## University of Richmond Law Review

Volume 27 | Issue 4 Article 13

1993

# Child Custody Modification Based on a Parents Non-Marital Cohabitation: Protecting the Best Interests of the Child in Virginia

Katherine A. Salmon
*University of Richmond*

Follow this and additional works at: http://scholarship.richmond.edu/lawreview

Part of the Family Law Commons

### Recommended Citation

Katherine A. Salmon, *Child Custody Modification Based on a Parents Non-Marital Cohabitation: Protecting the Best Interests of the Child in Virginia*, 27 U. Rich. L. Rev. 915 (1993).
Available at: http://scholarship.richmond.edu/lawreview/vol27/iss4/13

This Note is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

# NOTE

## CHILD CUSTODY MODIFICATION BASED ON A PARENT'S NON-MARITAL COHABITATION: PROTECTING THE BEST INTERESTS OF THE CHILD IN VIRGINIA

### I. INTRODUCTION

In recent years, courts have been faced with deciding what constitutes "parental fitness" for custody purposes in light of society's changing mores and values. In attempting to define the role that a parent's sexual lifestyle plays in a custody or visitation dispute, courts across the country have lost sight of their ultimate responsibility — to protect the best interests of the child. Instead, courts often seem more concerned with protecting the sexual freedom of unmarried parents than in contemplating the impact cohabitation may have on children. The Court of Appeals of Virginia is no exception.

This Note seeks to provide a psychological and sociological basis for the Supreme Court of Virginia's conclusion that children are likely to be harmed when exposed to a parent's unmarried cohabitation. Specifically, section two presents a recent study of the effects of new parental relationships following separation or divorce on a child's emotional well-being.[1] Section three examines the supreme court's approach to the issue of unmarried cohabitation in custody determinations.[2] Finally, section four discusses recent Court of Appeals of Virginia decisions which are contrary to the Supreme Court of Virginia's precedent.[3] Section five concludes by suggesting that a rebuttable presumption that unmarried cohabitation is harmful to a child would be a workable middle ground approach better suited to meet the child's best interests.[4]

Overall, this Note shows that there is a firm foundation for the supreme court's finding that unmarried cohabitation adversely affects the mental and emotional health of children exposed to such a relationship.

1. *See infra* notes 7-28 and accompanying text.
2. *See infra* notes 29-74 and accompanying text.
3. *See infra* notes 75-136 and accompanying text.
4. *See infra* notes 137-46 and accompanying test.

The primary purpose of any child custody determination should be determining which parent is most capable of serving the child's best interests. A per se rule which automatically mandates removing children from an unmarried cohabiting parent's custody is almost universally considered too harsh a standard by which to make such a decision. However, the current trend of many courts, including the Court of Appeals of Virginia, is to effectively ignore evidence of cohabitation unless the trial court finds immediate evidence of harm to the children. Clearly, this is antithetical to both Supreme Court of Virginia precedent and psychological findings that cohabitation by its very nature affects children, although the effects may take several years to manifest.[5]

Because the standard adopted by the court of appeals insists upon immediate evidence of harm to children, parents who seek to modify a custody arrangement based on their objection to the custodial parent's non-marital cohabitation are faced with an almost impossible burden of proof. Virginia appellate case law has recently reduced cohabitation from a seemingly conclusive finding of unfitness to a virtually irrelevant factor in determining custody.[6] This has left trial courts free to disregard cohabitation as a factor in a child's upbringing. By refusing to give meaningful effect to the presumption apparently made by the supreme court, the court of appeals has subordinated the child's best interests to the parent's desire for sexual freedom.

## II. Effects of a Parent's Non-Marital Cohabitation on Children

The effects of new parental relationships following separation or divorce on a child's well-being have been documented. According to a 1988 study at the Philadelphia Child Guidance Clinic,[7] child adjustment varied among four categories of what it termed parental "blending:" (a) remarriage, (b) living together but not remarried, (c) seriously involved but not living together, and (d) not seriously involved.[8] Operating from the premise that children of divorce are influenced by the new relationships their parents establish,[9] the study tracked eighty-seven families in which mothers had custody.[10] The researchers examined the differences in the children's behavioral, emotional, and social adjustment over the first five years following their parents' separation.[11] The children were evaluated

5. *See infra* notes 17-23 and accompanying text.
6. *See infra* notes 84-136 and accompanying text.
7. Marla B. Isaacs & George H. Leon, *Remarriage and Its Alternatives Following Divorce: Mother and Child Adjustment*, 14 J. Marital & Fam. Therapy 163 (1988).
8. *Id.*
9. *Id.*
10. *Id.* at 165. Isaacs and Leon acknowledged that their study was not exhaustive, as it did not consider the father's "blending status." *Id.* at 171.
11. *Id.* at 165.

for behavioral problems[12] and social competence[13] based on a checklist completed by only the mothers.[14] By the fifth year of separation, twenty percent of the women had remarried, thirteen percent had not remarried but were living with a new partner,[15] and twenty-two percent were seriously involved but not living with a new partner. Forty-six percent of the mothers were not seriously involved with a new partner at the time of the fifth-year interview.[16]

The results of the study were dramatic. Only one blending arrangement had a statistically significant effect on the child's adjustment — where the mother was unmarried but living with her new partner:[17]

> Those children whose mothers had not remarried but were living with their new partners, [sic] were more maladjusted than the children in any other arrangement, including those whose mothers were not involved. This was true even when the child's age and sex as well as the mother's own adjustment levels were taken into account. Furthermore, it is apparent that these differences in adjustment cannot be explained by differences [in the children] that may have existed prior to blending.[18]

Children whose mothers had live-in partners had a greater degree of maladjustment, evidenced by substantially higher scores for behavior problems.[19] Their poor adjustment was similarly reflected by lower scores on the social competence scale,[20] with older children and adolescents experiencing the greatest difficulty.[21] Thus, in a situation where an unmarried mother lived with her partner, a "deleterious effect on child outcome" resulted.[22] The most well-adjusted group with respect to both behavior problems and social competence were those children whose

---

12. "Behavior problems included both negatively valued acts against persons or objects and inner discomfort experienced by the child." *Id.* at 166.

13. "Social competence tapped adaptive functioning in terms of participation in a variety of typical childhood activities such as chores, sports and hobbies, as well as social relationships and academic performance." *Id.*

14. *Id.*

15. In the study, the term "partner" was not gender-specific, making it unclear whether the partner was always male.

16. Isaacs & Leon, *supra* note 7, at 167.

17. *Id.* at 169.

