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**BOTTOMS V. BOTTOMS: IN WHOSE BEST
INTEREST? ANALYSIS OF A LESBIAN
MOTHER CHILD CUSTODY DISPUTE**

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I. INTRODUCTION

In recent years, there have been a number of notable judicial decisions¹ and articles² discussing the legal rights of gay and lesbian parents involved in

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¹ See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (father brought suit to regain custody of child from lesbian mother); *Birdsall v. Birdsall*, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988) (holding order prohibiting homosexual father from keeping son overnight in the presence of another homosexual unreasonable); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (denying claim that mother's homosexuality would adversely affect her children); *but see Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (granting custody to father rather than homosexual mother); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982) (granting custody to father because of mother's homosexuality); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (holding father's homosexual conduct made him unfit and improper father).

² See, e.g., Robert A. Beargie, *Custody Determinations Involving the Homosexual*

child custody disputes. No other case, however, has attracted so much national and international attention³ as the recent Virginia child custody case of *Bottoms v. Bottoms*.⁴

In one of the most widely publicized child custody disputes in American

Parent, 22 FAM. L.Q. 71 (1988) [hereinafter Beargie]; David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL OF RIGHTS J. 345 (1994) [hereinafter Flaks]; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459 (1990) [hereinafter Polikoff]; Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian*, 23 SUFFOLK U. L. REV. 711 (1989) [hereinafter Stone]; Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOL. 941 (1989) [hereinafter Falk]; Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991) [hereinafter Herek]; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992) [hereinafter Patterson]; Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852 (1985). See also *infra* note 120.

³ In addition to national media attention in the United States, the foreign press also discussed the *Bottoms* case ranging from the *Ottawa Citizen* and *Calgary Herald* in Canada to the *Agence France Presse* in Europe. All the major American television network news programs fully aired the *Bottoms* case and it was a subject on numerous morning talk shows. The *Bottoms* controversy was further portrayed in a made-for-television movie on the ABC television network on September 22, 1996. See generally *infra* notes 85-97 and accompanying text.

The *Bottoms* case also was discussed in the *American Bar Association Journal*. See *Lesbian Loses Custody*, Dec., 1993 A.B.A. J. 24; *Lesbian Wins Custody Appeal*, Sept., 1994 A.B.A. J. 24; *Lesbianism at Center of Custody Dispute*, July, 1995 A.B.A. J. 28.

⁴ No. CH 93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993), *rev'd and remanded*, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) (3-0 decision), *rev'd*, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (4-3 decision).

When the history of gay and lesbian civil rights in the United States comes to be written, a chapter will surely be devoted to the case of Sharon Lynne Bottoms. In the summer of 1993, . . . this young Virginia mother, who never wanted to be famous—least of all for her love of another woman—became a national and international celebrity almost literally overnight. Millions of people now know her name and her situation: she lost custody of her two-year-old child to her mother in court solely because she wanted a family that did not fit the norm.

Stephen B. Pershing, *Entreat Me Not to Leave Thee: Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL OF RIGHTS J. 289, 289 (1994) [hereinafter Pershing]. Mr. Pershing's article discusses and analyzes the applicable law, facts, and empirical studies surrounding the trial court decision in the *Bottoms* case. Mr. Pershing is the Legal Director of the American Civil Liberties Union of Virginia, and served as co-counsel representing Sharon Bottoms.

history, Sharon Lynne Bottoms was divested of the custody of her two-year-old son, Tyler. The custody battle, however, was not between Tyler's mother and father.⁵ Rather, this particular custody dispute was precipitated by a petition filed by Tyler's maternal grandmother, Pamela Kay Bottoms, who claimed that her daughter Sharon, Tyler's mother, was not fit to raise Tyler. While a mother-daughter child custody battle is somewhat unusual, it is not the kind of event that normally attracts a great deal of public attention from anyone outside the immediate family and friends. But the fact that Tyler's grandmother alleged Tyler's mother was unfit solely because of her relationship with her lesbian lover was enough to attract the attention of the local media, and with the aid of national wire services and other related media sources, Tyler's story quickly spread throughout the United States and into Canada and Europe.⁶

The *Bottoms* child custody dispute, now a high profile case, quickly became the major focus for a number of national interest groups, ranging from the activist National Center for Lesbian Rights to the conservative Family Foundation. The American Civil Liberties Union offered to represent Sharon Bottoms in her appeal for custody of Tyler, and Stephen B. Pershing⁷ of the Virginia ACLU served as Sharon's co-counsel. Donald K. Butler, Chair of the Family Law Section of the Virginia Trial Lawyers Association, agreed to work with the ACLU on a pro bono basis as a "cooperating attorney."⁸ Richard R. Ryder of Richmond, Virginia represented Tyler's grandmother, Pamela Kay Bottoms.

Numerous organizations filed amicus curiae appellate briefs on Sharon Bottoms' behalf, including the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, and the National Association of Social Workers and its Virginia Chapter.⁹ The American

⁵ Tyler's father, Dennis D. Doustou, divorced Sharon when Tyler was an infant. Sharon was awarded sole custody of Tyler, and since their divorce Doustou has provided little, if any, emotional or financial support to Tyler.

⁶ See generally *infra* notes 85-97 and accompanying text.

⁷ See Pershing, *supra* note 4.

⁸ Player B. Michelson of the law firm of Morano, Colan & Butler also served as co-counsel for Sharon Bottoms in this case.

⁹ See *infra* notes 119-131, 213-215 and accompanying text.

Academy of Matrimonial Lawyers also filed an appellate brief in support of Sharon Bottoms,¹⁰ and a consolidated amicus brief was filed on behalf of the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders, National Lesbian and Gay Law Association, Bay Area Lawyers for Individual Freedom, National Organization for Women's Legal Defense and Education Fund, the Women's Law Project, and the Northwest Women's Law Center.¹¹ The Virginia Women Attorneys Association later filed an additional amicus brief in the Supreme Court of Virginia in support of Sharon Bottoms by the Virginia Women Attorneys Association.¹²

It was not until the Virginia Court of Appeals issued its well-reasoned and well-documented decision of June 21, 1994, shortly before Tyler's third birthday — a ruling that subsequently was reversed by the Virginia Supreme Court — that the focus of the *Bottoms* case was properly redirected back to its most significant and important subject: the best interests of young Tyler Doustou.

This Article traces and analyzes the series of legal and factual events leading up to the Virginia Supreme Court's contradictory and controversial decision in *Bottoms v. Bottoms*.

II. CHILD CUSTODY DISPUTES INVOLVING GAY AND LESBIAN PARENTS: A NATIONAL OVERVIEW

The generally prevailing standard in American child custody adjudications is the best interests of the child,¹³ and the sexual conduct or sexual orientation of a custodial parent has long been recognized as one important factor in determining the child's best interests in any parent-child relationship.¹⁴ But as Professor Homer Clark aptly observes, this is a very

¹⁰ See *infra* notes 132-144, 216 and accompanying text.

¹¹ See *infra* notes 145-156, 217-220 and accompanying text. On appeal to the Virginia Supreme Court, this amicus curiae brief was joined by the People for the American Way, Virginians for Justice, North Carolina Gay & Lesbian Law Association, and the Louisiana Electorate of Gays and Lesbians, Inc.

¹² See *infra* notes 221-224 and accompanying text.

¹³ See generally HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 797-814 (2d ed. 1988) [hereinafter CLARK]; and JOHN D. GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 371387 (2d ed. 1995) [hereinafter GREGORY].

¹⁴ See CLARK, *supra* note 13, at 802-06; GREGORY, *supra* note 13, at 377-380.

difficult area of child custody law to adjudicate:

Parental conduct raising questions of sexual morality has produced more custody litigation than any other types of conduct. This is particularly true in some states where the courts have had great trouble in arriving at ways of talking about the issue which take account of contemporary changes in moral standards without at the same time abandoning all moral standards entirely. Notwithstanding contemporary changes in sexual mores, sexual morality still generates strong emotions in the minds of judges which are reflected in their judgments either expressly or under the surface.¹⁵

Moreover, a number of courts have treated parental heterosexual conduct and parental homosexual conduct very differently. For example, although most courts treat heterosexual adultery or heterosexual nonmarital cohabitation as not constituting parental unfitness *per se*,¹⁶ this is not always the same judicial approach with regard to homosexual cohabitation or conduct. As Professor John DeWitt Gregory observes:

The conduct of a parent that will most often affect custody is sexual conduct, sometimes disguised by references to "lifestyle." Courts generally will consider a parent's heterosexual conduct outside of marriage or homosexual conduct as one factor to be considered in a custody determination, rather than as constituting unfitness *per se*. Nevertheless, cases involving lesbian or gay male custodians who maintain live-in or other relationships with persons of the same sex often enough provoke judicial high dudgeon.¹⁷

¹⁵ See CLARK, *supra* note 13, at 803-04.

¹⁶ The heterosexual conduct of the custodial parent, while still constituting a factor in child custody disputes, would not amount to parental unfitness *per se* if the parent were otherwise discreet in his or her conduct. See, e.g., Brinkley v. Brinkley, 336 S.E.2d 901 (Va. Ct. App. 1985); Davis v. Davis, 372 A.2d 231 (Md. 1977); *In re Dahlman's Marriage*, 531 P.2d 909 (Or. Ct. App. 1975). See also Annotation, *Custodial Parent's Sexual Relations with Third Person as Justifying Modification of Child Custody Order*, 100 A.L.R.3d 625 (1980). Thus, the parent's sexual conduct would only have a detrimental effect on the child if the child knew of that conduct. See, e.g., Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975). See generally Nora Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CINN. L. REV. 647 (1977).

¹⁷ See GREGORY, *supra* note 13, at 377.

Accordingly, when dealing with child custody disputes involving gay or lesbian parents, the courts generally have applied one of three tests to determine the custodial "fitness" of the gay male or lesbian parent: (1) a *per se* approach; (2) a middle ground "presumptive" approach; and (3) a "nexus" approach.

A. The *Per Se* Approach

In spite of increased social tolerance to homosexuality in recent years, a number of courts have continued to deny custody or visitation rights to homosexual parents on the sole basis that such homosexual conduct or orientation makes the individual an "unfit" custodial parent as a matter of law.¹⁸ The rationale behind this *per se* approach is based on a number of interrelated perceptions.

First, the *per se* approach has been premised upon the illegality of homosexual relations¹⁹ which are prohibited by state statutes that criminalize sodomy and the fact that the Supreme Court of the United States upheld the constitutionality of these statutes in *Bowers v. Hardwick*.²⁰ It is estimated however, that approximately ninety percent of married and unmarried heterosexual couples also engage in similar sexual conduct,²¹ and just because a particular state has enacted a sodomy statute does not necessarily mean a

¹⁸ See, e.g., *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981). See generally *Stone*, *supra* note 2, at 721-28; *Beargie*, *supra* note 2, at 74-75. See also *Wanda E. Wakefield*, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R.4th 1297 (1981); *Carroll J. Miller*, Annotation, *Visitation Rights of Homosexual or Lesbian Parent*, 36 A.L.R.4th 997 (1985).

¹⁹ See, e.g., *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (recognizing that sexual relationship between two persons of same sex is not a legal relationship); See also *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (calling father's homosexual relationship unlawful in light of the fact that sodomy is a class six felony under Virginia law).

²⁰ 478 U.S. 186 (1986). Four dissenting judges criticized the majority opinion in *Bowers* for not addressing the constitutionality of the statute as a whole as applied to both heterosexual and homosexual acts alike. 478 U.S. at 200. Ironically, Justice Lewis Powell, Jr., the swing vote in *Bowers v. Hardwick*, subsequently admitted that he had made a mistake in voting with the majority position. See JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 530 (1994) ("I think I probably made a mistake on that one," Powell said of *Bowers*.).

²¹ See, e.g., PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 236 (1983).

court is bound to apply a *per se* approach rather than a “nexus” approach in determining the custodial rights of gay or lesbian parents.²²

Courts also base the *per se* approach upon judicial perceptions that the child of a homosexual parent “may have difficulties in achieving a fulfilling heterosexual identity of his or her own in the future,”²³ or that a child would bear an “intolerable burden” because of the perceived “social condemnation” attached to homosexuality which would “inevitably harm” the child’s relationship with his or her peers and with the community at large.²⁴ However, empirical social science research data from the mid-1980s has largely negated and dispelled this largely subjective and unfounded judicial concern.²⁵

²² For example, Massachusetts, Michigan, and South Carolina all have sodomy prohibitions, but do not use them to justify a *per se* approach to parental fitness. Instead, these states employ a “nexus” test requiring a factual showing of harm to the child from the parent’s homosexual conduct. *See, e.g.,* *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980); *Hall v. Hall*, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980); *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. 1987). *See generally* Pershing, *supra* note 4, at 292-98 n.13. *See also infra* notes 106, 156, 220, 243 and accompanying text.

²³ *S. v. S.*, 608 S.W.2d 64, 65 (Ky. Ct. App. 1980).

²⁴ *See, e.g.,* *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980).

²⁵ *See, e.g.,* Flaks, *supra* note 2, at 371 (“The social science literature reviewed here demonstrates clearly that lesbians and gay men can and do raise psychologically healthy children. In fact, no evidence has emerged to date which suggests that homosexual parents are inferior to their heterosexual counterparts, or that their children are in any regard compromised.”). *See also* Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers in HOMOSEXUALITY AND THE FAMILY* 123, 132 (Frederick W. Bozett ed. 1989); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551, 565-67 (1983); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEVELOPMENT 1025 (1992). *But see* *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (court was persuaded by a psychologist, Dr. Tom Biller, who expressed grave concerns about the harmful effects that could occur to the child by being raised by a lesbian mother. Dr. Biller opined that the practice of homosexuality is not socially acceptable, is a learned practice, and is damaging to the proper development of the child.). *See* Stone, *supra* note 2, at 721-22.

