

ion as to the victim's sexual orientation, was prepared to testify that "several of the victim's acquaintances assumed he was a homosexual because 'he was not seen with very many females' and 'he always seemed to be with males.'" Upholding the trial court's exclusion of this testimony, Justice Lake wrote for the court: "[It] is clear that the evidence offered by the defendant showing that the victim had a reputation for being a homosexual is not a pertinent character trait with the meaning of [the Rule governing reputation evidence]. A victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to assault a female. Because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it therefore can bear no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault."

The court also rejected a variety of other alleged errors urged by the defendant on appeal, and noted, contrary to the defendant's arguments, that the jury could have concluded based on the forensic evidence that the victim was killed while trying to escape from the defendant rather than that the defendant killed the victim while trying to rebuff his aggressive sexual advances. A.S.L.

Missouri Appeals Court Reverses Custody Grant to Transsexual Father; Remands for Reconsideration of Visitation Order

The Missouri Court of Appeals, Eastern District, reversed an award of joint custody to J.L.S. and D.K.S. (now known as S.D.S.), and remanded for reconsideration of the trial court's order that the transsexual father be allowed to exercise visitation rights one year after issuance of the order. *J.L.S. v. D.K.S., n/k/a S.D.S.*, 1997 WL 104514 (March 11).

Mother and Father married in 1983, and had two sons, the oldest of whom was eight at the time of trial and the youngest of whom was five. Father ultimately determined that he was transsexual, and obtained treatment and sex-reassignment surgery after moving out of the family home. (Prior to marrying, Father had told Mother that he occasionally engaged in cross-dressing, but had assured her that his problems with this were "resolved." However, father struggled with the urge to cross-dress throughout his marriage.) The parties had separated at Father's request on August 1, 1992, while he began the trial process of living as a woman prior to surgery. The sons were not told that this was the reason for the separation. They executed a separation agreement drafted by Father, which gave Mother sole, permanent care and custody of the children, and in which Father

promised not to attempt visitation during his year of living as a woman. Mother filed for divorce in Maryland, where they lived, and filed a copy of the separation agreement with her divorce papers. Father opposed the divorce, stating his wish to continue living married to Mother and having his sons refer to him as "Aunt Sharon." Mother and sons moved to Missouri before the case was concluded, and the action was dismissed. Father has had no face-to-face contact with the sons since their move to Missouri.

Mother filed for divorce in Missouri several months later, alleging that Father's lifestyle choices now made it impossible for the family to live together, and that it would be "extremely harmful" for the children to be placed in temporary custody or visitation with Father. Father denied the harmfulness allegations, and the statements in the divorce petition concerning his "choice" of a particular "lifestyle." The trial court appointed an expert to examine the children and the Father. Experts for both parties and the court's expert testified at trial. All of the experts agreed that immediate face-to-face contact between the boys and Father would be detrimental, since Father had undergone sex-reassignment surgery and was now a woman and the boys had not been prepared to deal with this.

The trial court found that the father's expert, who testified that contact with the father would not be harmful to the boys after a suitable period of counseling, was the most credible, and awarded joint legal custody, the boys to live with Mother, and liberal visitation rights for father, after a period of one year, during which the court recommended that appropriate counseling be provided to prepare the sons to deal with their Father in her new status. (This was an extraordinarily enlightened decision, by contrast to most judicial rulings on parental claims by transsexual litigants, and the judge suffered for it, being defeated for re-election largely due to press coverage of this case.)

Writing for the Court of Appeals, Judge Simon found implicit in the trial judge's decision a finding that "immediate contact between the children and father would impair the boys' emotional development." The twelve-month period for counseling specified in the trial court's order had expired, but there was no indication that the required counseling had taken place while the appeal was pending, and at oral argument Mother's attorney represented that the boys had still been told nothing about their Father's new status. "Clearly," wrote Simon, in the best interest of the children, a reevaluation of all parties must occur before the boys are exposed to a situation that father's experts deemed as harmful to them if they have not been correctly prepared."

Simon characterized this as a "unique situation," and described the need for new evaluations before face-to-face contact as "imperative." "Thus, on remand the trial court should determine the mental and emotional status of the parents and children to determine what is in the best interest of the children. Based upon those findings the trial court should decide what remedial measures, if any, should be taken to insure the best interest of the children are served while working toward their reunification with father. Likewise, the trial court should structure a visitation schedule appropriate to the children's best interest." Responding to further argument from the Mother criticizing the trial court's order on counseling as too vague, Simon wrote that "the court should require evidence of successful counseling before implementing reunification... If the trial court finds, after the hearing, that the children are not emotionally and mentally suited for physical contact with their father, then the trial court should not order visitation until such time as the parties demonstrate it is in the children's best interest to do so."

Turning to the joint custody award, the court agreed with Mother that the trial court erred in awarding joint legal custody. Missouri precedents provide that "joint legal custody is only appropriate where the parents show the willingness and ability to share the rights and responsibilities of raising their children," and the statutory preference for joint custody "is not that of a forced joint custody in order to induce the parents to find common ground." Here, the court found that the parents did not share a "commonality of beliefs" about how the children should be raised sufficient to support such a custody award, noting that the parents had not functioned together as a parental unit for several years and that Mother and children lived in Missouri and Father lived elsewhere.

Father had cross-appealed part of the trial court's order, which restrict Father from cohabiting with other transsexuals or sleeping with another female person while exercising temporary custody during visitation with the children. Here, Father ran into the well-established practice of Missouri courts of restricting the living arrangements of gay parents exercising custody, and the court found "substantial evidence" to support the trial court's conclusion that such restrictions were necessary to protect the children's "moral development."

In a separate opinion concurring in part and dissenting in part, Judge Karohl strongly disagreed with the court's decision to remand for a new visitation decree based on new evaluations of the parties and the children. Karohl observed that the trial judge was no longer on the bench, so the case would have to go to a new judge who did not have intimate familiarity with the parties and the situation, thus inevita-

bly producing extended delay in the reunification of Father with the children. Karohl criticized the court's conclusion that the trial court had implicitly found that face-to-face reunification would be harmful to the children without extensive counseling preparation, and urged that reunification be allowed to proceed without further delay. However, Karohl agreed that a joint legal custody arrangement was not suitable for these parties, in light of their differences. Karohl found that the father's cross-appeal was flawed by failure to provide any case support for the legal points he was urging, in violation of the court's rules; in any event, Karohl found the restrictions imposed on the Father's living arrangements during visitation periods to be consistent with Missouri precedents.

Although it is tempting to see the court of appeals' decision as a defeat for transsexual parents, actually the decision goes much further in acknowledging the parental interests of transsexuals than most prior cases. The reversal of the joint custody award seems reasonable in light of Missouri doctrine governing joint custody and the undisputed evidence that there were significant differences between the parents; significantly, the father was not requesting sole custody. While the court's remand order can be faulted on many grounds, it does not express overt hostility to the parental rights of the transsexual Father, as decisions by many other courts have done, and does not preclude reunification of the Father with the sons, as many courts in other jurisdictions would have done. In many contested cases of this type, the court's decision is to terminate the transsexual parent's parental rights and bar any contact with the children, so in that light, the court of appeals' decision can be viewed as progress on these issues, especially in light of the well-established reputation of Missouri courts as hostile to non-conforming parental sexuality. A.S.L.