18. *Id.* at 171.

19. *Id.* at 168.

20. *Id.*

21. *Id.* at 169.

22. *Id.* It is not the author's intention, in relying on this study, to perpetuate or validate the double standard applied when courts demand that mothers, but not fathers, lose custody of their children when they choose to be sexually active outside marriage. *See generally* Donald H. Stone, *Child Custody and the Live-In Lover: An Empirical Study*, 11 PACE L. REV. 1, 35-37 (1990). In the absence of a father-focused study, however, the research results indicate that the adverse effect on children comes not from the fact that the *mother* has brought a partner into their home, but that the *custodial parent* has introduced his or her lover into the family household.

mothers were not involved with a new partner, followed closely by those whose mothers had remarried.[23]

The researchers offered several reasons why the mother's cohabitation without marriage created problems for children. First, without the commitment and stability marriage signals, children may be insecure about the relationship between their mother and her new partner, and their own relationship with the partner.[24] Second, the mother's partner has an ambiguous status in the family. The boundaries of family membership are not clearly defined, and the partner is unable to assume a stable place in the home in terms of rules, discipline, and even nurturing.[25] Third, the child's father may object to his child's presence in such a living arrangement, and he may communicate his disapproval to the child.[26] Fourth, the child may be both troubled about the morality of the living situation and embarrassed by having to explain the relationship to others.[27] Finally, if a heightened sexuality exists between the couple, it may result in the mother redirecting her interest from the children, even if temporarily, toward her partner.[28]

## III. The Supreme Court of Virginia and the Presumption of Harm from Unmarried Cohabitation

### A. *Overview*

In custody disputes where a parent openly cohabits with a partner, courts have taken one of two approaches in determining whether to modify a custody award.[29] The "per se" standard leads courts to automatically remove custody from the cohabitating parent.[30] The "nexus" approach, however, is used by courts that wish to determine whether there is concrete evidence which shows a present, adverse effect on the child.[31] Cus-

23. Isaacs and Leon, *supra* note 7, at 168.

24. *Id.* at 171.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Despite these troubling findings, the researchers stop short of advocating that unmarried mothers not live with a partner, noting that such advice might cause the mother to resent her children. *Id.* at 172. However, the study suggested that clinicians should be alerted that "more work may be indicated for families with such arrangements." *Id.* In any event, it is clear that what is best for the parent is not necessarily best for the child.

29. *See* Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 Fam. L.Q. 71, 74-78 (1988), for three approaches courts have taken when determining the fitness of a homosexual parent.

30. *Id.* For a rather critical review of decisions based on the *per se* approach, see Stone, *supra* note 22, at 18-26.

31. *See* Stone, *supra* note 22, at 26-40, for a comparative review of sixty-three appellate custody cases in which the nexus approach was utilized. Stone believes that a standard

tody is removed from the cohabiting parent only if the court finds such evidence.[32]

It is debatable whether the Supreme Court of Virginia has utilized the *per se* approach when confronted with custody issues involving cohabitating parents.[33] The court has consistently ruled that simply exposing a child to unmarried cohabitation is sufficient to warrant a change in custody.[34] In several recent cases, however, the appellate court has acknowledged supreme court precedent yet allowed the cohabiting parent to retain custody. By requiring proof that the cohabitation results in immediate harm to the child and by evaluating the extent of the child's exposure to the intimate nature of the relationship, the court of appeals has implicitly rejected the supreme court's presumption that unmarried cohabitation adversely affects children.

### A. Brown v. Brown

*Brown v. Brown*,[35] decided in 1977, is the most recent supreme court case where a mother's non-marital relationship resulted in a finding of unfitness, requiring removal of the children from her custody. The trial court transferred custody of the couple's two children, ages four and seven, to their father, based on evidence that while the mother had custody of the children, she lived with her paramour in an adulterous relationship.[36] Despite evidence which indicated that Mrs. Brown was a poor housekeeper and sometimes neglected the children,[37] the trial court held that *solely* by reason of her adulterous cohabitation she was unfit to be a

---

which demands proof of "actual concrete harm" before removing children from a cohabiting parent is "enlightened." *Id.* at 31.

32. *Id.* at 18.

33. *See infra* notes 35-70 and accompanying text. For an excellent analysis of factors used by Virginia courts in determining child custody, see also PETER N. SWISHER, *et al*, VIRGINIA FAMILY LAW: THEORY AND PRACTICE § 15-7 (1991 ed. & Supp. 1992).

34. See Brown v. Brown, 218 Va. 196, 200, 237 S.E.2d 89, 91-92 (1977); Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985).

35. 218 Va. 196, 237 S.E.2d 89 (1977).

36. Neither Mr. nor Mrs. Brown had been awarded an absolute divorce at the time of the trial. *Brown*, 218 Va. at 197, 237 S.E.2d at 90. Mrs. Brown testified that she planned to marry her boyfriend once her divorce was final. *Id.* at 198, 237 S.E.2d at 91.

37. *Id.* at 198, 237 S.E.2d at 90. The trial court was satisfied that Mrs. Brown "was fit to care for her children so far as her treatment of the children and their physical care is concerned." *Id.* at 197, 237 S.E.2d at 90.

custodial parent.[38] The trial court specifically stated that it was satisfied that she was "otherwise a fit mother. . . ."[39]

The supreme court emphasized that all custody cases are primarily concerned with the best interests of the child, which are determined by considering all of the facts, including the "moral climate" of the custodial parent's household and the effect that a parent's non-marital relationship has on the child.[40] Because children learn by their parents' example, "[s]uch utter disregard for moral guidance and social standards *can have but ill effect* on the [child]."[41] The supreme court thus presumed that non-marital cohabitation has a detrimental effect on a child living in the same home.

While the court declared that adultery alone is an insufficient reason to declare a parent an unfit custodian.[42] It emphasized that "[a]n illicit relationship to which minor children are exposed *cannot* be condoned."[43] The

---

38. *Id.* at 198, 237 S.E.2d at 91. The supreme court later confirmed that non-marital cohabitation was the only factor involved in removing custody from the mother:

> In *Brown*, we affirmed a chancellor's decision to remove the custody of two [children] from their mother, who was otherwise a fit custodian, *on the sole ground* that she was openly living in an adulterous relationship with a male lover, in the same home as the children, during the pendency of the divorce suit.

