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# **BOTTOMS III: VISITATION RESTRICTIONS AND SEXUAL ORIENTATION**

Joseph R. Price\*

*In 1994, national media attention focused on the Virginia case Bottoms v. Bottoms, in which Kay Bottoms successfully fought to terminate her lesbian daughter Sharon's custody of Sharon's son, Tyler. Although the Court of Appeals of Virginia reversed the trial court's award of custody to Kay Bottoms, the Supreme Court of Virginia reversed the appellate court and returned custody to Tyler's grandmother. Sharon then sought modification of the visitation and custody order, but the trial court denied her petition and instead reduced and further restricted her visitation rights. In Bottoms III, the Court of Appeals of Virginia reversed the trial court's decision and remanded for reconsideration. This Comment uses the Bottoms case as a framework for analyzing state courts' approaches to determining homosexual parents' custody and visitation rights. Two approaches have emerged: the traditionalist approach, under which a trial court may consider a parent's homosexuality as evidence of moral unfitness inherently contrary to the best interests of the child, and the nexus approach, under which a homosexual parent's conduct, rather than status, is the pertinent consideration. The Comment concludes with a recommendation that courts adopt the conduct-focused nexus approach in order to afford homosexual parents a genuine opportunity to receive objective judicial consideration in custody and visitation contexts.*

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## **INTRODUCTION**

Six-year-old Tyler Doustou no longer runs laughing through his mother's Henrico, Virginia apartment. She doesn't tuck him into bed each evening or kiss him goodnight. In fact, for more than four years, Sharon Bottoms's longest visits with her son have been anxious hours spent sitting opposite him in a Virginia courtroom. For more than two years, Sharon fought to regain custody of her son from her mother, Kay Bottoms, and Kay's live-in companion, Tommy Conley, whom Sharon asserted sexually

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abused her more than eight hundred times.<sup>1</sup> In a highly publicized opinion, the Supreme Court of Virginia held that Sharon, "although devoted to her son, refuses to subordinate her own desires and priorities to the child's welfare,"<sup>2</sup> and it ordered the reinstatement of the trial court's award of custody to Kay.<sup>3</sup> Clearly focusing on Sharon's sexual orientation as the determinative factor in its decision, the court noted that "[c]onduct inherent in lesbianism is punishable as a Class 6 felony"<sup>4</sup> and that the "social condemnation" attached to lesbian relationships "will inevitably affect the child's relationships with his 'peers and the community at large.'"<sup>5</sup> In an apparent effort to find additional factors warranting the change in custody, the court cited other evidence that, in the absence of Sharon's sexual orientation, undoubtedly would have been insufficient to permit denying a biological parent custody under Virginia law.<sup>6</sup>

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<sup>1</sup> *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) [hereinafter *Bottoms I*], *rev'd*, 457 S.E.2d 102 (Va. 1995). Kay Bottoms eventually acknowledged that Sharon's accusations of sexual abuse "were not altogether unfounded." *Id.* at 279.

<sup>2</sup> *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) [hereinafter *Bottoms II*]. The Court of Appeals is Virginia's intermediate court of appeals; its jurisdiction includes appeal by right for all domestic relations cases.

<sup>3</sup> *Id.* at 109.

<sup>4</sup> *Id.* at 108.

<sup>5</sup> *Id.* (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (1985)).

<sup>6</sup> The court noted that in addition to Bottoms's lesbian lifestyle, "[t]he 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." *Id.* The court also found

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 his mother.

*Id.*

Virginia's courts long have found that the parental rights of biological parents are paramount, and it is well established in Virginia that for a third party to divest custody from a biological parent, the fitness of the biological parent must be rebutted before a court can consider whether the third party would be a "more fit" parent. *See Bottoms I*, 444 S.E.2d at 280. "Even when the parental level of care may be marginally satisfactory, courts may not take custody of a child from his or her parents simply because a third party may be willing and able to provide better care for the child." *Id.* (citing *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973)).

Virginia's commitment to the fundamental right of biological parents to custody of their children is sufficiently embedded in Virginia jurisprudence that Virginia's courts have found that a biological parent could retain custody even where otherwise compelling facts appeared sufficient to justify a change of custody. *See Phillips v. Kiraly*, 105 S.E.2d 855 (Va. 1958) (denying an uncle and an aunt custody even though the child's father was irresponsible, created pornography in his home, and had been a peeping

Despite this effort at judicial slight-of-hand, both the legal community and the press readily identified the "*Bottoms II*"<sup>7</sup> decision as another case in which a court relied on a parent's sexual orientation to justify diminishing the parent's parental rights.<sup>8</sup> Concerned that an appeal to the United States Supreme Court could result in an unfavorable ruling and that the appellate process would be a lengthy one,<sup>9</sup> Sharon and her attorneys returned to the local juvenile and domestic relations court in an unsuccessful attempt to seek modification of the custody order based on a change in circumstances.<sup>10</sup>