Prior to the *Bottoms* decision, a number of commentators²⁶ had stated the Virginia Supreme Court in the case of *Roe v. Roe*²⁷ applied a *per se* judicial approach toward gay and lesbian parents in child custody disputes. In *Roe*, the Virginia Supreme Court heard the complaint of a mother who alleged the father continuously exposed their nine-year-old daughter to his active homosexual relationship in the same household with his daughter. The evidence presented was that the father and his homosexual lover were hugging, kissing, and sleeping in the same bed in an indiscreet manner. Additionally, other homosexuals had visited the home and engaged in similar behavior in the presence of the child. Although in a previous case, *Doe v. Doe*,²⁸ the Virginia Supreme Court had declared a mother's lesbian lifestyle does not constitute unfitness *per se* in an adoption case, the *Roe* court expressed grave concern that the father allegedly had "flaunted" his homosexual relationship,²⁹ and then concluded:

The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. . . . [W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.³⁰

However, the *Dailey* case was decided prior to the publication of most of the empirical social science data listed above.

This prevailing social science research rebutting any alleged adverse effects of homosexual parents on their children was summarized in the amicus curiae brief in support of Sharon Bottoms by attorneys for the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, and the National Association of Social Workers. See Pershing, *supra* note 4, at 305 n.50. See also *infra* note 120 and accompanying text.

²⁶ See, e.g., Stone, *supra* note 2, at 723; Beargie, *supra* note 2, at 74; Pershing, *supra* note 4, at 312-18. See also CLARK, *supra* note 13, at 805. But see SWISHER ET AL., VIRGINIA FAMILY LAW: THEORY AND PRACTICE 628-29 (1991 and Supp. 1994) (explaining that in *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981) the Virginia Supreme Court refused to declare a homosexual parent unfit *per se*, but pointing out that this was an adoption case rather than a child custody case).

²⁷ 324 S.E.2d 691 (Va. 1985).

²⁸ 284 S.E.2d 799 (Va. 1981).

²⁹ *Roe*, 324 S.E.2d at 693.

³⁰ *Id.* at 694 (citing *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981)).

It might initially appear from this case excerpt from *Roe* that the Virginia Supreme Court has indeed adopted a *per se* unfitness approach in child custody disputes involving gay and lesbian parents. A closer reading of earlier Virginia precedent, however, including *Doe v. Doe*³¹ and *Brown v. Brown*,³² puts this *per se* unfitness classification of *Roe* in some doubt.³³ Thus, whether *Roe v. Roe* actually established a *per se* rule in Virginia, as applied to gay and lesbian parents in child custody disputes, became a crucial issue in the *Bottoms* case.

B. The Middle Ground "Presumptive" Approach

Though not always clearly articulated by the courts that arguably apply it, some courts that have rejected the *per se* approach,³⁴ but are unwilling to adopt a "nexus" approach have used a "middle ground" or "presumptive"

³¹ 284 S.E.2d 799 (Va. 1981) (holding that a lesbian mother was not *per se* an unfit custodian in an adoption case). See *supra* note 28 and accompanying text. See also *infra* note 48 and accompanying text.

³² 237 S.E.2d 89 (Va. 1977) (custodial mother divested of custody of her two children, ages 4 and 7, after the evidence indicated that the mother was openly and indiscreetly cohabiting with a boyfriend over an extended period of time, coupled with a showing that the children were aware of the relationship, were not faring well, and were neglected.). *Brown* did not establish a *per se* rule, however, and the *Roe* court cited *Brown* as precedent. Moreover, if the custodial parent and his or her paramour were discreet in their relationship, even though living under the same roof, this would not constitute unfitness. See, e.g., *Sutherland v. Sutherland*, 414 S.E.2d 617 (Va. Ct. App. 1992) and *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992) (both involving heterosexual parents and applying a "nexus" approach). See also *infra* note 50 and accompanying text.

³³ See SWISHER ET AL., VIRGINIA FAMILY LAW: THEORY AND PRACTICE 629 (1991) ("Whether or not one agrees with the *Roe* court's views regarding homosexuality, it was in many ways a predictable result. *Roe* involved an extreme set of facts which pushed the Court to the limit, the most significant of which was no different from the fact in *Brown*: [indiscreet] cohabitation with a lover. In this critical respect, the father in *Roe* was treated no differently than the mother in *Brown*. The real test of whether homosexuality is in itself a detriment to custody will not arise until a case presents itself [in Virginia] where the conduct of the homosexual parent in the presence of the child is not an issue.").

³⁴ See *supra* notes 18-25 and accompanying text.

approach to gay and lesbian parents.³⁵ These courts have found that it is not the mere homosexuality which renders a parent unfit, but the presence of a homosexual lover or other evidence of active homosexuality in the home which creates an environment which cannot be in the best interests of the child. Such courts will weigh the fitness of a parent aside from his or her sexual orientation. If the parent is fit, custody may be granted but will be conditioned upon the parent maintaining certain standards of behavior.³⁶

Although there is little, if any, credible social science evidence supporting the *per se* approach in gay and lesbian child custody disputes,³⁷ one commentator has argued that some empirical social science data does exist to support a “middle ground” or “presumptive” custodial approach applied to both heterosexual and homosexual custodial parents.³⁸ Citing a 1988 study at the Philadelphia Child Guidance Clinic³⁹ with approval, this commentator argues there is a demonstrated psychological and sociological basis for the Virginia Supreme Court — and other state courts — to presume that children are likely to be harmed when exposed to a parent's unmarried cohabitation.⁴⁰

³⁵ See *infra* notes 42-47 and accompanying text.

³⁶ See *Beargie*, *supra* note 2, at 75-76. See also *Hall v. Hall*, 291 N.W.2d 144 (Mich. Ct. App. 1980) (wife's homosexuality was considered as only one factor in the court's determination of the moral fitness of a custodial parent); *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980) (conditioning grant of custody of a daughter to her lesbian mother on the mother's refraining from living with her lover in the child's presence); *Constant A. v. Paul A.*, 496 A.2d 1 (Pa. Super. Ct. 1985) (applying presumption that traditional family environment was better for the child than lesbian environment).

³⁷ See *supra* note 25 and accompanying text.

³⁸ See Katherine A. Salmon, Note, *Child Custody Modification Based on a Parent's Non-Marital Cohabitation: Protecting the Best Interests of the Child in Virginia*, 27 U. RICH. L. REV. 915 (1993) [hereinafter Salmon].

³⁹ Marla B. Isaacs & George H. Leon, *Remarriage and Its Alternatives Following Divorce: Mother and Child Adjustment*, 14 J. MARITAL & FAM. THERAPY 163 (1988).

⁴⁰ See Salmon, *supra* note 38, at 916-18. The study found that children whose mothers had live-in partners had a greater degree of maladjustment, evidenced by substantially higher scores for behavior problems. Their poor adjustment similarly was reflected by lower scores on a social competence scale, with older children and adolescents experiencing the greatest difficulty. Thus, in a situation where an unmarried heterosexual or homosexual mother lived with her partner, a “deleterious effect on child outcome” resulted. Salmon, *supra* note 38, at 917 (quoting Marla B. Isaacs & George H. Leon, *Remarriage and Its Alternatives Following Divorce: Mother and Child Adjustment*, 14 J. MARITAL & FAM. THERAPY 163, 163 (1988)).

The commentator concludes a middle ground “presumptive” approach is thus preferable to either a *per se* approach or a “nexus” approach.⁴¹

C. The “Nexus” Approach

A growing number of courts have adopted a “nexus” approach in child custody disputes, holding a parent’s gay or lesbian sexual orientation or sexual conduct should have no bearing in a child custody determination unless

⁴¹ According to one commentator:

The nexus approach . . . does not consider either the moral dimension of cohabitation or the potentially harmful long-term effect it has on children. While cohabitation should not be the sole litmus test by which fitness for custody is determined, neither should it be ignored. Even if [a court] finds nothing morally troubling in unmarried cohabitation, such a relationship certainly warrants close judicial scrutiny when the emotional health of a child is at stake. A standard which establishes a rebuttable presumption that cohabitation is harmful would return the burden of proof to the cohabiting parent, whose conduct threatens to harm the child. This standard would give the cohabiting parent the opportunity to produce evidence that his or her child is either not susceptible to the harmful effects of unmarried cohabitation, or that the alternative of shifting custody to the other parent would be more damaging to the child than the negative impact of the cohabitation.

.....

A rebuttable presumption would reinstate non-marital cohabitation as a factor in [child custody] cases [by] acknowledging evidence that children are likely to be harmed when exposed to such living situations. Moreover, the rebuttable presumption avoids absolute preferences for either parent, so that the overall goal of meeting the child’s best interests is not eclipsed by extreme rules on either side.

Salmon, *supra* note 38, at 932-33. *But see supra* notes 2 and 25, and *infra* 160 and accompanying text.

One problem with this presumptive test when applied to gay and lesbian nonmarital cohabitation is that even if gay or lesbian couples desired to marry, the vast majority of states prohibit such same-sex marriage. *See, e.g., In re Estate of Cooper*, 564 N.Y.S.2d 684 (N.Y. Surrogate’s Ct. 1990); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). *But see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1994) (questioning whether same-sex marriage prohibitions violate the equal protection provisions of the Hawaii Constitution). Subsequently, the Hawaii legislature stated that its marriage statutes applied only to male-female, and not same-sex, couples. 1994 Haw. Sess. Laws 217.

credible evidence is presented to show such orientation or conduct has a detrimental or adverse affect on the child.⁴²

This "nexus" approach in child custody disputes is based in large part on recent empirical social science evidence demonstrating gay and lesbian parents can and do raise psychologically healthy children,⁴³ and that "what the evidence suggests is that courts determining parental fitness among lesbian and gay individuals need not apply special presumptions, nor require expert evaluations, which depart from typical methods of psychosocial assessment. Instead, the literature is consistent with appropriate case-by-case evaluations of lesbian and gay families based on the same criteria employed with heterosexual parent families."⁴⁴ Under this "nexus" approach, therefore, heterosexual and homosexual custodial parents in child custody disputes are evaluated under the same legal principles and standards.⁴⁵

For example, the Massachusetts Supreme Court, in *Bezio v. Patenaude*,⁴⁶ defined the "nexus" approach in this way:

A finding that a parent is unfit further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average."⁴⁷

⁴² See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Birdsall v. Birdsall*, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981); *Peyton v. Peyton*, 457 So. 2d 321 (La. Ct. App. 1984); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *Guinan v. Guinan*, 477 N.Y.S.2d 830 (N.Y. App. Div. 1984); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); *In re Marriage of Cabalquinto*, 669 P.2d 886 (Wash. 1983). See *Pershing*, *supra* note 4, at 312 n.88. See also *Stone*, *supra* note 2, at 730-37; *Beargie*, *supra* note 2, at 76-78.

⁴³ See generally *supra* notes 2 and 25 and accompanying text. *But see supra* notes 38-41 and accompanying text.

⁴⁴ *Flaks*, *supra* note 2, at 371-72.

⁴⁵ See *supra* note 16 and accompanying text.

⁴⁶ 410 N.E.2d 1207 (Mass. 1980).

⁴⁷ 410 N.E.2d at 1216 (citing *In re a Minor*, 393 N.E.2d 379, 383 (1979)). See also *S.N.E. v. R.L.E.*, 699 P.2d 875, 879 (Alaska 1985) ("It is impermissible to rely on any real or imagined social stigma attaching to the Mother's status as a lesbian."); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) ("This court cannot take into consideration the

Curiously, the Virginia Supreme Court had quoted with approval the *Bezio* case in *Doe v. Doe*,⁴⁸ holding a natural parent's homosexual orientation in Virginia did *not* render her an unfit parent *per se* in an adoption case, but the Virginia Supreme Court declined to follow *Bezio* in the subsequent case of *Roe v. Roe*.⁴⁹ Moreover, the Virginia Court of Appeals applied the "nexus" approach in two subsequent child custody disputes involving heterosexual custodial parents who had cohabited with their lovers in the same household.⁵⁰

The trial and appellate judges in *Bottoms v. Bottoms* thus had to determine whether Virginia should apply a *per se* approach, a middle ground "presumptive" approach, or a "nexus" approach in this particular child custody dispute involving a lesbian mother and a heterosexual grandmother.

unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship."); *M.P. v. S.P.*, 404 A.2d 1256, 1262-63 (N.J. Super. Ct. App. Div. 1979) (holding that the risk of social condemnation "does not necessarily portend" that the child's "moral welfare or safety will be jeopardized"). *C.f.* *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that the likelihood of private bias against the child of an interracial couple is an impermissible basis for transferring custody).

⁴⁸ 284 S.E.2d 799, 806 (Va. 1981) (quoting *Bezio*, 410 N.E.2d at 1215-16). The court further stated:

If Jane Doe is an unfit parent, it is solely her lesbian relationship which renders her unfit, and this must be to such an extent as to make the continuance of the parent-child relationship heretofore existing between her and her son detrimental to the child's welfare. The petitioners introduced no evidence, scientific or otherwise, to establish this fact. Regardless of how offensive we may find Jane Doe's life-style, its effect on her son's welfare is not a matter of which we can take judicial notice.

Id. at 805. The Virginia Supreme Court therefore applied a "nexus" approach in this particular case.

⁴⁹ See *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985). *Roe* is discussed *supra* in notes 27-30 and accompanying text.

⁵⁰ See *Sutherland v. Sutherland*, 414 S.E.2d 617 (Va. Ct. App. 1992); *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992). *But see* SWISHER ET AL., *VIRGINIA FAMILY LAW: THEORY AND PRACTICE* 154 (Supp. 1994) ("Whether *Sutherland* and *Ford* reflect what the Supreme Court of Virginia would hold under similar circumstances remains to be seen.").

III. PAMELA KAY BOTTOMS v. SHARON LYNNE BOTTOMS

A. *History of the Dispute*

In February of 1993, Pamela Kay Bottoms (Kay), Tyler's grandmother, sued for custody of her grandson. According to Kay, she did this because she thought Tyler would "end up getting hurt" by being exposed to the open lesbian relationship between his mother, Sharon Bottoms, and her lover, April Wade.⁵¹ Sharon's version of Kay's motivation, however, was that Sharon and April had refused to allow Tyler to stay with Kay on the weekends.⁵²

The initial custody hearing was held in the Henrico County, Virginia Juvenile and Domestic Relations District Court before Judge William G. Boice on March 31, 1993. The hearing lasted only 45 minutes and resulted in a one-paragraph order granting custody of Tyler to Kay and allowing Sharon reasonable visitation with her son "but not in the presence of her lesbian lover."⁵³

Following Judge Boice's ruling, Deborah Kelly, a staff writer for the *Richmond Times Dispatch*, picked-up the Bottoms' child custody dispute, and thereafter news of this intergenerational battle between a lesbian woman and her disapproving mother traveled quickly through the United States, as well as several foreign countries. According to *The New York Times*, the ruling "delivered a legal shock to the nation's homosexuals."⁵⁴

⁵¹ Trial Court Transcript at 69, *Bottoms v. Bottoms*, CH93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993).