Roe v. Roe, 228 Va. 722, 726, 324 S.E.2d 691, 693 (1985) (emphasis added).

39. The trial court ruled as follows:

> [W]hile the Court was satisfied that [Mrs. Brown] was otherwise a fit mother and did not find her unfit due to any deficiency in the care of the children while in her custody, the court found, by reason of her adulterous relationship with [her lover] in the same residence of which the minor children also lived, that [she] was not a fit and proper person to have the care and custody of the minor children of the parties.

*Id.* at 199, 237 S.E.2d at 91.

40. *Id.* The double standard applied to Mrs. and Mr. Brown by the trial court was also applied by the supreme court, which considered adultery to be a reflection of a mother's moral values but, interestingly, failed to consider the reflection of a father's adultery on his moral values. Mr. Brown was also involved in an adulterous relationship while he had custody of the children pending appeal by the mother. Mr. Brown's girlfriend admitted that she and Mr. Brown were "lovers," but not surprisingly claimed that this relationship was "never obvious in front of the children," and that she and Mr. Brown planned to marry when his divorce became final. *Id.* at 197, 237 S.E.2d at 90. It is unclear from the case whether Mr. Brown's girlfriend actually lived with him, or simply spent the night on occasion. The trial court, however, accepted that the children had not been "exposed" to their relationship. This fact raises a troubling issue, in that if *both* parents are involved in adulterous relationships, it becomes difficult to apply presumptions of any kind.

41. *Id.* at 199, 237 S.E.2d at 91 (emphasis added) (quoting Beck v. Beck, 341 So. 2d 580, 582 (La. App. 1977)).

42. *Id.* at 200, 237 S.E.2d at 91 (citing *In re* Marriage of J-H-M- and E-C-M-, 544 S.W.2d 582, 585 (Mo. App. 1976)).

43. *Id.* at 199, 237 S.E.2d at 91 (emphasis added). While courts often refer to cohabitation as involving "immoral" or "illicit" sexual conduct, this comment does not purport to make any judgment about the morality of any particular lifestyle. This Comment's purpose is to stress that, despite society's increased tolerance for a variety of sexual lifestyles, there is psychological evidence that children are being allowed to suffer the emotional consequences

supreme court thus unanimously affirmed the trial court's ruling that, because Mrs. Brown was "openly cohabiting" in her children's presence, she was unfit to retain custody.[44] The *Brown* court focused on two concerns: first, determining what effect non-marital cohabitation has on children and second, protecting children from exposure to such a living arrangement. The court presumed that non-marital cohabitation has a detrimental effect on a child living in the same house.[45] The court therefore did not require the impact of cohabitation on the children to be proven by evidence at trial. Nevertheless, the court recognized testimony that the cohabitation had adversely affected at least one of the children.[46]

Despite the troubling aspects of *Brown*,[47] the court clearly distinguished adultery outside the presence of the child from open cohabitation.[48] The court viewed open cohabitation as *inevitably* adversely impacting the child,[49] because the child would have knowledge of his or her parent's sexual misconduct.[50] Because this argument provided the foundation for the *Brown* decision, many practitioners interpreted it to mean that a parent who engages in unmarried cohabitation is per se unfit for custody.[51] The supreme court probably stopped short of fashioning a *per se* rule by requiring that non-marital cohabitation be given "the most careful consideration in a custody proceeding."[52] At the very least, however, *Brown* requires Virginia courts to presume that such relationships are harmful to children.

---

of their parents' sexual choices because courts no longer treat unmarried cohabitation as potentially detrimental to children.

44. *Brown*, 218 Va. at 200, 237 S.E.2d at 92. The supreme court emphasized that the decision of the trial court was entitled to deference and, in the absence of an abuse of discretion, the supreme court would not reverse the trial court's decision. *Id.* at 200-201, 237 S.E.2d at 92.

45. *See supra* text accompanying note 41.

46. *Brown*, 218 Va. at 200, 237 S.E.2d at 92. This minor aspect of *Brown* was later stretched to the extent that it became the critical test applied by the court of appeals to the issue of custody modification. *See infra* text accompanying notes 119-130.

47. *See supra* note 40.

48. *Brown*, 218 Va. at 200, 237 S.E.2d at 91-92. It is unclear whether the court considered sexual activity behind closed doors to be "outside the presence" of the child.

49. *See supra* text accompanying note 41.

50. *Brown*, 218 Va. at 200, 237 S.E.2d at 92 (quoting *In re* Marriage of J-H-M- and E-C-M-, 544 S.W.2d 582, 585 (Mo. App. 1976)).

51. *See* PETER N. SWISHER, *supra* note 33, § 15-7, at 56 (Supp. 1992); Letter from James Ray Cottrell, Gannon, Cottrell & Ward, P.C., to Katharine A. Salmon, Staff Member, *University of Richmond Law Review* 1 (June 1, 1993) (on file with the author); *see also* Stone, *supra* note 22, at 18 n.39 (categorizing *Brown* as a *per se* case). *Contra* Letter from Lawrence D. Diehl, Esq., to Katharine A. Salmon, Staff Member, *University of Richmond Law Review* 1 (Mar. 30, 1993) (on file with the author) (opining that *Brown* was never a *per se* rule).

52. *Brown*, 218 Va. at 199, 287 S.E.2d at 91.

B. Roe v. Roe

*Roe v. Roe*[53] gave the supreme court the opportunity to reiterate that *Brown v. Brown* was not concerned with a mother's adulterous relationship in the abstract, but with the fact that it was conducted in her children's presence.[54] The court repeated that when children are subjected to their mother's "open and public adultery with her paramour for a substantial period of time, in total disregard of the moral principles of our society, the mother is generally held morally unfit for custody."[55]

In *Roe*, the supreme court considered another custody dispute which involved a parent's cohabitation. After the Roe's divorce, Mrs. Roe retained custody of the couple's only child. Several years later, Mrs. Roe was stricken with cancer and, physically unable to care for her daughter, consented to a decree awarding custody to the child's father.[56] Four years later, Mrs. Roe discovered that Mr. Roe was living with his homosexual lover in the house where her daughter lived.[57] In her petition to have permanent custody returned to her, she alleged that the child had seen the two men hugging, kissing, and sleeping in bed together.[58]