Subsequently, Sharon experienced difficulties in exercising the visitation rights established by the trial court and reinstated by the Supreme Court of Virginia in *Bottoms II*.<sup>11</sup> The original visitation order provided for weekly visitation with Tyler from 10 a.m. on Mondays until 6 p.m. on Tuesdays.<sup>12</sup> The order prohibited Sharon from bringing Tyler to the home she shared with her lesbian partner, April Wade, and prohibited visitations in Wade's presence.<sup>13</sup> Based on her continuing difficulties in exercising her visitation

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tom); *Mason v. Moon*, 385 S.E.2d 242, 244 (Va. Ct. App. 1989) (denying a paternal grandmother custody even though the child and her natural mother resided with the child's stepfather, who had killed the child's natural father in the child's presence).

<sup>7</sup> Throughout this Comment, the court of appeals's 1995 decision (444 S.E.2d 276) will be referred to as "*Bottoms I*," the supreme court's 1995 overruling of the appellate decision (457 S.E.2d 102) will be referred to as "*Bottoms II*," and the court of appeals's 1997 decision (1997 WL 421218) will be referred to as "*Bottoms III*." See *supra* notes 1 and 2 and *infra* note 11.

<sup>8</sup> Legal scholars viewed the opinion as placing Virginia among those remaining jurisdictions that permit a legal presumption that a gay or lesbian parent's mere status as a homosexual is contrary to the best interests of his or her child. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (forthcoming 1997) (manuscript at 804, on file with author).

*Newsweek*, discussing the increasing number of "out" homosexual parents, noted that gay and lesbian "parents are haunted by such well-publicized legal cases as the 1995 Virginia Supreme Court ruling that Sharon Bottoms was an unfit parent because she is a lesbian." Barbara Kantrowitz, *Gay Families Come Out*, *NEWSWEEK*, Nov. 4, 1996, at 51, 56.

<sup>9</sup> See Deborah Kelly, *Bottoms, ACLU Ponder Move Denied at the State Supreme Court Level: Should U.S. Appeal Be Next?*, *RICHMOND TIMES-DISPATCH*, June 12, 1995, at B1.

<sup>10</sup> See Deborah Kelly, *Lesbian May End Bid for Son*, *RICHMOND TIMES-DISPATCH*, Feb. 28, 1996, at A1. Among the changes in circumstance were Sharon's securing steady employment and her efforts to provide a stable home, which included her commitment to a long-term relationship with her partner. *Id.*

<sup>11</sup> See *Bottoms II*, 457 S.E.2d at 109 (reinstating the trial court's order); *Bottoms v. Bottoms*, No. 2157-96-2, 1997 WL 421218, at \*1 (Va. Ct. App. July 29, 1997) [hereinafter *Bottoms III*].

<sup>12</sup> See *Bottoms I*, 444 S.E.2d at 280; Kelly, *supra* note 9, at B1.

<sup>13</sup> See *Bottoms I*, 444 S.E.2d at 280. Wade noted that the restricted visitation re-

rights, Sharon petitioned the juvenile and domestic relations court for Tyler's custody and an order requiring Kay to show cause why she should not be held in contempt for her repeated violations of the visitation order.<sup>14</sup> In response, Kay petitioned the court for further reduction or termination of Sharon's visitation rights.<sup>15</sup>

Following an *ore tenus* hearing, the juvenile and domestic relations court dismissed the show cause motion and denied both Sharon's and Kay's petitions for modification of the original visitation order.<sup>16</sup> Sharon appealed to the circuit court and again appeared before Judge Buford M. Parsons, who originally took custody of Tyler from Sharon because of her "illegal . . . [and] immoral" lifestyle.<sup>17</sup> Despite testimony from a psychologist who had examined Tyler, Sharon, and Wade and had determined that Tyler needed to spend more time with his mother and Wade,<sup>18</sup> Judge Parsons rejected the petition and instead further restricted Sharon's visitation rights.<sup>19</sup>

Judge Parsons's new order limited Sharon's visitation to every other weekend and one weekend during the summer.<sup>20</sup> Judge Parsons specified that "visitation shall occur outside of the presence of April Wade, it being expressly provided that Sharon Bottoms will permit no contact between Tyler and April Wade in any manner, including verbal contact."<sup>21</sup> The order also required that Sharon's visitations occur only at Sharon's home.<sup>22</sup> Judge Parsons's decision to restrict visits to Sharon's residence reportedly was based on his learning that Sharon had taken Tyler to the homes of lesbian friends during visitations.<sup>23</sup> In adding the additional restrictions to Sharon's visitation, Judge Parsons declared that he was bound by the Supreme Court of Virginia's opinion in *Roe v. Roe*,<sup>24</sup> in which the court divested a homosexual father of custody of his biological child and awarded

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quired that "I have to leave my own house when Tyler comes to visit." Amanda Bloodgood, *Bottoms Back in Court: Appeal for Increased Visitation*, OUR OWN, June 1997, at 1.