⁵² See Deborah Kelly, *Case Pits Mother Against Daughter*, RICHMOND TIMES DISPATCH, April 19, 1993 at B-1. This article discusses that Sharon elaborated on her reasons for this action by explaining that following a period of professional counseling, she confronted Kay with the fact that as a teenager Sharon had been sexually abused on approximately 800 occasions by Kay's live-in lover of seventeen years, Tommy Conley. [Sharon's allegation of sexual abuse by Tommy Conley was later corroborated in a voluntary polygraph test submitted on Sharon by David E. Boone, guardian ad litem for Tyler.] Sharon decided at that point it would be best if Tyler spent less time at Kay's house when Tommy Conley was present. Kay subsequently ordered Tommy to move out of her house during the custody dispute because her lawyer "thought it would be best."

⁵³ *In re Doustou*, No. J-32, 113-01 (Henrico County, Va. Juvenile and Domestic Relations Dist. Ct. March 31, 1993). Judge Boice cited *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) as precedent, apparently applying *Roe* as a *per se* rule. See *supra* notes 27-30 and accompanying text.

⁵⁴ B. Drummond Ayers, Jr., *Judge's Decision in Custody Case Raises Concerns*, TIMES, Sept. 9, 1993, at A16.

The American Civil Liberties Union of Virginia offered to represent Sharon in her *de novo* appeal of Judge Boice's decision to the Henrico County Circuit Court.⁵⁵ Donald K. Butler, a prominent Richmond family law practitioner, agreed to work with the ACLU on a pro bono basis as a "cooperating attorney."⁵⁶ Richard R. Ryder, a noted criminal defense attorney in Richmond, represented Kay Bottoms. One local newspaper columnist described Ryder as "the eminently quotable, even outspoken, good ol' boy with a law degree, who got locally famous decades ago by representing criminals and occasionally running for Congress or the City Council."⁵⁷

On September 7, 1993, Judge Buford M. Parsons heard the six-hour emotionally-charged *de novo* hearing in the Henrico County, Virginia Circuit Court. A capacity crowd, which included various wire services' reporters, numerous newspaper reporters for publications ranging from the *New York Times* to *USA Today*, and a courtroom artist from a major television network, attended the hearing.

Richard Ryder, attorney for Kay Bottoms, who had the burden of going forward with the evidence, first called Sharon Bottoms as an adverse witness. Through Sharon, Mr. Ryder established that Sharon and April Wade frequently would hug and kiss each other in their home and occasionally pat each other on the bottom.⁵⁸ Sharon also admitted during her testimony that

⁵⁵ Bottoms v. Bottoms, No. CH93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993). Stephen B. Pershing represented Sharon as co-counsel for the ACLU. See *supra* notes 4 and 7 and accompanying text.

⁵⁶ See *supra* note 8 and accompanying text.

⁵⁷ Ray McAllister, *Virginia is for Talk Shows*, RICHMOND TIMES DISPATCH, Sept. 15, 1993, at B1. Mr. Ryder previously had gained national attention in the legal community, and particularly in law school legal ethics courses, as the defendant in *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967).

⁵⁸ Trial Court Transcript at 10-11, Bottoms v. Bottoms, CH93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993). This section of the trial court transcript would be quoted numerous times by Mr. Ryder. See Appellee's Appellate Brief at 3, Bottoms v. Bottoms, 444 S.E.2d 276 (Va. Ct. App. 1994) and Petition for Appeal of Pamela Kay Bottoms at 7, Virginia Supreme Court. Mr. Ryder also used these words in describing Sharon's "homosexual conduct" on the syndicated "Sally Jesse Raphael Show" and on CNN's "Larry King Live."

she and April engaged in oral sex once or twice a week.⁵⁹ There was testimony that Sharon had “screamed” at Tyler, had “popped him on his leg too hard a couple of times” and had “left fingerprints on his leg.”⁶⁰

Kay Bottoms, in her testimony, described a situation where Tyler, after visiting with Sharon, told himself to go and stand in the corner. A photograph was introduced displaying this conduct.⁶¹ There was also testimony that Tyler screamed and cried when Sharon and April came to pick him up from Kay's house, and that he didn't want to leave with Sharon and April.⁶² Additionally, evidence was presented when Tyler was brought back to Kay's home after Tuesday night visitations with his mother, that Tyler could not sit down in the bathtub because Sharon had neglected to change his diapers.⁶³ However, on cross-examination by Tyler's guardian *ad litem*, David Boone, Kay admitted that she had no reason to believe that Tyler had been physically abused.⁶⁴ Two additional witnesses were called in Kay's case in chief, Kenneth Wayne Bottoms, Sharon's brother, and Angela Price, a friend of Kay's, who both testified that in their opinion Sharon was not a good mother, and that they did not approve of Sharon's lesbian lifestyle with April Wade.⁶⁵

Sharon Bottoms' attorneys called Carolyn Campbell, a court psychologist, on Sharon's behalf. Ms. Campbell testified she had evaluated Sharon, Kay, and Tyler by running them through a full battery of psychological tests. A report of her finding was presented into evidence. Ms. Campbell testified she had observed Tyler with Kay and with Sharon, and found that Tyler was “very comfortable” with the both of them, that Sharon set limits when they were

⁵⁹ Trial Court Transcript at 12.

⁶⁰ *Id.* at 45. Evidence also was presented that Sharon had cursed in front of Tyler, that Tyler used the words “shit” and “damn” that were not used in his grandmother's home, that Tyler often had temper tantrums, and that Sharon had been absent for unexplained periods of time when Tyler was staying at Kay's home.

⁶¹ *Id.* at 56.

⁶² *Id.* at 57.

⁶³ *Id.* at 70.

⁶⁴ *Id.* at 83.

⁶⁵ *Id.* at 91-98. Ms. Price also testified that April Wade had threatened that she “might end up killing somebody.” *Id.* at 97. Further evidence was presented that April Wade is a recovering alcoholic who has a child now living in North Carolina with his adoptive parents. *Id.* at 41, 49.

necessary, and that Kay was “less flexible and probably more rigid in her perception of parenting.”⁶⁶

Sharon's attorneys then called Dr. Rochelle Klinger, a psychiatrist at the Medical College of Virginia, who testified she had met with Sharon and April in an effort to assess Sharon's mental health as an individual and the mental health of Sharon and April as a couple. She expressed her opinion that they were “a healthy, well-functioning couple and interacted very well together.”⁶⁷

David Boone, the court-appointed guardian *ad litem* for Tyler, brought in as an expert witness a noted child psychologist, Dr. Charlotte Patterson. Dr. Patterson testified concerning extensive research she had conducted in the area of social and personal development of children and adolescents, and more specifically the effects of gay and lesbian parenting on child development.⁶⁸ Dr. Patterson expressed her opinion, derived from her own studies as well as reviewing the research of others,⁶⁹ that “children of lesbian parents are equally as solid in their gender identity as masculine or feminine as are children of heterosexual parents.”⁷⁰ In addition, she stated “children of lesbian mothers are equally likely to exhibit the expected gender role behavior as are kids of heterosexual parents.”⁷¹ In response to a question concerning the possibility that children of lesbian and gay parents will be taunted and teased by their peers, Dr. Patterson responded:

[A]ll children are going to be teased, aren't they, about something, and most families differ from the average in some way or another, and many of us are, in fact, teased for those reasons. What's important is not whether or not teasing occurs, in my opinion, but how it's handled and whether the child has the support of a loving parent in learning to deal with it.⁷²

⁶⁶ *Id.* at 139-41.

⁶⁷ *Id.* at 153-54.

⁶⁸ See Patterson, *supra* note 2.

⁶⁹ See *supra* notes 2 and 25 and accompanying text.

⁷⁰ Trial Court Transcript at 118.

⁷¹ *Id.* at 123.

⁷² *Id.*

At the conclusion of the testimony, counsel argued their respective positions. Richard Ryder, on behalf of Kay Bottoms, urged the court to follow the precedent of the 1985 Virginia Supreme Court case of *Roe v. Roe*.⁷³ Mr. Ryder argued *Roe* stood for the proposition that a homosexual relationship renders a parent *per se* unfit as a matter of law.⁷⁴ On the other hand, Donald Butler, on behalf of Sharon Bottoms, urged the court to reject the *per se* approach espoused by Mr. Ryder and asked the court instead to apply a "nexus" test as found in the 1981 Virginia Supreme Court case of *Doe v. Doe*.⁷⁵ Mr. Butler also argued that the *Roe* decision should be distinguished from *Bottoms* because *Roe* was a case involving a parent versus parent child custody dispute which applied a preponderance of the evidence rule, whereas *Bottoms* involved a parent versus third party dispute which required proof of parental unfitness by clear and convincing evidence.⁷⁶

Mr. Boone, the court-appointed guardian *ad litem* for Tyler, concluded as follows:

The homosexual issue does not alarm me. And I will tell the Court that in my opinion, for whatever it's worth, I believe that a homosexual should be allowed to raise a child. I have no question with that whatsoever, if the particular parent is a good parent. . . . I don't think the fact a parent's sexual orientation is different than the mainstream should in and of itself be a litmus test as to whether that parent should be allowed to raise the child.

But in this case, we have a situation where Sharon is living openly with another homosexual. They are kissing and hugging in front of the child, and obviously they are not married to one another because they can't marry one another. But the bottom line is whether April was a man or woman, I would have the same problem. Two adults raising a child without benefit of marriage, to me influences me, for whatever it's worth. And I think as guardian *ad litem* I've got to say through my eyes that it would be in the best interests of Tyler to be with the grandmother because of that relationship.⁷⁷

⁷³ 324 S.E.2d 691 (Va. 1985).

⁷⁴ See *supra* notes 27-30 and accompanying text.

⁷⁵ 284 S.E.2d 799 (Va. 1981) ("We are not prepared to say that homosexuals are *per se* unfit to have custody of their children . . ."). See also *supra* notes 45-50 and accompanying text.

⁷⁶ See, e.g., *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986).

⁷⁷ Trial Court Transcript at 188-89, *Bottoms v. Bottoms*, CH 93JA0517-00 (Henrico Co.,

After a short recess, Judge Parsons rendered his decision:

There is no case directly on point concerning all of these matters. In the case of *Roe v. Roe*, it's certainly of assistance to me in reaching a decision here today. I will tell you first that the mother's conduct is illegal. It is a Class 6 felony in the Commonwealth of Virginia. I will tell you that it is the opinion of this Court that her conduct is immoral. And it is the opinion of this Court that the conduct of Sharon Bottoms renders her an unfit parent.⁷⁸

Disregarding the testimony and the empirical social science data presented by Dr. Charlotte Patterson,⁷⁹ Judge Parsons then quoted the pivotal excerpt in *Roe v. Roe*⁸⁰ concerning the perceived "social condemnation" which would "inevitably afflict" the child. He stated:

I find that to be applicable in this case. I further find that in addition to this, there is other evidence of the child being affected or afflicted with the evidence which is un rebutted of the cursing, the evidence of the child standing in the corner.

From all the facts and circumstances that I have heard here today, all the circumstances of the case, it is the order of the Court that the custody will be with the grandmother, Kay Bottoms. That Sharon, the mother will have visitation specifically on Monday.⁸¹

Va. Cir. Ct. Sept. 7, 1993). Mr. Butler responded to Mr. Boone's comments: "[O]ne of the things [Sharon] can't do is she can't make herself an honest woman and marry April. If this were as Mr. Boone compares it to a heterosexual situation, she doesn't have that option. So she stands before you asking the Court to consider her right to have an association with her son, and her son with her . . . a relationship that she intends to be permanent, as permanent as any relationship can be these days." *Id.* at 192.

⁷⁸ *Id.* at 196.

⁷⁹ See *supra* notes 68-72 and accompanying text.

⁸⁰ See *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (citing *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980)).

⁸¹ Trial Court Transcript at 197, *Bottoms v. Bottoms*, CH 93JA0517-00 (Sept. 7, 1993).

Thus, Judge Parsons, like Judge Boice before him,⁸² once again applied *Roe v. Roe* in a *per se* manner to the *Bottoms* case.⁸³

B. *The Media Reaction to the Bottoms Case*

Following the initial custody hearing in the Juvenile and Domestic Relations District Court,⁸⁴ Deborah Kelly, a staff writer for the *Richmond Times Dispatch*, described Tyler's custody battle in an article entitled "Case Pits Mother Against Daughter."⁸⁵ "Are lesbians unfit mothers?" she asked. "The case exemplifies what the gay community says is homosexual discrimination at its most fundamental level."⁸⁶ The story immediately caught the attention of the gay and lesbian community and the American Civil Liberties Union. Kent Willis, Director of the ACLU of Virginia: "The simple matter is that the grandparent doesn't approve of her daughter's lifestyle and feels that she is moralistically superior to her daughter because she's heterosexual." He also stated that because of President Clinton's stand on gays in the military, "it's perceived as political dynamite."⁸⁷

In a subsequent article dated May 23, 1993, Ms. Kelly reported, "Civil rights lawyers say the Virginia ruling is one of the most blatantly anti-gay in the country."⁸⁸ The Executive Director of the National Center for Lesbian Rights, San Francisco attorney Elizabeth Henderickson,⁸⁹ was quoted as saying: "Virginia is the only state that has explicitly declared that being a lesbian is an adequate reason to lose custody of your child. . . . Virginia is on the far end of the spectrum in terms of having institutionalized through a court decision homophobia that denies women custody of their kids."⁹⁰

⁸² See *supra* note 53 and accompanying text.

⁸³ See Pershing, *supra* note 4, at 312-18.

⁸⁴ See *supra* note 53 and accompanying text.