The trial court found that each parent had been a "fit, devoted, and competent custodian," and that there was "*no evidence that the father's conduct had an adverse effect on the child. . . .*"[59] The court found this despite the father's testimony that he lived in an "active homosexual relationship" and shared a bedroom with his lover in the child's home.[60] The court granted joint legal custody of the child to the father and mother, but required that the father and his lover not share the same bed or bedroom.[61] The court commented that this arrangement constituted "one of the greatest degrees of flaunting [their sexual relationship] that one could imagine."[62] Such conduct, held the trial court, "flies in the face of *Brown v. Brown* [as well as] . . . society's mores. . . ."[63] The supreme court agreed, but held that this behavior alone was sufficient, as a matter of law, to find that the father was unfit,[64] *despite* the trial court's finding that the child had suffered no adverse effects by being exposed to the

53. 228 Va. 722, 324 S.E.2d 691 (1985).
54. *Id.* at 727, 324 S.E.2d at 693.
55. *Id.* (quoting Beck v. Beck, 341 So. 2d 580 (La. App. 1977)).
56. *Id.* at 724, 324 S.E.2d at 692.
57. *Id.*
58. *Id.*
59. *Id.* at 725, 324 S.E.2d at 692 (emphasis added). The child did, however, wish to live with her mother. *Id.*
60. *Id.*
61. *Id.* at 726, 324 S.E.2d at 693.
62. *Id.* at 725, 324 S.E.2d at 693.
63. *Id.* at 725-26, 324 S.E.2d at 693.
64. *Id.* at 727, 324 S.E.2d at 694.

relationship. The supreme court thus rejected the nexus approach, making it clear that a finding of unfitness does not depend on evidence of harm to the child. Unmarried cohabitation by itself is sufficient to change custody because the court *presumes* that this arrangement is deleterious to the child.[65]

Based on *Brown*, the supreme court reversed the joint custody award, holding that sole custody must be granted to the mother.[66] Otherwise, the court declared, the child would be required to live under conditions that were not only unlawful but imposed an intolerable burden upon her because of the social condemnation attached to them, which would "inevitably afflict her relationships with her peers and the community at large."[67] The court found Mr. Roe's unfitness evident in "his willingness to impose this burden upon her in exchange for his own gratification."[68]

---

65. *See supra* note 41 and accompanying text.

66. *Roe*, 228 Va. at 727-28, 324 S.E.2d at 694. The court was careful to distinguish its earlier holding in Doe v. Doe, 224 Va. 736, 284 S.E.2d 799 (1981), in which it declined to hold that every lesbian mother or homosexual father is *per se* an unfit parent. *Doe* was not a custody case but a disputed adoption. The *Roe* court pointed out that in *Doe* the issue was not the impact of a homosexual relationship upon a child in the context of permanent custody, but whether a father and stepmother should be permitted to adopt his child over the lesbian mother's objections. *Roe*, 228 Va. at 727, 324 S.E.2d at 693-94. Although the *Doe* court refused to terminate all parental rights of the mother, it "stopped far short of finding her a fit and proper custodian for her son" while her female lover continued to live with her. *Id.*

67. *Roe*, 228 Va. at 728, 324 S.E.2d at 694.

At press time, a Virginia custody dispute involving a homosexual parent unsuccessfully challenged the legitimacy of *Roe*. On March 31, 1993, a Henrico County juvenile court judge transferred custody of two-year-old Tyler Doustou from his lesbian mother, Sharon Bottoms, to his grandmother, Kay Bottoms. The transfer was ordered because Sharon Bottoms and Tyler were living with Ms. Bottoms' lover, April Wade. Deborah Kelly, *Sept. 7 Trial Set in Lesbian's Custody Case*, RICHMOND TIMES-DISPATCH, May 25, 1993, at B1.

That decision was upheld in the Circuit Court for the County of Henrico on September 7, 1993. In his bench opinion, Judge Buford M. Parsons, Jr., ruled that Sharon Bottoms was unfit to raise her son. Deborah Kelly, *Lesbian Ruled Unfit to Raise 2-Year-Old*, RICHMOND TIMES-DISPATCH, Sept. 8, 1993, at A1. Citing *Roe*, Judge Parsons noted that oral sodomy, which Ms. Bottoms admitted to, is a class six felony in Virginia. *Id. See* VA. CODE ANN. § 18.2-361 (Repl. Vol. 1988). In addition to finding Ms. Bottoms' conduct immoral and illegal, the judge held that it was potentially damaging to her son because it could create an "intolerable burden based on social condemnation." Deborah Kelly, *Dad Hopes Lesbian Regains Tot*, RICHMOND TIMES-DISPATCH, Sept. 13, 1993, at A1. While the judge recognized the presumption in favor of custody remaining with the biological parent, he determined that the "circumstances of [Sharon Bottoms'] unfitness . . . are . . . of such an extraordinary nature [that they] rebut this presumption." Deborah Kelly, *Lesbian Ruled Unfit to Raise 2-Year-Old*, RICHMOND TIMES-DISPATCH, Sept. 8, 1993, at A1. In addition, the child's court appointed guardian ad litem recommended that custody go to the grandmother. *Id.* Sharon Bottoms plans to appeal. *Id.* at A1.

68. *Id.*

Although the court's views regarding homosexuality undoubtedly influenced its decision,[69] the father in *Roe* was treated no differently than the mother in *Brown*.[70] In both cases, the presumption of unfitness was unrebuttable. Neither testimony of Mrs. Brown's general care of her children,[71] her plans to marry her lover,[72] nor the court's finding that she was otherwise a fit mother[73] was sufficient to overcome the presumption of unfitness. The *Roe* court essentially held that no conditions could remove the unfitness caused by the father's cohabitation with his homosexual lover.[74] The supreme court thus viewed unmarried cohabitation as the critical factor in determining parental fitness for custody.

## IV. THE COURT OF APPEALS OF VIRGINIA AND THE NEXUS APPROACH

Over time, *Brown* was read more narrowly in light of subsequent Virginia Court of Appeals decisions. The emphasis in custody cases shifted from the public policy analysis of moral considerations exemplified by *Brown v. Brown*. A nexus argument based on an expansive interpretation of the minor evidence in *Brown* relating to the behavioral problems of one of the children became the focus of the court of appeals.[75] While the nexus standard of evaluation has the potential positive effect of modifying an inflexible supreme court rule against a cohabiting parent ever retaining custody, as applied by the court of appeals it has become equally unyielding toward the non-custodial parent.