<sup>14</sup> *Bottoms III*, 1997 WL 421218, at \*1.

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See Bottoms I*, 444 S.E.2d at 279.

<sup>18</sup> *See Bloodgood, supra* note 13, at 16.

<sup>19</sup> *Bottoms v. Bottoms*, CH96JA0269-00 (Va. Henrico Cir. Ct. Aug. 20, 1996).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Bloodgood, supra* note 13, at 16. Because the trial court's original visitation order prohibited Sharon from bringing Tyler to the home she shares with Wade, she brought Tyler to friends' homes for the visits. After Judge Parsons learned that those friends are lesbians, he modified the order to prohibit visitation at any location other than Sharon's home. *Id.*

<sup>24</sup> *See Bottoms III*, 1997 WL 421218, at \*2 (citing *Roe v. Roe*, 324 S.E.2d 691 (1985)).

custody to the child's mother.<sup>25</sup> Sharon appealed the decision to the Court of Appeals of Virginia. Holding that Judge Parsons had incorrectly interpreted *Roe* as "requir[ing] a disposition based solely upon [Sharon's] sexual status,"<sup>26</sup> the court reversed and remanded.<sup>27</sup>

This Comment addresses the implications of the court of appeals's recent decision in *Bottoms III*<sup>28</sup> for lesbian and gay parents seeking visitation with their children. It concludes that *Bottoms III* fails to impose any meaningful limitation on a Virginia trial judge's ability to consider her beliefs about homosexuality in determining the best interests of a child and that the decision thereby continues the train of Virginia case law that permits custody determinations involving gay and lesbian parents to be made on the basis of third-party prejudices and stereotypes rather than on evidence regarding the actual impact of the parent's sexual conduct on his or her child's welfare.

### I. SEXUAL ORIENTATION AND CUSTODY AND VISITATION DETERMINATIONS

Discrimination on the basis of sexual orientation in custody and visitation battles was routine during early attempts by gay and lesbian parents to assert their parental rights.<sup>29</sup> Courts generally viewed a parent's sexual orientation as strongly mitigating against custody, and many jurisdictions adopted a per se rule that homosexuality disqualified a parent from having any form of custody.<sup>30</sup> Introduction of the "best interests of the child" standard in the 1970s placed less emphasis on the parent's sexual orientation and more emphasis on the child's physical and emotional needs.<sup>31</sup> Nevertheless, the majority of courts continued to view a child's exposure to a parent's homosexuality as detrimental to the child's best interests.<sup>32</sup> Courts also generally accepted that societal attitudes concerning the "immoral lifestyle" of a child's parent would detrimentally impact the child's welfare.<sup>33</sup> Consequently, while espousing a "best interests" standard of review, courts continued to deny custody and visitation rights by finding that the immoral nature of homosexual parents' lifestyle was presumptively contrary to the

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<sup>25</sup> *Roe*, 324 S.E.2d at 693-94.

<sup>26</sup> *Bottoms III*, 1997 WL 421218, at \*3.

<sup>27</sup> *Id.*

<sup>28</sup> See *supra* notes 7 and 14.

<sup>29</sup> ESKRIDGE & HUNTER, *supra* note 8, at 799.

<sup>30</sup> *Id.*; see, e.g., *Immerman v. Immerman*, 1 Cal. Rptr. 298 (Ct. App. 1959); *Bennett v. Clemens*, 196 S.E.2d 842 (Ga. 1973); *Commonwealth v. Bradley*, 91 A.2d 379 (Pa. Super. Ct. 1952).

<sup>31</sup> ESKRIDGE & HUNTER, *supra* note 8, at 799.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

best interests of their children.<sup>34</sup>

Beginning in the 1980s, a substantial increase occurred in the number of openly gay and lesbian parents seeking custody and visitation with their biological children.<sup>35</sup> Accompanying this rise in homosexual parents' assertion of their parental rights was a proliferation in the publication of scholarly research finding no developmental difference between children with homosexual parents and children with heterosexual parents.<sup>36</sup> Such studies also revealed that children were not adversely affected by growing up in a gay or lesbian household.<sup>37</sup> Based on her 1992 analysis of studies of gay and lesbian parenting, University of Virginia Professor Charlotte Patterson concluded:

There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect to that among offspring of heterosexual parents. Despite long-standing legal presumptions against gay and lesbian parents in many states, despite dire predictions about their children based on well-known theories of psycho-

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<sup>34</sup> *Id.*; see also *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *In re B.*, 380 N.Y.S.2d 848 (Sup. Ct. 1976); Wanda Ellen Wakefield, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R. 4th 1297 (1981) (citing *Hall v. Hall*, 291 N.W.2d 143 (Mich. Ct. App. 1980); *Di Stefano v. Di Stefano*, 401 N.Y.S.2d 636 (App. Div. 1978)).