⁸⁵ Deborah Kelly, *Case Pits Mother Against Daughter*, RICHMOND TIMES DISPATCH, April 19, 1993, at B1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Deborah Kelly, *Lesbian Gets Ally the ACLU*, RICHMOND TIMES DISPATCH, May 23, 1993, at A1.

⁸⁹ Ms. Henderickson later contributed to the preparation of an amicus curiae brief on Sharon's behalf and on behalf of the National Center for Lesbian Rights, et al. See *supra* note 11.

⁹⁰ Deborah Kelly, *Lesbian Gets Ally the ACLU*, RICHMOND TIMES DISPATCH, May 23,

On September 6, 1993, a day before the Henrico County Circuit Court hearing, a wire report from the Associated Press announced "Gay rights advocates are closely watching a potential landmark case in Virginia, where a judge will consider whether a woman may retain custody of her lesbian daughter's two-year-old son."⁹¹ The article quoted Sharon's lawyer, Donald Butler, as stating "The question is whether a parent should be disqualified because of her sexual orientation or lifestyle." Ann Kincaid, spokesperson for the Family Foundation, however, countered "Is it discrimination based on sexual orientation, or is it child protection based on the mother's sexual behavior?"⁹²

By September 7, 1993 hearing in the Henrico County Circuit Court, Tyler's custody battle had reached far beyond the boundaries of the Commonwealth of Virginia, and had received attention not only from the gay community and several conservative groups, but from families of all descriptions and the nation at large. The case was broadcast as a lead story on all the major television news networks across the country, and once the story was reported in the news wires, the *Bottoms* case made headlines not only throughout the United States, but also in foreign newspapers ranging from the *Ottawa Citizen* and *Calgary Herald* in Canada to the *Agence France Presse* in Europe. National Public Radio's "All Things Considered," NBC's "The Today Show," ABC's "Good Morning America," CBS's "Morning News," and a call-in poll conducted on "Fox News at Noon" in New York City all discussed the *Bottoms* case.

Both sides were immediately barraged with numerous requests to appear on television news and talk shows. Richard Ryder, Kay's attorney, appeared on CBS's "Eye to Eye with Connie Chung", along with Sharon Bottoms and April Wade. The following week Sharon and her attorney Donald Butler

1993, at A1.

⁹¹ Associated Press, *Woman Seeks to Keep Lesbian Daughter's Son—The Mother's Only Alleged Parental Shortcoming Has Been Her Sexuality*, NORFOLK VIRGINIAN-PILOT, September 6, 1993, at D2.

⁹² *Id.*

appeared on CNN's "Larry King Live." The show included a time for viewers to call in and ask questions of the guests and, not surprisingly, two of the callers that evening were Richard Ryder, Kay's attorney, and David Boone, the guardian *ad litem* for Tyler. The *Bottoms* story also aired as a segment of CBS's "20/20" and ABC's "Prime Time Live." Kay Bottoms appeared with Richard Ryder on the Sally Jesse Raphael Show, and Mr. Ryder appeared on the Geraldo Rivera Show.

Newspapers and magazines around the country reported the *Bottoms* case "stirred praise of conservatives and outrage of gay activists."⁹³ "Conservatives hailed the judge's ruling as a vindication of crusades against legitimizing homosexuality. Liberals denounced its prejudice masquerading as jurisprudence."⁹⁴ The story "touched a nerve"⁹⁵ and "provoked a national uproar."⁹⁶ One local reporter described the media barrage surrounding the *Bottoms* case as "a cause celebre for and against gay rights, and it's brought a national spotlight [on Virginia]. . . . What is a family tragedy — any way you look at it — became a sociological study and, in turn, material for all those TV hours that need to be filled."⁹⁷ What was seldom, if ever, discussed in all this media attention over Sharon's lesbian lifestyle in the *Bottoms* child custody dispute, however, was the best interests of young Tyler.

C. Sharon Bottoms' Appeal to the Virginia Court of Appeals

As expected, Sharon Bottoms' attorneys appealed Judge Parsons' circuit court decision⁹⁸ to the Virginia Court of Appeals, Virginia's intermediate appellate court. Sharon's attorneys requested an expedited appeal based on the detrimental impact that a long separation would have on young Tyler. Oral arguments were heard by a three-member panel on February 16, 1994, sooner than it normally would have been argued in the regular course of the appellate

⁹³ *Lesbian Ruling Stirs Fury, Praise* USA TODAY, September 9, 1993, at A3.

⁹⁴ William A. Henry, III, *Gay Parents: Under Fire and on the Rise*, TIME, September 20, 1993, at 66.

⁹⁵ *Custody Ruling Fuels Gay Rights Discussion*, CHICAGO TRIBUNE, September 12, 1993, at 25.

⁹⁶ *Id.*

⁹⁷ Ray McAllister, *Virginia is for Talk Shows*, RICHMOND TIMES DISPATCH, September 15, 1993, at B1.

⁹⁸ See *supra* notes 78-83 and accompanying text.

process. Although Sharon's lawyers were hopeful that they might also receive a prompt ruling, it was not until June 21, 1994, the Virginia Court of Appeals reached a decision, almost a month after the Virginia Court of Appeals rendered a decision in another case argued on the same day as the *Bottoms* appeal.⁹⁹

1. *The Appellant's Argument*

The major focus of Sharon Bottoms' Appellant Brief and oral argument was to distinguish the *Bottoms* case from *Roe v. Roe*.¹⁰⁰ The primary distinction was that *Roe* involved a custody dispute between two parents, whereas *Bottoms* was a custody dispute between a parent and a third party grandmother.¹⁰¹ This distinction was crucial. If a third party, including a grandmother, wants to deprive a parent of the custody of his or her child under Virginia law, that party must prove parental unfitness by clear and convincing evidence, rather than by a preponderance of the evidence, the evidentiary test in *Roe*.¹⁰² Moreover, if the parental presumption is rebutted, then the court must go on to determine whether or not the best interests of the child require that custody be transferred to the third party.¹⁰³

⁹⁹ See, e.g., *Smith v. Smith*, 444 S.E.2d 269 (Va. Ct. App. 1994) (argued on February 16, 1994 and decided on May 24, 1994).

¹⁰⁰ 324 S.E.2d 691 (Va. 1985).

¹⁰¹ See *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (using preponderance of evidence rule in parent versus parent custody battle). *But cf.* *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986) (requiring proof of parental unfitness by clear and convincing evidence in parent versus third party custody dispute).

¹⁰² See *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986). In order to rebut the parental presumption, a third party must prove by clear and convincing evidence that: (1) the natural parent is unfit, (2) the natural parent has already been divested of custody, (3) the natural parent has voluntarily relinquished custody, (4) the natural parent has abandoned the child, or (5) special circumstances present a truly extraordinary reason for taking the child away from the parent. *Id.* at 827. To rebut the parental presumption by proving "special circumstances," the third party must prove by clear and convincing evidence that the child will be seriously harmed if custody remains with the natural parent. See *Mason v. Moon*, 385 S.E.2d 242, 245-46 (1989).

¹⁰³ *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973).

Sharon then argued there had been no showing by clear and convincing evidence that she was an unfit mother, so the parental presumption had not been rebutted, and therefore the second "best interests" test need not be addressed.

The brief then cited four reasons why the circuit court's ruling was "plainly wrong" and based on insufficient evidence. First, Sharon argued the circuit court was wrong in holding Sharon was an unfit parent solely based on her same-sex relationship with April Wade. Instead, a parent's private sexual conduct should be considered as only one factor in any child custody determination, utilizing the better-reasoned nexus approach.¹⁰⁴ Second, Sharon argued the circuit court was wrong in applying *Roe* to a third party versus parent child custody dispute.¹⁰⁵ Third, Sharon contended the court erred because expert testimony presented in the case, based upon credible social science evidence published since the *Roe* decision, negated any presumption or conclusion that a parent in a same-sex relationship is *per se* an unfit custodian.¹⁰⁶ Fourth and finally, Sharon asserted the circuit court erred because Kay Bottoms did not introduce any other evidence of unfitness or special circumstances, and certainly not any evidence sufficient to rebut the parental presumption in favor of Sharon Bottoms by clear and convincing evidence.¹⁰⁷

¹⁰⁴ See *supra* notes 42-50 and accompanying text. The brief cited these cases as persuasive authority. The brief also cited as mandatory authority the cases of *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981); *Sutherland v. Sutherland*, 414 S.E.2d 617 (Va. Ct. App. 1992); and *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992), all applying a nexus approach in child custody disputes.

¹⁰⁵ See *supra* notes 100-03 and accompanying text.

¹⁰⁶ See *supra* notes 25 and 68-72 and accompanying text. Sharon's brief also argued if homosexual parents are held to be unfit parents for engaging in conduct prohibited by a state sodomy statute, so too should heterosexual parents. "If the Court's illegality rationale for depriving Sharon of custody of her son were [sic] proper, the same reasoning should first have compelled a finding that Kay's illegal behavior with Tommy Conley over almost two decades rendered her an unfit custodian, and her petition should have been denied. . . . Without a showing of some nexus between Sharon's relationship with April and some harm to the child, the unprosecuted illegal behavior of Sharon is irrelevant to Kay's burden of proving the mother's unfitness." Brief of Appellant at 13. See also *supra* notes 21-22 and 52 and accompanying text.

¹⁰⁷ Citing *Mason v. Moon*, 385 S.E.2d 242 (Va. Ct. App. 1989) (holding that "when determining whether a non-parent's evidence is sufficient to rebut the presumption in favor of

Arguably, one area was not sufficiently addressed in the brief for Sharon Bottoms, except in a footnote: Judge Parsons' appointment of David Boone as independent counsel to act as Tyler's guardian *ad litem* in an attempt to determine Tyler's best interests. Although the guardian *ad litem* played a significant role in the circuit court hearing, especially by presenting the testimony of Dr. Charlotte Patterson,¹⁰⁸ in the end, Mr. Boone's custody recommendation went against Sharon.¹⁰⁹ Judge Parsons made no express reference in his ruling to the guardian *ad litem*'s custody recommendation, so there is no way of knowing how much weight Judge Parsons placed on Mr. Boone's recommendation that Kay Bottoms be granted custody of Tyler.¹¹⁰

2. *The Appellee's Argument*

Kay Bottoms' attorney, Richard Ryder, wrote her Appellee's Brief. It was nine pages long, including the certificate of service page, and cited only two cases in the table of authorities. Predictably, one of those cases was *Roe v. Roe* which Mr. Ryder argued constituted a *per se* rule of parental unfitness.¹¹¹ The other case was a 1949 Virginia Supreme Court case standing for the proposition that in appellate conflicts the Court of Appeals should resolve the burden of proof in favor of the prevailing party.¹¹²

After a very brief statement of the facts, Mr. Ryder blamed the American Civil Liberties Union for creating and exploiting the *Bottoms* controversy. "The American Civil Liberties Union (ACLU) by its advice created the controversy that now exists and seeks to have this Court resolve this case

granting custody to a natural parent, the trial court must consider all the evidence before it" and "a parent and child will not be deprived of one another based on surmise and conjecture").

¹⁰⁸ See *supra* notes 68-72 and accompanying text.

¹⁰⁹ See *supra* note 77 and accompanying text.

¹¹⁰ Subsequently, however, the Virginia Supreme Court placed great weight on the guardian *ad litem*'s custody recommendation. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995).

¹¹¹ *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

¹¹² *Nelson v. Liggan*, 56 S.E.2d 54 (Va. 1949).

solely upon the lesbian issue.”¹¹³ Mr. Ryder attacked the ACLU for advising Sharon “she could move back in with April and assert her right as a lesbian and regain custody of Tyler, thereby creating the lesbian controversy which is presently before the Court.”¹¹⁴ Stated somewhat differently three pages later, “Sharon decided to ‘take a chance’ with the custody of Tyler and moved back into April’s apartment upon the advice of the ACLU.”¹¹⁵

Unlike Sharon Bottoms’ Appellant Brief, the custody recommendation of the guardian *ad litem* favoring Kay over Sharon was prominently mentioned in the Appellee’s Brief.¹¹⁶ However, having had the benefit of the Appellant’s Brief — with its multiple arguments and extensive references to leading case law and empirical studies — it is surprising that Mr. Ryder made no effort to rebut many of these arguments made by the Appellant. There was no reference, for example, in Mr. Ryder’s brief to the presumption in favor of parental custody, or to Kay Bottoms’ burden of proof.¹¹⁷ Nor did Mr. Ryder attempt to rebut any proffered empirical social science evidence.¹¹⁸

3. *Amicus Curiae* Briefs

a. *Brief of the American Academy of Child and Adolescent Psychiatry et al. [The AACAP Brief]*

A formidable *amicus curiae* brief was filed in support of Sharon Bottoms on behalf of the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, the National Association of Social Workers, Inc., and the Virginia Chapter of the National Association of Social

¹¹³ Brief of Appellee Pamela Kay Bottoms at 1-2.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 5.

¹¹⁶ “Based upon his extensive investigation, he concluded that the best interests of Tyler would be for Kay to have custody of Tyler.” *Id.* at 7.

¹¹⁷ See *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (using preponderance of evidence for custody disputes between parents). *But cf.* *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986) (using clear and convincing standard for custody disputes between a parent and a third party). See also *Mason v. Moon*, 385 S.E.2d 242, 245-46 (Va. Ct. App. 1989) (holding that, to prove special circumstances, third party must prove by clear and convincing evidence that the child will be seriously harmed if custody remains with the natural parent).

¹¹⁸ See *supra* note 25 and *infra* notes 120-31 and accompanying text.

Workers, Inc.¹¹⁹ This well-documented "Brandeis brief" presented an extensive listing of 45 social science studies and related articles¹²⁰

¹¹⁹ Dr. Rochelle L. Klinger, a psychiatrist at the Medical College of Virginia, who was one of the witnesses at the *Bottoms* hearing in the Henrico County Circuit Court, was a substantial contributor to the preparation of this particular brief. Trial Court Transcript at 153-54, *Bottoms v. Bottoms*, CH 93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993). Counsel for this amicus curiae brief were Carolyn F. Corwin, Christopher A. Crain, and E. Gary Spitko of Covington & Burling, Washington D.C., and Steven W. Bricker of Bricker & Associates, Richmond, Virginia.