### A. Brinkley v. Brinkley

Unlike *Brown v. Brown* and *Roe v. Roe*, *Brinkley v. Brinkley*[76] did not involve open cohabitation by a parent Rather, Mr. Brinkley appealed a grant of sole custody to his wife in a final divorce decree.[77] The divorce was granted based on Mrs. Brinkley's adultery.

The court of appeals recognized that adultery, without more, is an insufficient basis upon which to find that a parent is unfit.[78] However, the

69. *See* Beargie, *supra* note 29, at 72-86, for an in-depth discussion of homosexuality as it relates to child custody.

70. *See* SWISHER, *supra* note 33, § 15-7, at 629. For a brief overview of the effects of various sexual lifestyles on child custody and visitation laws, see Robert L. Gottsfield, *Child Custody and Sexual Lifestyle*, 23 CONCILIATION CTS. REV. 43 (1985).

71. Brown v. Brown, 218 Va. 196, 198, 237 S.E.2d 89, 91 (1977).

72. *Id.*

73. *Id.*

74. Roe v. Roe, 228 Va. 722, 727, 324 S.E.2d 691, 694 (1985).

75. Cottrell, *supra* note 50; *see infra* note 93.

76. 1 Va. App. 222, 336 S.E.2d 901 (1985).

77. *Id.*

78. *Id.* at 224, 336 S.E.2d at 902. *See* Brown v. Brown, 218 Va. 196, 198, 237 S.E.2d 89, 91 (1977).

court reiterated *Brown*'s statement that adultery remains "a reflection of a parent's moral values which should be considered in evaluating the moral climate in which a child is to be reared."[79] Contradictory evidence of the mother's affair was presented at trial. The father alleged that the mother's lover visited her home at night for long periods of time. The mother, however, testified that the child never saw her boyfriend in the home.[80] The trial court made no determination that adultery actually occurred in the child's home, nor did it find evidence of any harmful effects to the child as a result of the mother's adultery.[81]

The court of appeals distinguished *Brown* as a case in which open cohabitation was compounded by evidence that the relationship adversely impacted the children, an element the trial court found absent in *Brinkley*.[82] The court of appeals therefore held that the trial court did not err in awarding custody to the mother.[83]

The significance of *Brinkley* lies in the subtle yet distorting twist the court of appeals added to the *Brown* rule. The court stated: "[A]s the *Brown* decision mandates, in determining a child's best interest, the *extent* to which the child is exposed to an illicit relationship *must be given the 'most careful consideration'* in a custody proceeding."[84] Nowhere in *Brown*, however, is there language that requires the court to scrutinize the *extent* of a child's exposure to adultery. *Brown* states: "An illicit relationship to which minor children are exposed cannot be condoned. Such a *relationship* must necessarily be given the *most careful consideration* in a custody proceeding."[85] With this seemingly innocuous alteration of the *Brown* rule, the court of appeals abandoned the supreme court's presumption that unmarried cohabitation is tantamount to unfitness and instead embraced the requirement that a nexus between sexual misconduct and an immediate negative impact on a child be shown.

### B. Sutherland v. Sutherland

In 1992, the Court of Appeals of Virginia decided two cases addressing unmarried cohabitation in the context of a custody determination. The

---

79. *Brinkley*, 1 Va. App. at 224, 336 S.E.2d at 902. Neither *Sutherland* nor *Ford* quoted this language, thus it is questionable whether it is still considered a meaningful factor by the court of appeals. *See* Sutherland v. Sutherland, 14 Va. App. 42, 414 S.E.2d 617 (1992); Ford v. Ford, 14 Va. App. 551, 419 S.E.2d 415 (1992).

80. *Id.*

81. *Id.*

82. *Id.* For the evidence in *Brown* which constituted an "adverse impact," see *infra* note 86. This evidence was relatively minor and pertained to only the eldest son.

83. *Brinkley*, 1 Va. App. at 224, 336 S.E.2d at 902-03.

84. *Id.* at 224, 336 S.E.2d at 902 (emphasis added).

85. Brown v. Brown, 218 Va. 196, 199, 237 S.E.2d 89, 91 (1977) (emphasis added).

decisions acknowledged that *Brown* still controlled these matters, yet allowed the cohabiting parent to retain custody in both cases.

*Sutherland v. Sutherland*[86] was a father's appeal of a custody award to the child's mother, who was engaged in a live-in, adulterous relationship with a man she intended to marry following his divorce.[87] The father argued that *Brown* required custody to be awarded to him. The court of appeals disagreed, holding that *Brown* did not establish a *per se* rule and therefore did not prevent the trial court from refusing to give the father custody.[88] The court unconvincingly distinguished *Sutherland* from *Brown* by claiming that evidence of Mrs. Brown's poor housekeeping and neglect of her children was a factor which aggravated the consequences of her adulterous relationship and led the court to find her unfit.[89] However, *Brown* expressly states that this evidence was *not* given any consideration in determining her lack of fitness.[90] Only Mrs. Brown's unmarried cohabitation made her an unfit mother in the eyes of the court.[91]

As in *Brinkley*, the court of appeals noted that a factor in the *Brown* decision was the evidence that the mother's conduct had an adverse impact on at least one of the children.[92] While there was evidence in *Brown* suggesting that one child might be reacting to his mother's cohabitation, the supreme court did not emphasize this aspect of the case in its determination.[93] Nevertheless, because none of these concerns was present in the record before the court of appeals, it left the decision to the discretion of the trial court "whose judgments will not be reversed in the absence of a showing that the discretion given has been abused."[94]

---

86. 14 Va. App. 42, 414 S.E.2d 617 (1992).

87. *Id.* at 43, 414 S.E.2d at 618.

88. *Id.*

89. *Id.*

90. Brown v. Brown, 218 Va. 196, 199, 237 S.E.2d 89, 90-91 (1977); *see supra* notes 37-39 and accompanying text.

91. *Brown*, 218 Va. at 199, 237 S.E.2d at 90-91.

92. *Sutherland*, 14 Va. App. at 44, 414 S.E.2d at 618.

93. At trial, Mr. Brown testified that his older son had developed a hyperactive condition during the parties' separation, and that this condition seemed to improve while he was in his father's custody. He also claimed that the child:

> particularly and repeatedly pleaded for the return of [Mr. Brown] to the household and asked repeatedly why the other man was sleeping with Mommie instead of [Mr. Brown]; That . . . [this child] resorted to long periods of silence; That he was irritable with and slapped his brother and then immediately hugged him; and that he otherwise tended to lose control.