Such was the case in the Supreme Court of Virginia's decision in *Bottoms II*. Noting this, the dissent in *Bottoms II* criticized the majority's participation in this form of discrimination:

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.

*Bottoms II*, 457 S.E.2d at 109 (Keenan, J., dissenting).

<sup>35</sup> APRIL MARTIN, *THE LESBIAN AND GAY PARENTING HANDBOOK: CREATING AND RAISING OUR FAMILIES* 162 (1993).

<sup>36</sup> See David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 355 (1994); Richard Green, *The Best Interests of the Child with a Lesbian Mother*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 7, 9 (1982); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 156 (1991); 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); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992).

<sup>37</sup> See sources cited *supra* note 36.

social development, and despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychological growth.<sup>38</sup>

In conjunction with this new evidence and the growing number of cases involving gay and lesbian parents, judicial treatment of gay and lesbian domestic rights evolved, with the majority of jurisdictions adopting a nexus approach to considering sexual orientation in the custody and visitation context.<sup>39</sup> In nexus jurisdictions, a parent's sexual orientation "is not per se disqualifying in custody and visitation determinations, but it may justify denying custody to a lesbian or gay parent if there is a nexus between the sexual orientation and harm to the child."<sup>40</sup> Recognizing parents' fundamental right to have and maintain a relationship with their children,<sup>41</sup> courts adopting the nexus approach have regularly held that a parent's homosexuality alone cannot be the basis for denying custody or visitation.<sup>42</sup>

Although a majority of jurisdictions have adopted the nexus approach, a number of states continue to embrace the traditional approach.<sup>43</sup> Traditionalist courts hold that a parent's homosexual status, although not a per se bar to a finding of fitness, is nevertheless a negative factor indicating moral unfitness.<sup>44</sup> Such jurisdictions weigh parents' "moral fitness" in their determinations of custody and visitation and consequently routinely find that the homosexual parents' "immoral lifestyle" warrants denying them custody and

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<sup>38</sup> Patterson, *supra* note 36, at 1036.

<sup>39</sup> ESKRIDGE & HUNTER, *supra* note 8, at 802-03.

<sup>40</sup> *Id.* (citing *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988); *Charpentier v. Charpentier*, 536 A.2d 948 (Conn. 1988); *In re Marriage of Wiarda*, 505 N.W.2d 506 (Iowa Ct. App. 1993); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992); *Anonymous v. Anonymous*, 503 N.Y.S.2d 466 (App. Div. 1986); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *Nickerson v. Nickerson*, 605 A.2d 1331 (Vt. 1992)); see cases cited *infra* note 48.

<sup>41</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>42</sup> See, e.g., cases cited *supra* note 40.

<sup>43</sup> ESKRIDGE & HUNTER, *supra* note 8, at 804.

<sup>44</sup> *Id.*; see *White v. Thompson*, 569 So.2d 1181 (Miss. 1990); *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).



restricting substantially their visitation rights.<sup>45</sup>

## II. RESTRICTIONS ON VISITATION

The trend toward a neutral consideration of parents' sexual orientation resulted in not only an increased likelihood that a gay or lesbian parent could be granted custody or visitation but also that any grant of visitation would be free of the numerous restrictions previously imposed on homosexual parents' visitation rights. During the initial period in which homosexual parents began to win visitation with their children, courts in almost all jurisdictions routinely imposed substantial restrictions on the parents' visitation.<sup>46</sup> Gay and lesbian parents were regularly prohibited from having overnight visitation, were required to exercise their visitation rights outside of the presence of their partner or any homosexual, and were often not permitted to take their children to churches or other places accepting of their homosexuality.<sup>47</sup>

With the advent of the nexus approach, an increasing number of jurisdictions began limiting the restrictions that could be placed on homosexual parents' visitation rights.<sup>48</sup> The same research underpinning reevaluation of

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<sup>45</sup> ESKRIDGE & HUNTER, *supra* note 8, at 804; *see cases cited supra* note 44.

<sup>46</sup> *See, e.g.,* Irish v. Irish, 300 N.W.2d 739 (Mich. Ct. App. 1980) (holding that a lesbian's children could not remain overnight at their mother's home if her partner was present); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982) (holding that no female with whom the lesbian mother was living could be present during the mother's visitation with her children); *In re J.S. & C.*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976) (*per curiam*), *aff'g* 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) (holding that a homosexual father could not take his children to any homosexual-related activities or have his partner present during visitation); *In re B.*, 380 N.Y.S.2d 848 (Sup. Ct. 1976) (holding that a lesbian mother could not have overnight visitation with her daughter and could not have her partner or other homosexuals present during visitation); *Woodruff v. Woodruff*, 260 S.E.2d 775 (N.C. Ct. App. 1979) (holding that a homosexual father could not have his partner present during his son's overnight visitation but reversing the holding that the father could not have overnight visitation with his son); *Roberts v. Roberts*, 489 N.E.2d 1067 (Ohio Ct. App. 1985) (holding that the trial court's restriction on a homosexual father's visitation that merely prohibited the presence of any unrelated male during visitation was insufficient and remanding for consideration of additional restrictions).

