d at 17.
- ⁴⁴ *Id.* at 587, 477 N.W.2d at 14 (quoting *Cooper v. McManus*, 581 P.2d 487, 488-89 (Okla. App. 1978)).
- ⁴⁵ 264 Neb. 217, 647 N.W.2d 56 (2002).
- ⁴⁶ *Russell v. Bridgens*, 264 Neb. 217, 219, 647 N.W.2d 56, 58 (2002).
- ⁴⁷ *Russell*, 264 Neb. at 229-31, 647 N.W.2d at 65-66 (Gerrard J., concurring).
- ⁴⁸ *Id.* at 219, 647 N.W.2d at 58.

⁴⁹ *Id.* at 218-19, 647 N.W.2d at 57-59.

⁵⁰ Appellant=s Brief at 9, *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002) (No. A-01-965).

⁵¹ Appellant's Brief at 9, *Russell* (No. A-01-965).

⁵² Appellant=s Brief at 27, *Russell* (No. A-01-965).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Russell*, 264 Neb. at 219, 647 N.W.2d at 57-59.

⁵⁶ *Id.* at 219, 647 N.W.2d at 57-59; *Russell*, 264 Neb. at 230, 647 N.W.2d at 65-66 (Gerrard J., concurring).

⁵⁷ *See Stuhr v. Stuhr*, 240 Neb. 239, 246, 481 N.W.2d 212, 217 (1992); *In re Interest of Amber G.*, 250 Neb. 973, 982, 554 N.W.2d 142, 149 (1996); *Uhing v. Uhing*, 241 Neb. 368, 374, 488 N.W.2d 366, 371 (1992).

⁵⁸ *In re Interest of Eric O. & Shane O.*, 9 Neb. Ct. App. 676, 685, 617 N.W.2d 824, 832 (2000). *See also Amber*, 250 Neb. at 981-82, 554 N.W.2d at 148-49 (recognizing a constitutionally protected relationship between a parent and a child); *and Uhing*, 241 Neb. at 371, 488 N.W.2d at 371 (noting that biological parents have superior custody rights).

⁵⁹ *Stuhr*, 240 Neb. at 246, 481 N.W.2d at 217. *See also Eric O.*, 9 Neb. Ct. App. at 684, 617 N.W.2d at 832; *Blecha v. Blecha*, 257 Neb. 543, 547, 599 N.W.2d 829, 832 (1999).

⁶⁰ *Eric O.*, 9 Neb. Ct. App. at 685, 617 N.W.2d at 832.

⁶¹ *Blecha*, 257 Neb. at 547, 599 N.W.2d at 832.

⁶² *Id.* at 544-45, 599 N.W.2d at 830-31.

⁶³ 9 Neb. Ct. App. 676, 685, 617 N.W.2d 824, 832 (2000).

⁶⁴ *In re Interest of Eric O. & Shane O.*, 9 Neb. Ct. App. 676, 688, 617 N.W.2d 824, 833 (2000).

⁶⁵ *Eric O.*, 9 Neb. Ct. App. at 688, 617 N.W.2d at 833.

⁶⁶ NEB.REV.STAT. ' 43-1202(9) (Reissue 1998).

⁶⁷ NEB.REV.STAT. ' 43-1214.01 (Reissue 1998).

⁶⁸ NEB. REV. STAT. ' 43-109 (Reissue 1998); NEB. REV. STAT. ' 43-292 (Reissue 1998); NEB. REV. STAT. ' 43-1214.01 (Reissue 1998); NEB. REV. STAT. ' 30-2610 (Reissue 1998).

⁶⁹ *Nielsen v. Nielsen*, 217 Neb. 34, 35, 348 N.W.2d 416, 417 (1984) (citing *Gorsuch v. Gorsuch*, 148 Neb. 122, 26 N.W.2d 598 (1947)).

⁷⁰ See *Vogel v. Vogel*, 262 Neb. 1030, 1041, 637 N.W.2d 611, 621 (2002) (stating that when a custodial parent petitions for removal of the minor child from the jurisdiction, the paramount consideration is whether the proposed move is in the minor child=s best interests); *In re Change of Name of Andrews*, 235 Neb. 170, 175, 454 N.W.2d 488, 491 (1990) (a change in a minor child=s surname must be found to be in the minor child=s best interests); *Peter v. Peter*, 262 Neb. 1017, 1025, 637 N.W.2d 865, 873 (2002) (quoting *Noonan v. Noonan*, 261 Neb. 552, 567, 624 N.W.2d 314, 327 (2001) (stating that the paramount concern in determining child support is the best interests of the minor child)).

⁷¹ NEB. REV. STAT. ' 42-364(2) (Reissue 1998).

⁷² Ellen C. Perrin, M.D., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 American Academy of Pediatrics No. 2 (February 2002) at 341.

⁷³ *Id.*

⁷⁴ *Smith-Helstrom v. Yonker*, 249 Neb. 449, 459, 544 N.W.2d 93, 100 (1996); *Helgenberger v. Helgenberger*, 209 Neb. 184, 188, 306 N.W.2d 867, 870 (1981).

⁷⁵ *Smith-Helstrom*, 249 Neb. at 460, 544 N.W.2d at 101; *Helgenberger*, 209 Neb. at 188, 306 N.W.2d at 870.

⁷⁶ 6 Neb. Ct. App. 13, 570 N.W.2d 368 (1997).

⁷⁷ *Hassenstab v. Hassenstab*, 6 Neb. Ct. App. 13, 18, 570 N.W.2d 368, 372 (1997).

⁷⁸ *Hassenstab*, 6 Neb. Ct. App. at 20, 570 N.W.2d at 373.

⁷⁹ *Id.*

⁸⁰ See *Mair v. James*, No. 1-00-016 (Neb. Ct. App. 2001) (applying parental preference doctrine to award custody to biological father over maternal grandmother and maternal grandfather seeking custody under *in loco parentis* doctrine); *Weinard v. Weinard*, 260 Neb. 146,

152-53, 616 N.W.2d 1, 6 (2000); *Quintela v. Quintela*, 4 Neb. Ct. App. 396, 401-02, 544 N.W.2d 111, 116 (1996); *Cavanaugh v. deBaudiniere*, 1 Neb. Ct. App. 204, 218-19, 493 N.W.2d 197, 206-07 (1992) (stating that ex-stepfather has no rights unless he maintains an *in loco parentis* relationship with the child); *In re Destiny*, 263 Neb. 255, 262, 639 N.W.2d 400, 406-07 (2002) (stating subsequent adoption terminates a persons' *in loco parentis* standing); *Hamilton v. Foster*, 260 Neb. 887, 903-04, 620 N.W.2d 103, 116 (2000) (determining that *in loco parentis* is an issue of intent and if a person chooses to terminate the relationship, the *in loco parentis* status also terminates).

⁸¹ See *Wienand*, 260 Neb. at 152-53, 616 N.W.2d at 6; *Quintela*, 4 Neb. Ct. App. at 401-02, 544 N.W.2d at 116; *Cavanaugh*; 1 Neb. Ct. App. at 218-19, 493 N.W.2d at 206-07; *Hamilton*, 260 Neb. at 903-04, 620 N.W.2d at 116.