*Brown*, 218 Va. at 198, 237 S.E.2d at 90. In view of *Sutherland* and *Ford*, the adverse impact aspect has become the controlling concern.

94. *Sutherland*, 14 Va. App. at 44, 414 S.E.2d at 618. In *Brinkley*, *Carrico*, *Sutherland*, and *Ford*, the court of appeals showed great deference to the trial court by affirming its decision in each case. It has been suggested that the true test of whether the court of appeals has totally departed from *Brown* will come only when a trial court is *reversed* for deciding to award custody to the other parent on grounds that the child has been exposed to

Because the trial court effectively ignored the crucial rule in *Brown*, that courts "*may not condone* . . . exposing the children to adulterous and immoral contacts",[95] it is difficult to see how this does not constitute an abuse of discretion, particularly when it was found that "[t]he children are often present in the house when the adultery occurs."[96] *Brown* explicitly stated that a "critical" factor in the decision to modify custody was that the mother's affairs were conducted "with the children's knowledge and *while they were present in the house*."[97] The supreme court logically assumed that unmarried cohabitation inevitably exposes a child to the relationship.[98] Thus, the court could not have intended to give the lower courts much discretion in this regard. Although the court of appeals repeated that the trial court "must consider all the facts"[99] in determining the best interests of the child, it is clear that cohabitation had little, if any, impact on the trial court's decision.

The outcome of *Sutherland* was particularly surprising because it arrived on the heels of a prior court of appeals decision involving indiscreet sexual conduct in the context of a child visitation dispute. In *Carrico v. Blevins*,[100] the court of appeals upheld a trial court's order barring the mother from having overnight male guests during her child's visitation. Significantly, the court acknowledged that "[e]xposing children to their parents' living with persons to whom they are not married has been disfavored by our Supreme Court [sic]. [*Brown*] held that the fact that the mother was openly living in an adulterous relationship in the same house with the children *was sufficient cause* to change custody."[101] This inter-

an immoral environment. *See* SWISHER, *supra* note 33, § 15-7, at 59 (Supp. 1992); Carrico v. Blevins, 12 Va. App. 47, 402 S.E.2d 235 (1991)

95. *Brown*, 218 Va. at 200, 237 S.E.2d at 91-92 (emphasis added).

96. *Sutherland*, 14 Va. App. at 43, 414 S.E.2d at 618.

97. *Brown*, 218 Va. at 200, 237 S.E.2d at 92.

98. *See id.* at 200, 237 S.E.2d at 92.

99. *Sutherland*, 14 Va. App. at 44, 414 S.E.2d at 618.

100. 12 Va. App. 47, 402 S.E.2d 235 (1991).

101. *Id.* at 49, 402 S.E.2d at 237 (citing Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977)) (emphasis added). The *Carrico* court went on to quote with approval the dissent of Judge Kenneth Ingram of the Alabama Court of Civil Appeals, (now sitting on the Alabama Supreme Court) in Jones v. Haraway, 537 So. 2d 946 (Ala. App. 1988) in which the judge recounted that a review of cases from various jurisdictions indicated that visitation restrictions were not uncommon. Judge Ingram's dissent is compelling, although the following language was not quoted by the Virginia Court of Appeals:

> Protection of a child's moral development should properly be a concern of our courts as part of the judicial search for the best interest of the child. I believe that courts can and should be involved in preventing the undermining of a child's respect for marriage and the family. Like the majority, I feel a parent's immoral or indiscreet conduct is a factor to be evaluated by trial judges in the determination of both custody and visitation. I would hold, however, that a Court should assign considerable negative impact to the conduct of a parent who engages in continuous or repeated immoral or indiscreet sexual relationships, such as cohabitation out of wedlock. . . .

pretation of *Brown* contradicts the view of the same court in *Ford v. Ford*[102] and *Sutherland.*

In addition, the *Sutherland* court disregarded the language in *Brown* which announced that non-marital cohabitation automatically triggers a presumption that the child will be harmed.[103] *Brown* did not require a finding of *immediate* manifestation of harm in order to change custody. Also, the trial court should not have been influenced by Mrs. Sutherland's claim that she eventually intended to marry her paramour. The mother in *Brown* made the same claim, yet the court did not consider this testimony sufficient to rebut the presumption of adverse effect.[104]

*Sutherland* significantly departs from the holding in *Roe v. Roe*, where the supreme court ignored the trial court's failure to find evidence that the father's conduct had an adverse effect on his child. The fact that societal condemnation would eventually burden the child was seen as sufficient reason to be concerned for her well-being.[105] The father's homosexuality in *Roe* should not obscure the fact that the supreme court was addressing *unlawful* sexual behavior in a child's presence.[106] It neither expressly nor impliedly confined this proscription to homosexuality. In fact, *Roe* was firmly based on the belief that exposing children to unmarried cohabitation, regardless of whether it is heterosexual or homosexual, is "in total disregard of the moral principles of our society . . ." and thus renders the offending parent "morally unfit" for custody.[107] Thus, by ignoring the supreme court's presumption of unfitness and requiring proof of a nexus between cohabitation and harm to the child, *Sutherland* represents a radically altered approach to determining a child's best interests in a custody proceeding.

---

*Jones*, 537 So. 2d at 951 (Ingram, J., dissenting). This dissent was prompted by the majority's refusal to presume a detrimental effect from the child's knowledge of such conduct, requiring instead a showing of "substantial detrimental effect" upon the child. Randall W. Nichols, *Modifying Child Custody Decisions Because of Indiscreet Sexual Behavior — Changing Times and an Elusive Standard*, 52 ALA. LAW. 36, 38 (Jan. 1991). Judge Ingram's chief concern was that appellate courts had begun to insist upon equating "substantial detrimental effect" with "tangible harm." *Id.* at 39.

102. 14 Va. App. 551, 419 S.E.2d 415 (1992).

103. *See Brown*, 218 Va. at 199-200, 237 S.E.2d at 91.

104. *Id.*

105. *See* Roe v. Roe, 228 Va. 722, 727, 324 S.E.2d 691, 694 (1985).