¹²⁰ These articles included: Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity in LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH AND CLINICAL APPLICATIONS* (Beverly Greene & Gregory M. Herek, eds., 1994); American Psychiatric Association, *Position Statement on Homosexuality*, April, 1993; National Association of Social Workers, Delegate Assembly, *Policy Statement on Lesbian and Gay Issues*, August, 1993; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 *CHILD DEVELOPMENT* 1025 (1992); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *LAW & SEXUALITY* 133 (1991); Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, in *HOMOSEXUALITY AND THE FAMILY* 137 (Frederick W. Bozett, ed., 1989); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *HOMOSEXUALITY AND THE FAMILY* 155 (Frederick W. Bozett, ed., 1989); Julie S. Gottman, *Children of Gay and Lesbian Parents*, in *HOMOSEXUALITY AND THE FAMILY* 177 (Frederick W. Bozett, ed., 1989); American Psychological Association, *Policy Statements on Lesbian and Gay Issues*, 1987; Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 *ARCHIVES OF SEXUAL BEHAVIOR* 167 (1986); Steve Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 *U.C.L.A. L. REV.* 852 (1985); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychological and Psychiatric Appraisal*, 24 *J. CHILD PSYCHOL. & PSYCHIATRY* 551 (1983); Beverly Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 *AM. J. ORTHOPSYCHIATRY* 536 (1981); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 *AM. J. ORTHOPSYCHIATRY* 545 (1981); Judith A. Miller et al., *The Child's Home Environment for Lesbian v. Heterosexual Mothers: A Neglected Area of Research*, 7 *J. HOMOSEXUALITY* 49 (1981); Karen G. Lewis, *Children of Lesbians: Their Point of View*, 25 *SOC. WORK* 198 (1980); Bernard F. Reiss, *Psychological Tests in Homosexuality*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (Judd Marmor, ed., 1980); Brian Miller, *Gay Fathers and Their Children*, 28 *FAM. COORDINATOR* 544 (1979); ALAN P. BELL & MARTIN S. WEINBURG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *AM. J. PSYCHIATRY* 692 (1978). See also *supra* note 25 and accompanying text.

accumulated in an effort to bring the Virginia Court of Appeal's attention to "the principal body of scientific knowledge pertinent to the questions posed in this case."¹²¹

In addition to the applicable case law dealing with parental presumptions,¹²² the AACAP Brief contained empirical research from the social and behavioral sciences pertaining to children and to sexual orientation.¹²³ According to this empirical social science literature, lesbians and gay men have parenting skills comparable to those of heterosexual parents, and "any presumption of unfitness rests on prejudice and false stereotypes."¹²⁴ In a Resolution dated December 15, 1973, the American Psychiatric Association declared that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."¹²⁵ Moreover, "[t]he social science literature does not indicate that lesbians and gay men are likely to have traits that would diminish their effectiveness as parents."¹²⁶ The AACAP Brief addressed the effect on children being raised by a lesbian mother or gay father and concluded the social science literature "has consistently found that children raised by lesbian mothers or gay fathers do not differ significantly from those raised by heterosexual parents."¹²⁷ In fact, the AACAP Brief noted the conclusion that the overall psychological health of these children does not differ from that of children raised by heterosexual parents.¹²⁸

In short, the AACAP Brief persuasively argued that current empirical social science research does not substantiate the subjective fear expressed by the court in *Roe v. Roe*¹²⁹ of placing a so-called "intolerable burden" on the

¹²¹ Brief of Amicus Curiae American Academy of Child and Adolescent Psychiatry et al. [hereinafter AACAP Brief] at 3, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹²² See *supra* notes 100-03 and accompanying text.

¹²³ Brief of Amicus Curiae American Academy of Child and Adolescent Psychiatry et al. at 7, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹²⁴ *Id.*

¹²⁵ *Id.* at 9.

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 14, (referring to Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEVELOPMENT 1025 (1992)).

¹²⁸ *Id.* at 15.

¹²⁹ See *supra* note 30 and accompanying text.

child. To the contrary, a court does far more harm than good when it removes the child from his or her gay or lesbian parent to "protect" the child from the possibility of future taunting.¹³⁰ Thus, the AACAP Brief concluded the *Bottoms* case should be decided without reference to a *per se* presumption of parental unfitness because "the presumption is wholly unsupported by social science research" and "its application undermines the statutory mandate that custody determination be based on the best interests of the child."¹³¹

b. Brief of the American Academy of Matrimonial Lawyers

An amicus curiae brief of the American Academy of Matrimonial Lawyers¹³² argued "any presumption that a homosexual parent is 'unfit' for custody simply by virtue of his or her homosexuality is a doctrine based upon prejudice and stereotypes which deprives a parent of fundamental rights and privileges guaranteed under the United States Constitution while simultaneously ignoring the best interests of the child."¹³³ The brief presented a number of social science studies¹³⁴ and judicial decisions¹³⁵ to support its

¹³⁰ Brief of Amicus Curiae American Academy of Child and Adolescent Psychiatry et al. at 21.

¹³¹ *Id.* at 26. By extending *Roe* to cases such as *Bottoms*, it may very well lead to a decision that would deprive the child of "the person with whom he or she shares the most important bond in his or her life, with significant negative psychological effects on the child." *Id.* at 29.

¹³² The American Academy of Matrimonial Lawyers is a national organization of 1,250 matrimonial attorneys from 46 states who specialize in all aspects of family law. Counsel for this amicus curiae brief included Lawrence D. Diehl, of Hopewell, Virginia, who was then serving as the Chair of the Family Law Section of the Virginia State Bar; Cynthia L. Greene of Elser, Greene & Hodor, Miami, Florida; and Melvyn B. Frumkes of Miami, Florida.

¹³³ Brief of the American Academy of Matrimonial Lawyers at 2, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹³⁴ See Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71 (1988); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Beverly Hoefler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981); Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody*

attack on the underlying rationale of the *per se* rule¹³⁶ and its argument for the recognition and application of the better reasoned “nexus” approach.¹³⁷

“As is manifestly apparent,” argued the brief, the “per se” approach to the determination of parental fitness in the case of homosexual parents is based upon presumptions and rationales that have no legitimate basis in either fact or law. More importantly, however, the “per se” approach as typified by *Roe v. Roe* actually ignores the single most overriding consideration in all custody cases — the best interests of the child.¹³⁸ The best interests of the child are not adequately addressed under the *per se* rule, the brief argued, because the *per se* rule focuses on the parent and not on the child. By determining custody solely on a presumption of unfitness, the court makes no allowance for a judicial determination of the actual welfare of the child, especially if the homosexual parent has the closest relationship to the child as the “psychological parent.”¹³⁹ Moreover, the *per se* test “fails to address the needs and welfare of the child because it limits the court’s consideration of the factors involved in child custody cases to: the presumed immorality of the parent. As such, the myriad elements that should properly comprise a child custody decision are never addressed.”¹⁴⁰

Standard, 32 U.C.L.A. L. REV. 852 (1985); Note, *Custody Denials to Parents in Same Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989); Note, *Developments—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989).

¹³⁵ These cases included *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (Cal. Ct. App. 1967); *Braman v. Braman*, 602 So. 2d 682 (Fla. Dist. Ct. App. 1992); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re Jacinta M.*, 764 P.2d 1327 (N.M. Ct. App. 1988); *Guinan v. Guinan*, 477 N.Y.S.2d 830 (App. Div. 1984); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981); *In re Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986).

¹³⁶ See *supra* notes 18-25 and accompanying text.

¹³⁷ See *supra* notes 42-47 and accompanying text.

¹³⁸ Brief of the American Academy of Matrimonial Lawyers at 1516, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹³⁹ *Id.* at 16-17.

¹⁴⁰ *Id.* at 17.

Consequently, only the “nexus” approach provides a means of protecting a child in the event that there is a valid basis for concern in a given case A homosexual parent might be found to be unfit for any of the many reasons that a heterosexual parent might be found unfit or for reasons directly related to the parent's sexual orientation so long as such valid reasons exist and are demonstrated to the court.¹⁴¹ Under the “nexus” test, therefore, the court “can be assured of having truly served the best interests of the child.”¹⁴²

The American Academy of Matrimonial Lawyers' Brief, therefore, argued Virginia should abandon the *per se* rule in favor of the better reasoned “nexus” approach. What the brief did not discuss in more detail, however, was why the middle ground “presumptive” approach¹⁴³ should likewise be rejected.¹⁴⁴

c. Brief of the National Center for Lesbian Rights, et al. [The NCLR Brief]

Another formidable amicus curiae brief in support of Sharon Bottoms was filed on behalf of the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., Gay and Lesbian Advocates and Defenders, National Lesbian and Gay Law Association, Bay Area Lawyers for Individual Freedom, N.O.W. Legal Defense and Education Fund, Women's Law Project, and Northwest Women's Law Center.¹⁴⁵

¹⁴¹ *Id.*

¹⁴² *Id.* at 18.

¹⁴³ See *supra* notes 34-41 and accompanying text.

¹⁴⁴ For example, the brief recognized that the “various states of the United States have adopted three approaches to determinations of the fitness of a homosexual parent to the custody of his or her child”, Brief of the American Academy of Matrimonial Lawyers at 2, but then the brief subsequently ignored the middle ground “presumptive” approach. See Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71, 75-76 (1988).

¹⁴⁵ Counsel for this brief was Abby Abinanti, Legal Director of the National Center for Lesbian Rights, and Elizabeth Henderickson, Executive Director of the National Center for Lesbian Rights, San Francisco. On brief were Paula Ettlbrick, Rachel Bernstein, Paula Brantner, Catherine Stearne, and Shannon Minter. Local counsel was Pia J. North of Richmond. *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

The NCLR Brief once again reiterated many of the empirical studies cited in the Appellant's Brief¹⁴⁶ and the AACAP Brief¹⁴⁷ in arguing the trial court ignored uncontradicted expert testimony that there is no difference in psychological development between the children of heterosexual and lesbian parents, and that children of lesbian mothers are no more likely to become lesbian or gay than the children of non-lesbian mothers.¹⁴⁸

The NCLR Brief also argued Virginia should adopt the "nexus" approach, because by following *Roe*, the trial court chose a standard inconsistent with the best interests of the child and inconsistent with the national trend necessitating a nexus between the proscribed activity and any detriment to the child.¹⁴⁹ Like the American Academy of Matrimonial Lawyers' Brief,¹⁵⁰ the NCLR Brief recognized there are three judicial approaches concerning a parent's sexual orientation in child custody cases.¹⁵¹ Yet after identifying the middle ground "presumptive" test¹⁵² as well as the *per se* rule and the "nexus" approach, the NCLR Brief — like the American Academy of Matrimonial Lawyers' Brief — basically ignored the middle ground "presumptive" approach without any further discussion regarding its inherent strengths or weaknesses.

Like the Appellant's Brief,¹⁵³ the NCLR Brief argued the trial court failed to apply the strong presumption in favor of leaving custody with a natural parent — a presumption that could only be overcome by clear and convincing evidence of parental unfitness.¹⁵⁴ Moreover, even if *Roe* were erroneously extended to non-parent challenges, the NCLR Brief argued the trial court

¹⁴⁶ See *supra* note 106 and accompanying text.

¹⁴⁷ See *supra* note 120 and accompanying text.

¹⁴⁸ NCLR Brief at 25-32, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹⁴⁹ *Id.* at 22-27. "Other than Virginia, only four states—Arkansas, Missouri, Oklahoma, and Kentucky—hold that a parent's sexual orientation conclusively disqualifies him or her from being a custodial parent in a dispute with a natural parent." *Id.* at 22.

¹⁵⁰ See *supra* notes 143-44 and accompanying text.

¹⁵¹ NCLR Brief at 22.

¹⁵² "Some states hold that a parent's lesbian or gay identity does not preclude custody as a matter of law, but that it creates a rebuttable presumption against custody." *Id.* at 22. See also *supra* notes 34-41 and accompanying text.

¹⁵³ See *supra* notes 101-03 and accompanying text.

¹⁵⁴ NCLR Brief at 2-3.

judge failed to make a separate determination of which placement would be in the child's best interests, based upon the facts of each particular case, as required by Virginia law.¹⁵⁵

Finally, the NCLR Brief argued the application of a *per se* test of parental unfitness when a parent is a lesbian is not justified by the existence of Virginia's sodomy statute because the statute is applicable to heterosexuals as well as homosexuals, because other states with sodomy statutes have not applied those statutes to intraparental disputes, and since no other state has applied the statute to a custody dispute between a parent and a nonparent.¹⁵⁶

D. The Decision of the Virginia Court of Appeals

On June 21, 1994, the Virginia Court of Appeals handed down its decision in *Bottoms v. Bottoms*.¹⁵⁷ The unanimous opinion, written by Judge Sam W. Coleman III, agreed with Appellant Sharon Bottoms¹⁵⁸ that Kay Bottoms had not rebutted the parental presumption in favor of Sharon by clear and convincing evidence.¹⁵⁹

¹⁵⁵ *Id.* at 5-6. "The trial court never undertook an analysis of the best interests of the child. If it had, the only evidence in the record upon which it could have made that requisite finding is the uncontradicted expert testimony that a parent's sexual orientation is not harmful to a child. The trial court in the instant case relied without evidence on its own fears regarding the child's psychological welfare. This is impermissible under Virginia law: Virginia courts have consistently held that before a parent can lose custody to a nonparent, there must be a specific finding that parental custody would harm the child."

¹⁵⁶ *Id.* at 11-20. See also *supra* notes 19-22 and accompanying text.

¹⁵⁷ 444 S.E.2d 276 (Va. Ct. App. 1994).

¹⁵⁸ See *supra* notes 100-03 and accompanying text.

¹⁵⁹ The court wrote:

A child's natural and legal right to the care and support of a parent and the parent's right to the custody and companionship of the child should only be disrupted if there are compelling reasons to do so. *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986). Therefore, in order for a third party, even a grandparent, to be awarded custody of a child in preference to the child's natural parent, the third party must prove by clear and convincing evidence that the parent is unfit or that special circumstances give an extraordinary reason for a transfer of custody. . . .