<sup>47</sup> *See, e.g.,* cases cited *supra* note 46.

<sup>48</sup> *See, e.g., In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988) (holding that an affirmative showing of harm or likely harm to the child was necessary in order to restrict parental visitation); *In Interest of R.E.W.*, 471 S.E.2d 6 (Ga. Ct. App.) (holding that a homosexual parent's "immoral conduct" might warrant limitations on contact between the parent and the child but only if it is shown that the child is exposed to the parent's undesirable conduct in such a way that it adversely has affected or likely would affect the child), *cert. denied*, 472 S.E.2d 295 (Ga. 1996); *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993) (holding that the trial court erred in restricting a lesbian

judicial treatment of sexual orientation in initial custody and visitation determinations likewise was cause for courts to question the legitimacy of the myriad of restrictions typically imposed on gay or lesbian parents' visitation rights.<sup>49</sup> Accordingly, courts began to reject the argument that a parent's homosexual orientation alone could justify restricting the parent's visitation. Instead, courts required proof of a nexus between the parent's homosexual orientation and harm to the child to justify restricting visitation rights.<sup>50</sup> Under this standard, sexual orientation could be considered only to the extent that the parent's sexual conduct had a "direct adverse impact" on a child's welfare and best interests.<sup>51</sup>

The Court of Appeals of Ohio's 1987 decision in *Conkel v. Conkel*<sup>52</sup> is illustrative. In *Conkel*, a mother appealed a court order granting overnight visitation to the homosexual father of her two sons. The court of appeals affirmed the order, rejecting the mother's argument that the father's status as a homosexual warranted depriving him of overnight visitation with his children and holding that "whether the issue is custody or visitation, before depriving the sexually active parent of his crucial and fundamental right of contact with his child, a court must find that the parent's conduct is having, or is probably having, a harmful effect on the child."<sup>53</sup>

Similarly, the Court of Appeals of Washington struck down a trial court's order permitting a homosexual father visitation only if he did not allow his partner to reside in the father's home and provided that the two men did not associate in any fashion that would suggest they were more than "casual friends."<sup>54</sup> The court of appeals observed:

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mother's visitation with her ten-year-old son to supervised visits on alternate weekends with no overnight or extended visitation ); *In re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990) (holding that the trial court improperly required that a homosexual father's visitation occur outside of the presence of any unrelated adult); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987) (holding that the trial court did not err in granting a homosexual father overnight visitation with his sons because there was no evidence that his homosexuality harmed the welfare of his children); *In re Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979) (holding that the trial court erred in requiring a lesbian mother to exercise her visitation rights with her son outside of the presence of other lesbians); *In re Marriage of Wicklund*, 932 P.2d 652 (Wash. Ct. App. 1996) (holding that because the evidence did not show that a homosexual father's display of affection with his partner results in harm to his children's welfare, the trial court abused its discretion by conditioning his visitation with his children on the requirement that he not display signs of affection with his partner in the children's presence).

<sup>49</sup> See *supra* notes 36-38 and accompanying text.

<sup>50</sup> See, e.g., cases cited *supra* note 48.

<sup>51</sup> See, e.g., cases cited *supra* note 48.

<sup>52</sup> 509 N.E.2d 983, 985 (Ohio Ct. App. 1987).

<sup>53</sup> *Id.*

<sup>54</sup> *In re Marriage of Cabalquinto*, 718 P.2d 7, 7-8 (Wash. Ct. App. 1986).

Parents come in all shapes and sizes. It is a wonder of the human race that, as a general proposition, children love their parents and are better off with them than without them. There are some restraints society places upon parents, of course, but they are few in number and sexual preference is not one of them.<sup>55</sup>

The court concluded that because “[t]here is no evidence in the record to support a finding that the [unrestricted] visitation ‘would endanger the child’s physical, mental, or emotional health,’ the restriction was impermissible.<sup>56</sup>

Although requiring proof of a direct adverse impact on a child’s welfare caused by a parent’s sexual conduct prior to restricting visitation was a relatively new development in cases involving homosexual parents, it was not a novel approach. In a 1977 law review article, Professor Lauerman described the “direct adverse impact” approach applied in Ohio and other jurisdictions in custody and visitation cases involving allegations of inappropriate heterosexual sexual conduct by a parent:

In sum, the direct adverse impact approach to custody cases involving parental nonmarital sexual conduct is the soundest, provided certain limitations on its application are adopted. Courts should consider only present impact. Before depriving a sexually active parent of custody, courts should demand preponderance proof that the parent’s conduct is having or is probably having an effect on the child and that the effect is actually harmful. Without such proof, the fact of nonmarital sexual conduct should not justify a custody denial or change. Moreover, on the issue of harmfulness, the primary focus should be on the child’s present physical and psychological welfare and developmental potential. Unless accompanied by clearly adverse collateral consequences, moral impact should be ignored.<sup>57</sup>

Despite its general acceptance in most jurisdictions, traditionalist

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<sup>55</sup> *Id.* at 8 (citations omitted).