106. *See id.*

107. *Id.* at 727, 324 S.E.2d at 693-94. *Compare Id.*, 228 Va. at 727, 324 S.E.2d at 693 (referring to a mother as morally unfit as a result of her "open and public adultery with her paramour for a substantial period of time, in total disregard of the moral principles of our society. . . .") *with id.*, 228 Va. at 722, 324 S.E.2d at 694 (finding a father an unfit and improper custodian because of his "continuous exposure of the child to his immoral and illicit relationship. . . .").

C. Ford v. Ford

Three months after *Sutherland v. Sutherland*,[108] the court of appeals turned its back on the *Brown* determination that adulterous cohabitation is sufficient grounds to change custody. In *Ford v. Ford*,[109] the court of appeals reached a particularly disturbing decision when it allowed a father involved in an adulterous relationship to retain custody of his six-year-old daughter after he moved with her into his lover's home.[110] During the custody trial, Mr. Ford maintained his residence at the former marital home, where he lived with the couple's daughter, Christina.[111] Mr. Ford's lover, Dr. Marciana Wilkerson, testified that she and Mr. Ford were sleeping together and that Mr. Ford and Christina spent nights at her house on a regular basis.[112] Nevertheless, the trial court awarded Mr. and Mrs. Ford joint legal and shared physical custody of the child, with Mr. Ford having primary physical custody during the school year.[113]

Following the trial, but prior to the entry of the custody decree, Mr. Ford moved from the marital home into his paramour's house.[114] Mrs. Ford then filed a motion for reconsideration asking that primary physical custody be transferred to her due to Mr. Ford's misconduct.[115] The trial court denied this motion and the court of appeals affirmed.[116]

The court of appeals looked to the language of *Brinkley*,[117] rather than *Brown*,[118] to determine that the "standard governing our review of this issue is 'the *extent* to which the child is exposed to an illicit relationship.' "[119] Based on this distorted version of the *Brown*[120] rule, the court painstakingly reviewed the evidence to discover whether the child had been exposed to the "intimate nature" of her father's adulterous relationship.[121] Such an analysis was not contemplated by *Brown*, which held that

108. 14 Va. App. 42, 414 S.E.2d 617 (1992).

109. 14 Va. App. 551, 419 S.E.2d 415 (1992).

110. *Id.* at 555, 419 S.E.2d at 418.

111. *Id.* at 552, 419 S.E.2d at 416.

112. *Id.*

113. *Id.* at 553, 419 S.E.2d at 417.

114. *Id.*

115. *Id.*

116. *See generally* SWISHER *supra* note 33, § 15-7, at 58 (Supp. 1992). James Ray Cottrell, the author who wrote this section of the book, was Mrs. Ford's attorney before the court of appeals.

117. Brinkley v. Brinkley, 1 Va. App. 222, 224, 336 S.E.2d 901, 902 (1985).

118. Brown v. Brown, 218 Va. 196, 199, 237 S.E.2d 89, 91 (1977).

119. *Ford*, 14 Va. App. at 555, 419 S.E.2d at 418 (emphasis added) (quoting Brinkley v. Brinkley, 1 Va. App. 222, 336 S.E.2d 901 (1985)).

120. *See supra* text accompanying notes 83-84.

121. *Ford*, 14 Va. App. at 554-55, 419 S.E.2d at 417.

adulterous cohabitation by its very nature exposes the child to the illicit relationship.[122]

Despite the fact that Mr. Ford moved his child into his lover's home, the court insisted that this was not determinative of the extent to which the child was "exposed to the intimate nature of [their] relationship."[123] Dr. Wilkerson testified that she and Mr. Ford slept together on a regular basis, presumably while the child was in the same house, before Mr. Ford and Christina moved in with her.[124] In addition, Dr. Wilkerson admitted that she and Mr. Ford were currently sleeping together. However, the court was impressed by testimony that they "maintained" separate bedrooms at her house.[125] The court of appeals gave great weight to evidence "that proved" that Mr. Ford and his lover had made "every effort to establish for Christina a nonthreatening, platonic relationship."[126] For example, evidence was introduced that Mr. Ford and Dr. Wilkerson stayed in separate hotel rooms when they traveled with the child.[127] The court also considered the couple's open discussions with the child about their ultimate intention to marry,[128] despite the *Brown* court's refusal to allow such intentions to rebut the presumption of harm.[129] The *Ford* court thus concluded that no evidence that Christina was actually exposed to her father's adultery had been introduced.[130]

The *Ford* court also denied that it was controlled by *Roe*, which it maintained turned on the issue of the father's homosexuality.[131] This is an extremely narrow interpretation of *Roe*, which was a broad indictment of unlawful sexual conduct in the same house in which a child lived.[132] Although the *Roe* court linked its decision to societal condemnation of the father's relationship, the *Ford* court implicitly denied that heterosexual affairs to which a child was exposed were similarly disapproved.[133]

---

122. *Brown*, 218 Va. at 200, 237 S.E.2d at 92 (1977).

> [Mrs. Brown's] adulterous relationship was admitted. They were openly cohabitating in the presence of her two young children. [She] had maintained her home under these conditions over an extended period of time. . . . The [trial] court therefore ruled that . . . by reason of her adulterous relationship . . . in the same residence of which the minor children also lived, that [she] was not a fit and proper person to have the care and custody of the minor children of the parties.

*Id.* at 199-200, 237 S.E.2d at 91-92.

123. *Ford*, 14 Va. App. at 554-55, 419 S.E.2d at 417.

124. *Id.* at 555, 419 S.E.2d at 418.

125. *Id.* at 553, 419 S.E.2d 416-17.

126. *Id.* at 555, 419 S.E.2d at 418.

127. *Id.*

128. *Id.*

129. *See supra* text accompanying note 104.

130. *Ford*, 14 Va. App. at 556, 419 S.E.2d at 418.

131. *Id.* at 555-56, 419 S.E.2d at 418.

132. *See supra* note 107 and accompanying text.

133. *Ford*, 14 Va. App. at 555-56, 419 S.E.2d at 418.

The court thereby overlooked the supreme court's condemnation of both homosexual and heterosexual cohabitation in *Brown* and *Roe.*

Finally, the *Ford* court claimed that a critical issue in *Roe* was the father's failure to "shield" his child from the illicit nature of his relationship.[134] The supreme court, however, did not allow Mr. Roe to have joint custody even on the condition that he and his lover maintain separate bedrooms.[135] The court was persuaded that the "child's awareness of the nature of the father's illicit relationship is fixed and cannot be dispelled . . . The impact of such behavior upon the child . . . is *inevitable.*"[136] Although *Ford* contained no evidence that the relationship had an adverse effect on the child, and the court was impressed by testimony that efforts were made to hide the sexual nature of the relationship from the child, these factors should not have indicated that the cohabitation was consistent with the child's best interests.