The custody dispute between Sharon and Kay Bottoms is not governed by the same principles that control a dispute between two parents. When natural parents are

Regarding the facts of this particular case, involving Sharon's conduct and Tyler's best interests, the court of appeals stated:

The most that can be said against Sharon Bottoms, insofar as her parenting is concerned, is that on two occasions she spanked her son "too hard," on occasion she swore in his presence, she had him stand in a corner, and on occasion she had failed to change his diaper. . . .

Although Sharon Bottoms' parenting during this three-year period was far from ideal, she was not indifferent to her child's well-being. Her disciplining of the child, even if by some standards considered intemperate or inappropriate, was not abusive. Her lifestyle in moving several times in a short period, in being unemployed for a time, and in failing to inform her mother of her whereabouts for a week were not acts of neglect or abuse sufficient to render her an unfit custodian. At all times, Sharon Bottoms either cared for the child or assured that proper care was provided for the child. No evidence suggested that any of Sharon Bottoms' actions resulted in psychological, emotional, or physical harm to the child or that her actions constituted neglect or abuse.¹⁶⁰

The Virginia Court of Appeals agreed with the trial court that a lesbian "lifestyle" is one factor to be considered in determining a woman's fitness as a mother because a parent's behavior and conduct in the presence of the child "influences and affects the child's values and views as to the type of behavior

contesting for custody of their child, the court balances the equities between the parents and determines with which parent will the child's best interests be served. *See Roe v. Roe*, 228 Va. 722, 723, 324 S.E.2d 691, 691 (1985). . . .

Unlike parental custody disputes wherein the parents stand on equal legal footing, however, when a third party attempts to divest custody of a child from a natural parent, the presumption of parental fitness must be rebutted before a court may consider whether a third party would be a fit or proper custodian. *Wilkerson v. Wilkerson*, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973). Thus, unless a parent, by his or her conduct or condition, is unfit or is unable and unwilling to provide or care for a child, a court is not entitled to consider whether a third party might be better able to care for a child. . . .

444 S.E.2d at 280.

The court subsequently concluded "[b]ecause we hold that the presumption favoring Sharon Bottoms in this case was not rebutted, we do not decide whether the grandmother, Kay Bottoms, could best provide for the child's needs." 444 S.E.2d at 284.

¹⁶⁰ *Id.*

and conduct that the child will find acceptable.”¹⁶¹ Citing the case of *Doe v. Doe*¹⁶² as authority, however, the court further stated:

The fact that a parent is homosexual does not *per se* render a parent unfit to have custody of his or her child. . . . Thus, the fact that a mother is a lesbian and has engaged in illegal sexual acts does not alone justify taking custody of a child from her and awarding the child to a non-parent. . . .

A parent's private sexual conduct, even if illegal, does not create a presumption of unfitness. . . . In order for the state or a third party to take custody of a child from its natural parent, more is required than simply showing that a parent has engaged in private, illegal sexual conduct, lacks ideal parenting skills, or is not meeting society's traditional or conventional standards of morality. A court will not remove a child from the custody of a parent, based upon proof that the parent is engaged in private, illegal sexual conduct or conduct considered by some to be deviant, in the absence of proof that such behavior or activity poses a substantial threat of harm to a child's emotional, psychological, or physical well-being.¹⁶³

The Virginia Court of Appeals, therefore, rejected the trial court's contention that, based upon *Roe v. Roe*, Virginia law applied a *per se* rule to gay and lesbian parents in child custody disputes.¹⁶⁴

¹⁶¹ *Id.*

¹⁶² 284 S.E.2d 799, 806 (1981).

¹⁶³ 444 S.E.2d at 281-82. The court cited as authority for this rationale the cases of *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981); *Ford v. Ford*, 419 S.E.2d 415, 417 (Va. Ct. App. 1992), and *Sutherland v. Sutherland*, 414 S.E.2d 617, 618 (Va. Ct. App. 1992).

¹⁶⁴ See *supra* notes 26-33, 48-50, 78-83 and accompanying text. The Virginia Court of Appeals held that the trial court erroneously adopted a *per se* rule based upon *Roe v. Roe* for two reasons:

First, the *Roe* case does not stand for the proposition that a homosexual parent is *per se* unfit to have custody of a child. The Court stated in *Roe* “[a]lthough we decline to hold that every lesbian mother or homosexual father is *per se* an unfit parent . . . [this] father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law.”

Second, the *Roe* decision has little or no application to this case because *Roe* involved a dispute between two parents over which was the preferred custodian. 444 S.E.2d at 283 (citations omitted).

Accordingly, since Kay Bottoms had not proven Sharon Bottoms was an unfit mother by clear and convincing evidence,¹⁶⁵ and because lesbianism did not constitute unfitness *per se* in Virginia under either *Roe v. Roe* or *Doe v. Doe*,¹⁶⁶ the Virginia Court of Appeals concluded “that Sharon Bottoms is not to be deprived of custody of her son upon the present record. We reverse and vacate the circuit court’s order and remand the case with directions that the circuit court enter an order effectuating the resumption of custody by the mother of her son.”¹⁶⁷ Predictably, Richard Ryder, attorney for Kay Bottoms, decided to appeal the Virginia Court of Appeals’ decision to the Virginia Supreme Court.¹⁶⁸

E. The Appeal to the Virginia Supreme Court

1. Kay Bottoms’ Petition for Appeal

In her Petition for Appeal to the Virginia Supreme Court, Kay Bottoms’ attorney, Richard Ryder, argued the court of appeals misinterpreted the holding of *Roe v. Roe*, and that *Roe* presented a “substantial constitutional question.”¹⁶⁹ The decision by the court of appeals in *Bottoms*, however, made no explicit reference to any state or federal constitutional issues, and neither party had previously raised a substantial constitutional issue before the Henrico County Circuit Court or the Virginia Court of Appeals.¹⁷⁰ Kay

¹⁶⁵ See *supra* notes 158-59 and accompanying text.

¹⁶⁶ See *supra* notes 161-64 and accompanying text.

¹⁶⁷ 444 S.E.2d at 284.

¹⁶⁸ During the pendency of this final appeal, custody of Tyler remained with his grandmother, Kay Bottoms.

¹⁶⁹ Kay Bottoms’ Petition for Appeal at 1, 6-8, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). Sharon Bottoms’ Appellee Brief to the Virginia Supreme Court also incorporated a constitutional argument:

In addition, constitutional due process requires a showing of actual or imminent harm before a child may be removed from the custody of his or her parents.

Id. at 13. See, e.g., *Roe v. Conn*, 417 F. Supp. 769, 778 (M.D. Ala. 1976). The United States Constitution protects parenthood, including the parent’s companionship, care, custody, and management of children, as well as individual choices about child-rearing. See *Palmore v. Sidoti*, 466 U.S. 429 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁷⁰ The amicus curiae brief of the National Center for Lesbian Rights, et al. however had referred to “the constitutional presumption” favoring parents over non-parents. NCLR Brief

Bottoms' Petition for Appeal also argued the Virginia Supreme Court should grant an appeal because the *Bottoms* case involved a matter of first impression in Virginia "and is of widespread interest in the courts and with the public."¹⁷¹ Finally, the Petition for Appeal argued the best interest of Tyler was to stay with his grandmother, Kay Bottoms.¹⁷²

In the Brief in Opposition to a Petition for Appeal filed on behalf of Sharon Bottoms, her attorneys argued "while it is arguably under [Rule 5:17(c)(2) of the Virginia Supreme Court] that in the present case a decision by this Court, depending on its scope, could have precedential value, the Court of Appeals' decision should stand because it reached the correct result by applying, not varying, the long-established standard for third-party custody cases."¹⁷³ Arguing that the court of appeals' decision should not be disturbed, Sharon's Opposition Brief went on to state:

The Court of Appeals properly placed this case within existing Virginia domestic relations law, and did not contravene, overrule or depart from this Court's precedents as it understood them. Indeed, in requiring the return of the child in this case to his natural mother absent clear and convincing proof that she was unfit and that the child's best interest required shifting custody to a third party, the Court of Appeals reached the only result permissible under the settled law of this Commonwealth.¹⁷⁴

at 3, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). However, Virginia child custody precedent has not been explicitly based upon any constitutional grounds. See, e.g., *Mason v. Moon*, 385 S.E.2d 242, 246 (Va. Ct. App. 1989); *Bailes v. Sours*, 340 S.E.2d 824, 826 (Va. 1986).

¹⁷¹ Kay Bottoms Petition for Appeal at I, 6-8, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹⁷² Kay Bottoms' Petition for Appeal at 3-6.

¹⁷³ Sharon Bottoms' Brief in Opposition of a Petition for Appeal at 4, 444 S.E.2d 276 (Va. Ct. App. 1994).

¹⁷⁴ *Id.*

An appeal to the Virginia Supreme Court from the intermediate Virginia Court of Appeals in family law matters is not an appeal of right, and such appeals are seldom granted by the Virginia Supreme Court. Ominously, the Virginia Supreme Court granted Kay Bottoms' Petition for Appeal.

2. *The Supreme Court Appellate Briefs*

a. *Kay Bottoms' Appellant Brief*

Kay Bottoms' Appellant Brief to the Virginia Supreme Court, written by Mr. Ryder, was again nine pages long and cited five relevant cases. Mr. Ryder basically ignored all the proffered empirical social science evidence.¹⁷⁵ He likewise ignored the legal controversy concerning whether or not *Roe v. Roe* constituted a *per se* rule¹⁷⁶ and he did not address the burden of proof and strong presumption in favor of parental custody.¹⁷⁷

Instead, Mr. Ryder primarily argued, based upon the facts of this particular case, it would be in Tyler's best interests to remain with Kay Bottoms.¹⁷⁸ Specifically, Mr. Ryder emphasized Sharon was an "unfit" mother because she admitted that she and April had "slept in the same bed while the child's bed was in that room;"¹⁷⁹ that Sharon "lived in four different homes in a three-year period . . . with a man, with her cousin, with two lesbians, and then with April;"¹⁸⁰ that Sharon was unemployed for three years, "being dependent on other people, including April;"¹⁸¹ that Sharon had "decided to 'take a chance' with the custody of Tyler and move back into April's apartment upon the advice of the ACLU;"¹⁸² that April was discharged from the Army because of alcoholism and had stopped attending Alcoholics

¹⁷⁵ See *supra* notes 2, 25, and 120-31 and accompanying text.

¹⁷⁶ See *supra* notes 27-33, 48-50, 105, and 162-64 and accompanying text.

¹⁷⁷ See *supra* notes 101-03, 158-59 and accompanying text.

¹⁷⁸ Appellant's Brief to the Virginia Supreme Court at 4-7, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

¹⁷⁹ *Id.* at 4 (citing to the Trial Court Transcript at 12-13, *Bottoms v. Bottoms*, CH93JA0517-00 (Henrico Co., Va. Cir. Ct. Sept. 7, 1993).

¹⁸⁰ *Id.* at 5-6.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.*

Anonymous;¹⁸³ that Sharon had lost her temper with Tyler and hit him on two occasions “too hard;”¹⁸⁴ that Sharon allegedly admitted to her brother that she was “not fit to be a mother;”¹⁸⁵ that Sharon “would get the AFDC check and spend it on having her fingernails done before she would buy food for the baby;”¹⁸⁶ that “Kay took care of Tyler [and] kept Tyler seventy percent (70%) of the time since he was born;”¹⁸⁷ that Kay “is a nanny who takes care of a home and two other children and keeps Tyler with her at her place of employment;”¹⁸⁸ and because, “[o]n a number of occasions, Sharon would leave Tyler with Kay for a period of time [and] Kay would not know Sharon’s location or telephone number.”¹⁸⁹

Secondarily, Mr. Ryder quoted the Virginia Supreme Court precedent in both *Brown v. Brown*¹⁹⁰ and *Roe v. Roe*¹⁹¹ holding:

In all custody cases the controlling consideration is always the child’s welfare and, in determining the best interest of the child, the court must decide by considering all the facts, including what effect a nonmarital relationship by a parent has on the child. The moral climate in which children are to be raised is an important consideration for the court in determining custody and adultery [or lesbianism] is a reflection of a mother’s moral values. An illicit relationship to which minor children are exposed

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ 237 S.E.2d 89 (Va. 1977) (involving an indiscreet heterosexual custodial mother cohabiting in the same household with her lover and her children). *But see* Ford v. Ford, 419 S.E.2d 415 (Va. Ct. App. 1992) and Sutherland v. Sutherland, 414 S.E.2d 617 (Va. Ct. App. 1992) (both involving discreet cohabitation of the custodial parent and heterosexual lover in the same household as the children).

¹⁹¹ 324 S.E.2d 691 (Va. 1985) (involving an indiscreet homosexual father cohabiting with his lover in the same household as his daughter). *See generally supra* notes 26-30 and accompanying text.

cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding.¹⁹²

Mr. Ryder conceded that *Roe* “did not say that the parent’s conduct rendered [him or her] an unfit parent.”¹⁹³ “It was only when the child was exposed to such conduct that [the parent] became unfit,” and the conduct of Sharon “i.e. hugging and kissing, patting on the bottom, coupled with the oral sex and Sharon sleeping in the same bed with April . . . in the residence where Tyler would live . . . renders Sharon an unfit parent.”¹⁹⁴

b. Sharon Bottoms' Appellee Brief

Sharon Bottoms' Appellee Brief to the Virginia Supreme Court¹⁹⁵ r^e emphasized the “unrebutted presumption in favor of parental custody and the best interests of the child.”¹⁹⁶ Factually, the brief reiterated that the trial court testimony established Sharon and April are a “healthy, well-functioning couple;”¹⁹⁷ Sharon is “warm” and “responsive” with her son and Tyler behaves “as if entirely secure and at ease with his mother, it being a very familiar and comfortable situation for him;”¹⁹⁸ Tyler is a “bright, self-confident, socially responsive little boy who is experiencing no undue emotional discomfort, cognitive deficits, or developmental delays;”¹⁹⁹ and Sharon testified she would cease living with April Wade if “extreme measures were necessary for her to retain custody of her son.”²⁰⁰ Kay had admitted that

¹⁹² Appellant's Brief to the Virginia Supreme Court at 7-8, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (citing *Brown v. Brown*, 237 S.E.2d 89, 91 (Va. 1977); *Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985)).