<sup>56</sup> *Id.*

<sup>57</sup> Nora Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 681 (1977); see *Inscoe v. Inscoe*, No. 95 CA 12, 1997 WL 346199, at \*10 (Ohio Ct. App. June 18, 1997) (per curiam) (holding that “[a] parent’s sexual orientation, standing alone, has no relevance to a decision concerning the allocation of parental rights and responsibilities”).

jurisdictions have accepted the adverse impact approach in form only. Although they espouse adherence to the proposition that a parent's homosexuality does not render him or her per se unfit,<sup>58</sup> traditionalist courts, whether deciding custody or visitation, more readily find proof of "harm" resulting from a parent's homosexuality than do nexus courts. Unlike nexus courts, which require that "harm" be proved by a showing of direct adverse impact,<sup>59</sup> traditionalist courts require no such showing and instead routinely consider evidence deemed inappropriate under the nexus approach. Specifically, traditionalist courts regularly permit evidence concerning the "immorality" of the parent's sexual orientation to play a substantial role in their determination that the parent's homosexuality is contrary to the best interests of the child.<sup>60</sup>

Although nexus jurisdictions consistently require that homosexual parents not expose their children to sexual *conduct* of any kind, they have rejected arguments that a homosexual parent's "immoral lifestyle" justifies requiring parents to conceal entirely their sexual orientation from their children.<sup>61</sup> This approach adheres to the principle that the direct impact of a parent's sexual conduct on his or her child is relevant to determinations of parental rights but that the presumptions of a judge, party, or community regarding sexual orientation are not. To this end, nexus jurisdictions not only have refused to consider allegations of the effect of a parent's "immoral lifestyle," but they also have rejected arguments that homosexuals' children will be stigmatized by a society that does not accept the parent's sexual orientation. An increasing number of nexus courts, citing the Supreme Court's holding in *Palmore v. Sidoti*,<sup>62</sup> have held that societal attitudes about a parent's sexuality are irrelevant to determinations of whether a parent's sexual orientation may harm the child's welfare.<sup>63</sup>

Not only do traditionalist courts permit consideration of the moral implications of a parent's conduct, but often they are required by statute to do so.<sup>64</sup> This places gay and lesbian parents at the mercy of trial judges' per-

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<sup>58</sup> See, e.g., *Maradie v. Maradie*, 680 So.2d 538 (Fla. Dist. Ct. App. 1996); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987); *Price v. Price*, No. 02A01-9609-CH-00228, 1997 WL 338588 (Tenn. Ct. App. June 20, 1997); *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980); *Bottoms II*, 457 S.E.2d at 108.

<sup>59</sup> See, e.g., cases cited *supra* note 48.

<sup>60</sup> Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); see, e.g., cases cited *supra* notes 44 and 48.

<sup>61</sup> See, e.g., cases cited *supra* note 48.

<sup>62</sup> 466 U.S. 429 (1984) (holding that it was error to remove a white child from the custody of her mother, who was cohabiting with a black man, and to award custody to the child's father on the grounds that the child would suffer social stigmatization because of her mother's interracial relationship).

<sup>63</sup> ESKRIDGE & HUNTER, *supra* note 8, at 803.

<sup>64</sup> See, e.g., ALA. CODE § 30-3-1 (1989) (permitting courts to consider parents'

ceptions about the morality of homosexuality.

[J]udges, in assessing how a parent's sexual orientation affects the child, often look beyond the evidence presented to their personal assumptions about gays. Since these assumptions often lead judges to conclude that a child's relationship with a gay parent is inherently damaging to the child, courts in many jurisdictions consider it a proper exercise of their discretion under the best interests standard to deem a parent's homosexuality harmful even where no evidence of adverse effect on the child exists. This amounts to a presumption that gay parents are unfit or that their fitness is impaired. Depending upon the weight the judge assigns to the presumption, it can be effectively irrebuttable.<sup>65</sup>

Such was the case in the Supreme Court of Virginia's decision in *Roe v. Roe*,<sup>66</sup> in which the court concluded that a homosexual "father's continuous exposure of the child to his immoral and illicit relationship render[ed] him an unfit and improper custodian as a matter of law."<sup>67</sup>