### D. *Problems with the Nexus Approach and the Need for a Rebuttable Presumption*

*Brown v. Brown* and *Roe v. Roe* emphasized that adverse effects on children are presumed whenever unmarried cohabitation is part of a child's home environment.[137] While the court of appeals has not construed this as a conclusive presumption, supreme court precedent clearly requires that cohabitation be considered when determining custody.[138] The Isaacs and Leon study illustrates the legitimacy of this consideration.[139] Disturbingly, however, *Sutherland* and *Ford* demonstrate that unmarried cohabitation, at least between heterosexuals, has become irrelevant in the absence of proof of direct harm to the children exposed to it.[140]

In focusing on the extent of the child's exposure to the sexual nature of the cohabiting relationship, the court of appeals has bound the best interests of the child to a nearly impossible standard of proof that requires both evidence of misconduct in the presence of the child and immediate proof that the child has been harmed by this behavior. The court's decision now apparently turns on nothing other than the testimony of the cohabiting couple that the child is never exposed to inappropriate behavior.[141] It is doubtful that the non-custodial parent will be able to prove

---

134. *Id.* at 556, 419 S.E.2d at 418.

135. Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985).

136. *Id.* (emphasis added).

137. *See* Brown v. Brown, 218 Va. 196, 199, 237 S.E.2d 89, 91 (1977); Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985).

138. *See Brown*, 218 Va. at 199, 287 S.E.2d at 91.

139. *See* Isaacs & Leon, *supra* notes 7-23 and accompanying text.

140. *See, e.g.*, Sutherland v. Sutherland, 14 Va. App. 42, 44, 414 S.E.2d 617, 618 (1992).

141. Cottrell, *supra* note 51, at 2.

otherwise. The custodial parent is extremely unlikely to produce a psychiatrist as an expert witness unless the psychiatrist plans to testify that the child is thriving in that parent's care. Furthermore, an opinion rendered by the American Psychiatric Association Ethics Committee indicates that a psychiatrist may not examine a child at the request of a non-custodial parent and without consent of the custodial parent, then testify in court about the child.[142] Thus, the non-custodial parent is hampered in his or her efforts to introduce contradictory expert testimony. Moreover, especially in the case of a young child, it may take several years before the deleterious effects are manifested in a tangible way.[143]

The nexus approach as applied recently by the court of appeals does not consider either the moral dimension of cohabitation or the potentially harmful long-term effects 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.[144] Even if the court of appeals 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. For example, if a child is happy, well-adjusted, and well cared for in the custody of one parent, removing the child from this atmosphere, even into the custody of an equally fit parent, does not serve the child's best interests.[145] A rebuttable presumption would avoid the harsh consequences of a rule where cohabitation is conclusive evidence of unfitness. This standard would also modify the nexus rule as presently applied, which presents significant problems of proof for the non-custodial parent given the court's tendency to consider only immediate manifestations of harm, rather than potentially harmful long-range effects.

A rebuttable presumption is also a meaningful guideline for trial courts, which have varied in their treatment of cohabitation as a factor. Testimony by the cohabiting parent that the extent of the child's exposure to the sexual nature of the non-marital relationship is slight should not be sufficient to rebut the presumption of harmfulness, since this substan-

---

142. American Psychiatric Association, Opinions of the Ethics Committee on the Principles of Medical Ethics § 4-M (1992) (on file with author).

143. *See* Isaacs & Leon, *supra* notes 7 and text accompanying notes 7-28.

144. Cottrell, *supra* note 51, at 1.

145. Beargie, *supra* note 29, at 84.

tially misconstrues the rule in *Brown v. Brown* and can only result in a "rote mimicry" of the evidence presented by the cohabiting couple in *Ford v. Ford*.[146] This "extent of the exposure" analysis is also undermined by the fact that there is no evidence that a child must actually see sexual behavior to be adversely affected by it.

A rebuttable presumption would reinstate non-marital cohabitation as a factor in custody modification cases, thereby satisfying supreme court precedent and acknowledging psychological 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.

## V. Conclusion

In order to obtain a shift in custody where unmarried cohabitation is a factor, the court of appeals now demands evidence that a parent's sexual misconduct has occurred in the child's physical presence and that it be directly linked to a present showing that the child has been harmed by such behavior.[147]

The judicial pendulum in Virginia custody cases has swung from a seemingly conclusive presumption which sided with the non-custodial parent to the current use of the nexus approach which is weighted entirely in favor of the cohabiting parent. A child's best interests cannot be met by either extreme. While the supreme court's approach under *Brown v. Brown* made cohabitation the critical factor in finding unfitness, the unfortunate trend of the court of appeals has been to require that, for unmarried cohabiting to *become* a factor, the harmful effect of cohabitation on the child must be proven by direct evidence. Non-marital cohabitation has thus become irrelevant in the absence of a showing of immediate harm to the child.

The Isaacs and Leon study supports the supreme court's presumption that a child whose parent cohabits with a lover is likely to be harmed by that parent's choice, although it may take several years for such harm to become apparent.[148] By failing to scrutinize such relationships with great care, except to the extent that a child has actually seen sexual behavior between the cohabiting couple, the court of appeals has liberally conceded to unmarried cohabitation. This concession allows the custodial parent to pursue his or her sexual freedom at the potential expense of a child's well-being. The current burden of proof imposed on the non-custo-

---

146. *Id.* at 2. *See* Ford v. Ford, 14 Va. App. 551, 555, 419 S.E.2d 415, 418 (1992).

147. *See* Sutherland v. Sutherland, 14 Va. App. 42, 44, 414 S.E.2d 617, 618 (1992); *Ford*, 14 Va. App. at 556, 419 S.E.2d at 418.

148. *See* Isaacs & Leon, *supra* notes 7-28 and accompanying text.

dial parent leaves many children in living situations which may permanently scar their emotional health. Instituting a rebuttable presumption that non-marital cohabitation is harmful to children would rightfully subordinate a parent's right to cohabit freely to a child's paramount right to a stable environment, yet allow for a fair consideration of which parent can best provide that environment.

*Katharine A. Salmon*