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.* at 8-9.

¹⁹⁵ The brief was submitted by co-counsel Donald K. Butler and Stephen B. Pershing, with William B. Rubenstein, Ruth E. Harlow, and Marc E. Elovitz of the American Civil Liberties Union Foundation of counsel.

¹⁹⁶ Appellee Brief of Sharon Bottoms to the Virginia Supreme Court at 2, Record No. 94-1166 (*Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995)). See also notes 101-03 and accompanying text.

¹⁹⁷ *Id.* at 4 (citing to the Trial Court Transcript at 155).

¹⁹⁸ *Id.* (citing to the Trial Court Transcript at 9).

¹⁹⁹ *Id.* at 4-5 (citing to the Trial Court Transcript at 9).

²⁰⁰ *Id.* at 5 (citing to the Trial Court Transcript at 40).

Sharon had never abused Tyler,²⁰¹ and Sharon testified that she had never engaged in sexual activity in the presence of Tyler, and Kay has never made any such claim.²⁰² Accordingly, the “parental presumption [should not be] rebutted by [Kay Bottoms'] conclusory allegations²⁰³ that a parent's conduct may have an adverse effect on his or her child.”²⁰⁴ Thus, the Virginia Court of Appeals correctly found Kay had not presented sufficient evidence to rebut Sharon's strong parental presumption by clear and convincing evidence.²⁰⁵

Sharon Bottoms' Appellee Brief also argued the Virginia Court of Appeals properly held that a court's view “as to the morality of a parent's behavior does not rebut the parental presumption in the absence of clear and convincing evidence of adverse effect on the child,”²⁰⁶ and as to a parent's homosexuality, “this Court has specifically held that any possible adverse effects of a parent's homosexuality cannot be assumed without specific proof,”²⁰⁷ and evidence had been presented in the trial court proceeding that “social science studies overwhelmingly demonstrate that being raised by a lesbian or gay parent has no adverse effect on the child.”²⁰⁸

The brief further argued the Virginia Court of Appeals correctly held that *Roe v. Roe* does not apply to a third-party custody dispute,²⁰⁹ and made a

²⁰¹ *Id.* at 5 (citing to the Trial Court Transcript at 83, 85).

²⁰² *Id.* (citing to the Trial Court Transcript at 12, 16).

²⁰³ *See supra* notes 179-89 and accompanying text.

²⁰⁴ Appellee Brief of Sharon Bottoms to the Virginia Supreme Court at 10, Record No. 94-1166 (Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995)) (citing *Mason v. Moon*, 385 S.E.2d 242, 246 (Va. Ct. App. 1989), which states “[a] parent and child will not be deprived of one another based on surmise and conjecture.”).

²⁰⁵ *Id.* at 6 (citing *Bottoms v. Bottoms*, 444 S.E.2d 276, 284 (Va. Ct. App. 1994)). *See also supra* notes 159-60 and accompanying text.

²⁰⁶ *Id.* at 12 (citing as authority *Brown v. Kittle*, 303 S.E.2d 864 (Va. 1983); *Phillips v. Kiraly*, 105 S.E.2d 856 (Va. 1958)).

²⁰⁷ *Id.* at 12 (citing as authority *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981)). *See also supra* notes 161-63 and accompanying text.

²⁰⁸ *Id.* at 6 (citing to the Trial Court Transcript at 112-34). *See also supra* notes 2, 25, 120 and accompanying text.

²⁰⁹ *Id.* at 18-19. *See also supra* note 164.

final—and not unreasonable—request that to the extent *Roe v. Roe* suggested an impermissible and factually unsupported *per se* rule that lesbian or gay parents are unfit as a matter of law,²¹⁰ that the Virginia Supreme Court should clarify or overrule *Roe v. Roe*.²¹¹

c. Amicus Curiae Appellate Briefs

The amicus curiae briefs submitted to the Virginia Supreme Court on behalf of Sharon Bottoms restated and reemphasized many of the previous arguments made to the Virginia Court of Appeals.²¹²

The amicus curiae brief of the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, the National Association of Social Workers, the Virginia Chapter of the National Association of Social Workers, and the Virginia Psychological Association again argued the social science research “indicates that there are no significant differences between children raised by lesbian mothers or gay fathers and those raised by heterosexual parents,”²¹³ that the social science research does not suggest that lesbian mothers and gay fathers are likely to be unfit parents,²¹⁴ and a natural parent in an openly lesbian or gay relationship is entitled to the presumption of parental fitness.²¹⁵

The amicus curiae brief of the American Academy of Matrimonial Lawyers continued to argue in favor of the better-reasoned “nexus” approach to gay and lesbian child custody disputes.²¹⁶

The amicus curiae brief of the National Center for Lesbian Rights et al. made a four-prong argument to the Virginia Supreme Court. First, the NCLR brief argued the Virginia Court of Appeals correctly concluded the trial court

²¹⁰ See *supra* notes 18-33 and accompanying text.

²¹¹ Appellee Brief of Sharon Bottoms to the Virginia Supreme Court at 19-25.

²¹² See *supra* notes 119-56 and accompanying text.

²¹³ Amicus Curiae Brief of the American Academy of Child and Adolescent Psychiatry, et al. to the Virginia Supreme Court at 8-17, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

²¹⁴ *Id.* at 20-24.

²¹⁵ *Id.* at 25-34. See generally *supra* notes 119-31 and accompanying text.

²¹⁶ Amicus Curiae Brief of the American Academy of Matrimonial Lawyers to the Virginia Supreme Court at 2-10, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). See also *supra* notes 132-44 and accompanying text.

abused its discretion by removing Tyler from the custody of his mother, and granting custody to the third party grandmother.²¹⁷ The brief contended the trial court erred because the trial court failed to apply the strong presumption of parental fitness under Virginia law which cannot be overcome without a specific showing that the parent's conduct has caused harm to the child by clear and convincing evidence.²¹⁸ Second, to the extent it is inconsistent with an evidence-based nexus approach to the determination of parental unfitness, *Roe v. Roe* should be overturned.²¹⁹ Third, social science research "unanimously shows" children of lesbian and gay parents are not harmed by their parents' sexual orientation.²²⁰ And fourth, Virginia's criminal code prohibiting sodomy does not justify the application of a *per se* test of parental unfitness where a parent is a lesbian.²²¹

Finally, a fourth amicus curiae brief submitted by the Virginia Women Attorneys Association²²² argued the Virginia Supreme Court should not award custody to a third party in the absence of clear and convincing evidence that the mother's sexual orientation had an adverse impact on the child;²²³ the court should refuse to establish any *per se* rules in custody determinations;²²⁴ and

²¹⁷ Amicus Curiae Brief of the National Center for Lesbian Rights, et al. to the Virginia Supreme Court at 1-13, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

²¹⁸ *Id.*

²¹⁹ *Id.* at 14-17.

²²⁰ *Id.* at 18-27. *But see also supra* notes 25, 38-40 and accompanying text.

²²¹ *Id.* at 28-32. *See also supra* notes 145-56 and accompanying text.

²²² Counsel for this amicus curiae brief was Kathleen A. Dooley, Secretary of the Virginia Women Attorneys Association; and on brief were Renae R. Patrick, Laurie E. Forbes, and L. Anne Coughenor.

²²³ Amicus Curiae Brief of the Virginia Women Attorneys Association to the Virginia Supreme Court at 4-10, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (citing as authority *Wilkerson v. Wilkerson*, 200 S.E.2d 581 (Va. 1973); *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986); *Malpass v. Morgan*, 192 S.E.2d 794 (Va. 1972)).

²²⁴ *Id.* at 10-13 (citing as persuasive authority the newly enacted VA. CODE ANN. § 20-124.1 *et seq.* (Michie 1994), as well as citing *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986); *Wilkerson v. Wilkerson*, 200 S.E.2d 581 (Va. 1973); *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992); *Sutherland v. Sutherland*, 414 S.E.2d 617 (Va. Ct. App. 1992); *Brinkley v. Brinkley*, 336 S.E.2d 901 (Va. Ct. App. 1985)).

a *per se* rule that homosexuals are unfit for custody would not serve the best interests of children in the Commonwealth of Virginia.²²⁵

Sharon Bottoms thus possessed a formidable array of appellate briefs²²⁶ and a well-reasoned unanimous decision from the Virginia Court of Appeals²²⁷ in her favor as she faced the Virginia Supreme Court.

F. *The Decision of the Virginia Supreme Court*

On April 21, 1995, the Virginia Supreme Court handed down its long-awaited *Bottoms v. Bottoms* decision.²²⁸ In a controversial 4-3 decision, Justice A. Christian Compton held the law and the evidence were sufficient to support the trial court's findings that the presumption in favor of Tyler's mother, Sharon Bottoms, had been rebutted by clear and convincing evidence of parental unfitness, and awarding custody to his grandmother, Kay Bottoms, would serve Tyler's best interests.²²⁹

This particular Virginia Supreme Court decision is disturbing, however, not only for what the court ultimately decided, but also for what the court ultimately refused to decide. First, the Virginia Supreme Court stated, absent "clear evidence to the contrary in the record, the judgment of a trial court comes to the appellate court with a presumption that the law was correctly applied to the facts"²³⁰ and "these [trial court] findings should not be disturbed by an appellate court unless they are plainly wrong or without evidence to support them."²³¹

The *Bottoms* trial court had interpreted *Roe v. Roe* as constituting a *per se* rule of parental unfitness,²³² whereas the Virginia Court of Appeals and the

²²⁵ *Id.* at 13-17 (citing as authority *Santosky v. Kramer*, 455 U.S. 745, 752-57 (1982); *Weller v. Dept. of Social Services*, 901 F.2d 387, 394 (4th Cir. 1990); *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986)). "This Court has said that the rights of a natural parent are founded upon natural justice and wisdom and . . . essential to the peace, order, virtue and happiness of society." *Id.* at 14 (citing *Walker v. Brooks*, 124 S.E.2d 195, 198 (Va. 1962)).

²²⁶ *See supra* notes 195-225 and accompanying text.

²²⁷ *See supra* notes 157-67 and accompanying text.

²²⁸ 457 S.E.2d 102 (Va. 1995), *rev'g*, 444 S.E.2d 276 (Va. Ct. App. 1994).

²²⁹ *Id.* at 108-09.

²³⁰ *Id.* at 105 (citing *Yarbough v. Commonwealth*, 234 S.E.2d 286, 291 (Va. 1977)).

²³¹ *Id.* at 105 (citing *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986)).

²³² *See supra* notes 78-83 and accompanying text.

Virginia Supreme Court both expressly held in their respective decisions “a lesbian mother is not *per se* an unfit mother.”²³³ Clearly, the trial court had not correctly applied the law to the facts, and the trial court decision therefore was indeed “plainly wrong.” Incredibly, the majority opinion chose to ignore this crucial fact.²³⁴

Next, the majority discussed the factual history of the *Bottoms* controversy to demonstrate Sharon Bottoms was an “unfit” mother by clear and convincing evidence.²³⁵ The majority again basically ignored trial court testimony that Sharon Bottoms — though far from being an ideal mother — was a good mother to Tyler and enjoyed a stable relationship with Tyler and with April Wade.²³⁶ The Virginia Supreme Court summarized:

In the present case, the record shows a mother who, although devoted to her son, refuses to subordinate her own desires and priorities to the child's welfare. For example, the mother disappears for days without informing the child's custodian of her whereabouts. She moves her residence from place to place, relying on others for support, and uses welfare funds to “do” her fingernails before buying food for the child. She has participated in illicit relationships with numerous men, acquiring a disease from one, and “sleeping” with men in the same room where the child's crib was located. To

²³³ *Bottoms v. Bottoms*, 444 S.E.2d at 283 (Va. Ct. App. 1994) and 457 S.E.2d at 108 (Va. 1995) (emphasis added). See also *supra* note 164 and *infra* note 241.

²³⁴ See 457 S.E.2d at 109 (Keenan, J., dissenting).

This court has held, as the majority of states, that a lesbian mother is not *per se* an unfit parent. *Doe v. Doe*, 222 Va. 736, 748, 284 S.E.2d 799, 806 (1981). Nevertheless, the majority ignores the trial court's refusal to follow this established law in the Commonwealth.

....

... Thus, I would affirm the Court of Appeals' holding that the trial court erred in applying a *per se* rule of parental unfitness based on the mother's homosexual conduct

Id.

²³⁵ 457 S.E.2d at 105-08. The court stated it would “summarize the facts in the light most favorable to the grandmother [who prevailed at the trial court level], resolving all conflicts in the evidence in her favor.” *Id.* at 105.

²³⁶ See *supra* notes 66-67, 197-204 and accompanying text.

aid in her mobility, the mother keeps the child's suitcase packed so he can be quickly deposited at the grandmother's.

The mother has difficulty controlling her temper and, out of frustration, has struck the child when it was merely one year old with such force as to leave her fingerprints on his person. While in her care, she neglects to change and cleanse the child so that, when he returns from visitation with her, he is "red" and "can't even sit down in the bathtub.

Unlike *Doe*, 222 Va. at 747, 284 S.E.2d at 805, relied on by the mother, there is proof in this case that the child has been harmed, at this young age, by the conditions under which he lives when with the mother for any extended period. For example, he has already demonstrated some disturbing traits. He uses vile language. He screams, holds his breath until he turns purple, and becomes emotionally upset when he must go to visit the mother. He appears confused about efforts at discipline, standing himself in a corner facing the wall for no apparent reason.²³⁷

The court also emphasized the guardian *ad litem's* recommendation that Kay Bottoms should have custody of Tyler.²³⁸

Although noting the Virginia Court of Appeals had concluded that all this evidence failed to prove that Sharon Bottoms "abused or neglected her son . . . or that she is an unfit mother,"²³⁹ the majority opinion disagreed. The majority opinion held the court of appeals failed to give proper deference upon appellate review to the trial court's factual findings, and misapplied the law to the facts viewed from a proper appellate perspective. The evidence is plainly sufficient, when applying the clear and convincing standard and when viewing the facts from the correct appellate perspective, to support the trial court's findings that the parental presumption has been rebutted, that the mother is an unfit custodian at this time, and that the child's best interests would be promoted by awarding custody to the grandmother.²⁴⁰

²³⁷ 457 S.E.2d at 108.