Traditionalist jurisdictions also have found compelling arguments that societal attitudes about homosexuality could result in the child of a gay or lesbian parent being stigmatized or otherwise adversely affected. The Supreme Court of Virginia relied in part on such an argument in its decision in *Roe*, in which it stated, "[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.*"<sup>68</sup>

Accordingly, because traditionalist courts are unconstrained in making presumptions concerning the allegedly harmful nature of a homosexual parent's "immoral lifestyle" and because they may rely on these presumptions instead of requiring evidence of actual harm, these courts are free to

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"moral character" in determining custody); FL. STAT. ANN. § 61.13(3)(f) (West 1985) (requiring courts to consider "the moral fitness of the parents" in determining custody and visitation rights); UTAH CODE ANN. § 30-3-10 (1989) (requiring courts to consider parents' "demonstrated moral standards" in determining custody).

<sup>65</sup> Bagnall et al., *supra* note 60, at 518-19 (footnotes omitted).

<sup>66</sup> 324 S.E.2d 691 (Va. 1985).

<sup>67</sup> *Id.* at 694. The appellate court reversed the trial court's order granting joint legal and physical custody to the child's divorced parents, holding that the order was insufficient because it merely "conditioned the father's custody upon his 'not sharing the same bed or bedroom with any male lover or friend while the child is present in the home.'" *Id.* at 692.

<sup>68</sup> *Id.* at 694 (emphasis added).

impose almost any restriction on parental rights, provided the restriction is premised on the need to protect the child from the parent's "deviant" lifestyle.<sup>69</sup> The result is that although traditionalist courts aver that they do not find homosexual parents per se unfit, they nevertheless do so implicitly by presumptively determining that a homosexual orientation is immoral and by considering societal attitudes that regard homosexuality as improper and "deviant" behavior.

### III. *BOTTOMS III*

Sharon Bottoms's experience is another example of the capricious nature of justice when a trial court is permitted to consider its own presumptions in lieu of actual evidence. The Court of Appeals of Virginia's decision in *Bottoms III* takes a step in the direction of limiting trial courts to the evidence before them by rejecting the trial court's clearly erroneous holding that *Roe* required finding that any exposure to April Wade would be per se contrary to Tyler's best interests.<sup>70</sup>

Although the court of appeals remanded the case to the trial court for consideration of all "pertinent statutory factors," its decision nevertheless falls short of imposing any meaningful restriction on the trial court's consideration of its own or society's presumptions regarding the deleterious nature of Sharon's lifestyle. Instead, the court of appeals merely recites the Supreme Court of Virginia's holding in *Roe*, in which it

expressly "declined to hold that every lesbian mother or homosexual father is per se an unfit parent," noting that "conduct[] in the child[]'s presence" and the attendant "impact of [such] relationship upon [the] child" were the relevant inquiries, not simply the sexual status of the parent or parents. Mindful, however, that "[t]he moral climate in which children are to be raised" warrants "the most careful consideration in a custody proceeding," the Court concluded that, "[i]n the circumstances of this case," the "best interests

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<sup>69</sup> See, e.g., *White v. Thompson*, 569 So.2d 1181 (Miss. 1990) (holding that the trial court did not abuse its discretion in ordering that a lesbian mother exercise her visitation rights outside of the presence of her female partner); *J.P. v. P.W.*, 772 S.W.2d 786 (Mo. Ct. App. 1989) (holding that the trial court erred in permitting a homosexual father unsupervised ten-day visitation every other month with his daughter even though the trial court required that the visitation be exercised outside of the presence of his male partner); *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982) (holding that the children's best interests were served by prohibiting a lesbian mother from exercising her visitation rights in the presence of any woman with whom she was living); cases cited *supra* note 46.

<sup>70</sup> *Bottoms III*, 1997 WL 421218, at \*2-\*3.

of the child" dictated divestiture of custody from the homosexual father, subject to a residual right of specifically limited visitation.<sup>71</sup>

The court of appeals also cited the Supreme Court of Virginia's holding in *Bottoms II*, noting that the court had reaffirmed its holding that a parent's status as a homosexual did not render him or her per se unfit but recognizing that the parent's homosexuality was "reflective of the 'home environment and moral climate,' an 'important consideration.'"<sup>72</sup> The *Bottoms III* court concluded:

Thus, both Code § 20-124.3 and controlling appellate decisions clearly instruct that the parental rights of custody and related visitation suitable to each instance must evolve from a myriad of considerations, all calculated to exalt and promote the best interests of the child. While issues of adult sexuality and related behavior are significant to an adjudication of visitation, such factors must be assessed by the court together with other relevant circumstances and balanced in a visitation arrangement which both benefits and protects the child.<sup>73</sup>

Although it reiterated the finding that Sharon's status as a lesbian does not render her per se unfit or require that she exercise visitation outside of April Wade's presence, the *Bottoms III* decision clearly indicates that the trial court can and should consider Sharon's sexual orientation in rendering its decision. On remand, the trial court is free to conclude that exposure to Sharon's "immoral lifestyle" would be contrary to Tyler's best interests. Likewise, the court may determine that Sharon's decision to live an open lesbian lifestyle or the likelihood of societal stigmatization necessitate restricting her visitation with her son. Consequently, without holding that Sharon's homosexuality requires a per se finding that she exercise visitation out of the presence of any lesbian, the trial court may nevertheless reach this result without proof that Sharon's actual conduct has harmed or is likely to harm Tyler.