²³⁸ "Finally, the recommendation of the guardian ad litem in this case, while not binding or controlling, should not be disregarded." 457 S.E.2d at 108.

²³⁹ *Id.* at 107. See also *supra* note 160 and accompanying text.

²⁴⁰ *Id.* at 107. But see also *supra* note 234 and accompanying text.

It is, therefore, clear from these two appellate decisions that reasonable jurists can — and did — differ regarding what factual background would constitute parental unfitness by clear and convincing evidence. Yet in this particular case, the facts arguably fell far short of demonstrating Sharon Bottoms was an “unfit” mother based upon clear and convincing evidence of any alleged child abuse or neglect, and one wonders if the court would have marshaled its evidence any differently had Sharon Bottoms been a heterosexual custodial parent.²⁴¹

Perhaps the most troubling and contradictory part of the Virginia Supreme Court majority opinion in *Bottoms*, however, involved the issue of Sharon Bottoms' lesbianism. On one hand, the court reiterated under Virginia law a lesbian mother is not *per se* an unfit parent,²⁴² and thus it impliedly agreed with the court of appeals that the trial court had misapplied *Roe v. Roe* as a *per se* rule of parental unfitness.²⁴³ But on the other hand, the court then paradoxically reiterated its support of the “social condemnation” assumptions made in *Roe*:

We have previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the “social condemnation” attached to such an arrangement, which will inevitably afflict the child's relationships with its “peers and with the community at large.” We do not retreat from that statement; such a result is likely under these facts.²⁴⁴

²⁴¹ See *supra* notes 197-202 and accompanying text. See also *Lesbian Denied Custody*, VIRGINIA LAWYER'S WEEKLY, May 1, 1995, at 23 (reporting a subsequent interview of Sharon Bottoms' co-counsel, Donald Butler). “The majority opinion tries to combine other factors with the lesbian factors and say it amounts to unfitness,” said Richmond attorney Donald Butler. “Even if you accept all [of the court's allegations of neglect] as true, nobody under Virginia law would lose custody for these things.”

Id.

²⁴² 457 S.E.2d at 108.

²⁴³ See *supra* notes 232-34 and accompanying text.

²⁴⁴ 457 S.E.2d at 108 (citations omitted). The court also stated “[c]onduct inherent in lesbianism is punishable as a Class 6 felony” in Virginia and “thus, that conduct is another important consideration in determining custody.” *Id.* at 108. The court, however, did not go

Incredibly, the majority opinion totally ignored — and refused to discuss — the substantial wealth of proffered empirical social science data, much of it compiled since the 1985 *Roe* decision, negating this erroneous judicial misperception.²⁴⁵ If this social science empirical data was unpersuasive to the majority, then the court should have properly addressed the issue. Instead, the court blatantly ignored it, and the dissenting opinion written by Justice Keenan properly took the majority to task for its unsupported assumptions:

As the Court of Appeals properly recognized, “adverse effects of a parent’s homosexuality on a child cannot be assumed without specific proof.” Although there is no evidence in this record showing that the mother’s homosexual conduct is harmful to the child, the majority improperly presumes that its own perception of societal opinion and the mother’s homosexual conduct are germane to the issue whether the mother is an unfit parent. Thus, the majority commits the same error as the trial court by attaching importance to factors not shown by the evidence to have an adverse effect on the child.²⁴⁶

A number of other commentators have agreed with the dissenting opinion on this troubling point.²⁴⁷ Justice Keenan continued:

into any detail on how to evaluate such factors. *See supra* notes 19-22, 156 and accompanying text.

²⁴⁵ *See supra* notes 2, 25, 69-71, 106, 119-31, 146-48, 208, 213-15, 220 and accompanying text.

²⁴⁶ 457 S.E.2d at 109 (Keenan, J., dissenting). *See also infra* notes 253-54 and accompanying text.

²⁴⁷ *See, e.g.*, Henry J. Reske, *Lesbianism at Center of Custody Dispute*, 81 A.B.A. J. 28 (July, 1995).

Joy M Feinberg, co-chair of the Custody Committee of the ABA’s Family Law Section, called the ruling ‘tragic’ and said it ignores evidence that ‘there is no difference between the psychological well-being of those brought up in a heterosexual or homosexual home.’ Feinberg added that a resolution will be brought before the ABA’s House of Delegates in August stating that ‘custody and visitation shall not be denied or restricted on the basis of sexual orientation.’ *Id.*

Lawrence D. Diehl, Chair of the Virginia State Bar Family Law Section, and co-counsel for the American Academy of Matrimonial Lawyers’ amicus curiae brief in support of Sharon Bottoms was also quoted as saying: “The judges have become self-determined experts and the experts have become meaningless. Who qualified Justice Compton as an expert in this area?” Diehl asked.” *Lesbian Denied Custody*, VIRGINIA LAWYER’S WEEKLY, May 1, 1995, at 23.

The majority's award of final judgment is doubly inappropriate under the holding of *McEntire*, because approximately 19 months have passed since the last evidentiary hearing in this case. In *McEntire*, the trial court had applied the wrong rule of law, and almost 18 months had passed since the last evidentiary hearing. This Court held that, based on the passage of that amount of time, "we are unable at this time properly to determine the issue of custody from the record before us. Accordingly, we will remand the case to the circuit court with direction to hold forthwith another hearing . . . applying the law in a manner consistent with this opinion." In the present case, the same disposition is required.²⁴⁸

What test does the Virginia Supreme Court now apply to child custody disputes involving gay and lesbian parents? Apparently, both the Virginia Court of Appeals and the Virginia Supreme Court have rejected the *per se* test of parental unfitness.²⁴⁹ Yet, the Virginia Supreme Court's confusing reaffirmation of its unsupported judicial assumptions in *Roe v. Roe*²⁵⁰ argues against Virginia's adoption of the "nexus" approach²⁵¹ *in toto*. Perhaps Virginia law recognizes a middle ground "presumptive" approach²⁵² in child custody disputes involving gay and lesbian parents, perhaps not.²⁵³ The court

²⁴⁸ 457 S.E.2d at 109 (Keenan, J., dissenting).

²⁴⁹ See *supra* notes 18-33 and accompanying text.

²⁵⁰ See *supra* notes 30, 244 and accompanying text.

²⁵¹ See *supra* notes 42-47 and accompanying text.

²⁵² See *supra* notes 36-41 and accompanying text.

²⁵³ Assuming arguendo that Virginia would apply the middle ground "presumptive" rule, the substantial empirical social science data indicating that there is no significant differences between children raised by homosexual and heterosexual parents would have rebutted such a presumption. See *supra* notes 25, 69-71, 119-131, 146-148, 213-215 and accompanying text. The Virginia Court of Appeals clearly recognized this important fact in its own Bottoms decision:

The social science evidence showed that a person's sexual orientation does not strongly correlate with that person's fitness as a parent. No evidence was presented to refute these studies. No evidence was presented that tended to prove that Sharon Bottom's living arrangement with April Wade and their lesbian relationship have harmed or will harm Sharon Bottoms' son.

Bottoms v. Bottoms, 444 S.E.2d 276, 283-84 (Va. Ct. App. 1994).

was silent as to exactly which approach it was utilizing, and it would have been extremely helpful if the majority opinion had given greater guidance to the jurist and had given greater guidance to the academic and practicing lawyer. Instead of settling a confusing and contradictory area of the law, the Virginia Supreme Court, in its *Bottoms* decision, arguably added even more unnecessary and unwarranted confusion.²⁵⁴

G. Post Appeal Alternatives

On June 9, 1995, the Virginia Supreme Court denied a rehearing motion made by attorneys for Sharon Bottoms, leaving Sharon and her attorneys, after their two-year court battle, with two alternatives. First, they could appeal the decision to the United States Supreme Court, but according to Kent Willis, Executive Director of the ACLU of Virginia, "The risk is [that] you'll take a bad court decision in Virginia and make it national policy."²⁵⁵ Moreover, Marc E. Elovitz, staff counsel for the ACLU's National Lesbian and Gay Rights Project in New York, notes that the U.S. Supreme Court has never ruled on the parental fitness of homosexual parents, and "the likelihood of the Supreme Court granting a review in any case is low."²⁵⁶ A final problem with any constitutional review is that neither the Virginia Court of Appeals nor the Virginia Supreme Court expressly based either decision on constitutional grounds.²⁵⁷

A second and more realistic alternative would be to argue the existence of a change of circumstances affecting Tyler's best interests, because child custody decisions are generally modifiable if in the child's best interests.²⁵⁸ According to one of Sharon Bottoms' attorneys, Player Michelsen:

²⁵⁴ The Virginia Supreme Court, however, maintained "[n]o novel questions of law are involved; the legal principles applicable under these circumstances to child custody cases are settled in the Commonwealth." 457 S.E.2d at 104. The authors, based on their analysis of *Bottoms v. Bottoms*, respectfully disagree.

²⁵⁵ Deborah Kelly, *Bottoms, ACLU Ponder Move*, RICHMOND TIMES-DISPATCH, June 12, 1995, at B1.

²⁵⁶ *Id.* at B3.

²⁵⁷ See *supra* notes 169-70 and accompanying text.

²⁵⁸ See generally GREGORY, *supra* note 13, at 399-401; SWISHER, *supra* note 13, at § 15-9 (1991). See also VA. CODE ANN. § 20-124.1 *et seq.* (Michie, 1994); Keel v. Keel, 303 S.E.2d 917 (Va. 1983); Turner v. Turner, 348 S.E.2d 21 (Va. Ct. App. 1986).

If the [Virginia] Supreme Court didn't make its ruling based on homosexuality, then every other reason cited doesn't exist anymore, or has been remedied by time . . . Sharon doesn't hit Tyler anymore. She has lived in the same house with the same person for two years. They're more financially stable . . . and Sharon is working now as a part-time department store cashier. The only thing that is still a fact is Sharon is in a lesbian relationship and is living with her lover. So, if that was not the court's basis for its ruling, she ought to be able to go back to court and get her son back²⁵⁹

Neither Kay Bottoms, nor her lawyer, Richard Ryder, could be reached for comment,²⁶⁰ and to date, additional legal proceedings filed on behalf of Sharon Bottoms have not affected the outcome. Tyler lives with his grandmother, Kay Bottoms, in rural Spotsylvania County, Virginia. He is now five years old.

IV. CONCLUSION

Bottoms v. Bottoms was a high profile child custody dispute that gained national and international attention. It presented the Virginia Supreme Court with an excellent opportunity to clarify two contradictory judicial precedents involving child custody rights of gay and lesbian parents in Virginia.

The *Bottoms* case basically involved two interrelated issues. First, did Virginia adopt a "nexus" test, requiring more proof of actual harm to a child before removing a child from the custody of a gay or lesbian parent—as suggested by the 1981 Virginia Supreme Court case of *Doe v. Doe*? Or did Virginia recognize a *per se* "unfitness" test applied to gay and lesbian parents—as suggested by the 1985 Virginia Supreme Court case of *Roe v. Roe*—or perhaps a middle ground "presumptive" test of parental unfitness? Second, what factual evidence—if any—constituted parental unfitness by clear and convincing evidence in a custody dispute between a lesbian mother and a third-party heterosexual grandmother?

²⁵⁹ See Kelly, *supra* note 256, at B3. See *Bottoms*, 457 S.E.2d at 107 (where the Virginia Supreme Court held that Sharon Bottoms "was an unfit mother at this time" (emphasis added)). See also *supra* note 248 and accompanying text.

²⁶⁰ Kelly, *supra* note 256, at B3.

Since the *Doe* and *Roe* cases, a substantial number of recent empirical studies in social science research indicate there are no significant differences between children raised by homosexual parents and heterosexual parents, and, therefore, a natural parent in an openly gay or lesbian relationship should be entitled to the presumption of parental fitness. This empirical social science research largely negated previous judicial misperceptions found in jurisdictions following a *per se* or middle ground “presumptive” test of parental unfitness, and these recent empirical studies were ably argued at Sharon Bottoms’ trial, in her two appellate briefs, and in a number of amicus curiae appellate briefs as well.

Nevertheless, the Virginia Supreme Court, in a controversial 4-3 decision, flatly ignored these empirical studies. Although purportedly refusing to recognize a *per se* parental unfitness rule in Virginia according to the *Doe* case, the Virginia Supreme Court paradoxically reaffirmed its unsupported judicial assumption in *Roe* that “active lesbianism in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement.”²⁶¹ As the court’s minority opinion correctly observed, “the majority improperly presumes that its own perception of societal opinion and the mother’s homosexual conduct are germane to the issue of whether the mother is an unfit parent.”²⁶² Accordingly, child custody law in Virginia arguably is *more* unsettled today than prior to the *Bottoms* decision.

Moreover, in determining whether or not Sharon Bottoms was an unfit parent by clear and convincing evidence, the Virginia Supreme Court refused to remand the case back to the trial court—even though nineteen months had transpired since the initial custody dispute, even though the factual circumstances of the case had materially changed, and even though the trial court judge had erred as a matter of law in applying a *per se* rule of parental unfitness to Sharon Bottoms at the trial court level.

The Virginia Supreme Court decision in *Bottoms v. Bottoms*, therefore, serves as an important example for subsequent state courts—including

²⁶¹ *Bottoms*, 457 S.E.2d at 108.

²⁶² *Id.* at 109.

subsequent Virginia courts—of how *not* to decide a child custody dispute involving a gay or lesbian parent.²⁶³

²⁶³ On February 27, 1996, Sharon Bottoms failed in her second attempt to regain custody of her son Tyler. See Deborah Kelly, *Lesbian May End Bid for Son*, RICHMOND TIMES-DISPATCH, February 28, 1996, at A1. During the last week of August 1996, Sharon Bottoms and her attorneys regrettably decided not to appeal Judge Boice's most recent custody decision in favor of Kay Bottoms, and concentrate instead on acquiring more liberal visitation rights for Sharon Bottoms. To date, Kay Bottoms still retains custody of young Tyler.