It is evident from the records established in *Bottoms I* and *II* that had Sharon resided in a nexus jurisdiction, the restrictions the trial court imposed would be struck down as unsupported by any evidence. In *Bottoms I*, the record established that although April and Sharon shared a bed, Tyler

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<sup>71</sup> *Id.* at \*2 (quoting *Roe*, 324 S.E.2d at 693-94) (alterations in original) (emphasis omitted) (citations and footnote omitted).

<sup>72</sup> *Id.* (emphasis omitted) (quoting *Bottoms II*, 457 S.E.2d at 107-08).

<sup>73</sup> *Id.* at \*3.

had not slept in the room with them since he was an infant.<sup>74</sup> The record also established that Sharon and April engaged in consensual sexual activity in their home and had displayed some affection for one another by hugging or kissing in front of Tyler, but that they "never engaged in any type of sexual activity in [Tyler's] presence, nor . . . exposed him to sexual conduct of any type."<sup>75</sup> All psychological evidence introduced at trial indicated that "Sharon Bottoms's open lesbian relationship has had no visible or discernable effect on her son."<sup>76</sup>

The following Illinois and Oregon decisions exemplify the many decisions in which courts have considered facts similar to those present in *Bottoms III* and have found that restrictions like those imposed on Sharon Bottoms are unwarranted.<sup>77</sup> In *Pleasant v. Pleasant*,<sup>78</sup> the Appellate Court of Illinois considered a lesbian mother's appeal of a trial court's order restricting her visitation with her six-year-old son Jimmie "by requiring that visitation be supervised by heterosexual employees of the Illinois Department of Children and Family Services, reducing her visitation to alternate weekends, eliminating overnight visitation, and requiring that [the mother] enroll in regular psychotherapy with no apparent goals for such therapy."<sup>79</sup> The mother lived with her lesbian partner, and the trial court record indicated that during unsupervised visitation, the son had seen his mother kiss and hug her partner, had accompanied them to a hotel where the mother and her partner stayed in one room and the son stayed in a connecting room, and had gone with them to a gay pride parade.<sup>80</sup> The trial court found that "having Jimmie in the presence of gays and lesbians was endangering his gender identity and morals and not in his best interests."<sup>81</sup> The judge also found that the mother's "inability to dissociate herself with known lesbians during periods of visitation is not in the best interests of the minor child, because it would seriously endanger the child's mental and moral well being."<sup>82</sup>

The Illinois appellate court found inadmissible the evidence that the mother had kissed and hugged her partner because that evidence was relayed by the son, whom it judged incompetent to testify. The court noted, however, that "[e]ven if the finding had been accurate, . . . respondent's behavior would not seriously endanger Jimmie. There was no evidence that there was any sexual conduct or other inappropriate conduct in Jimmie's

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<sup>74</sup> *Bottoms I*, 444 S.E.2d at 279.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* notes 20-23 and accompanying text.

<sup>78</sup> 628 N.E.2d 633 (Ill. App. Ct. 1993).

<sup>79</sup> *Id.* at 634.

<sup>80</sup> *Id.* at 636-37.

<sup>81</sup> *Id.* at 638.

<sup>82</sup> *Id.*



presence.”<sup>83</sup> The court concluded, “The record indicates that there was no evidence of any inappropriate behavior in Jimmie’s presence. The fact that respondent is openly involved in a lesbian relationship is not grounds to restrict respondent’s visitation with her son. Thus, we reverse . . . .”<sup>84</sup>

In the similar case of *In re Marriage of Ashling*,<sup>85</sup> the Oregon Court of Appeals reversed a lower court’s order restricting a lesbian mother’s visitation with her son “to such times and places that [the mother] does not have with her, in her home, or around the children any [other] lesbians.”<sup>86</sup> Evidence in *Ashling* established that the lesbian mother had sexual relations with her partner in her bedroom while her children were in the house, but never in the children’s presence. The record also reflected that the mother had demonstrated affection to other women while in the presence of her children, although she stated that her actions were friendly or casual, not sexual.<sup>87</sup> The Oregon Court of Appeals concluded that this conduct did not justify the restrictive provisions imposed, provided that “the mother’s sexual practices remain discreet—a requirement whatever the sexual preferences of the parties might be.”<sup>88</sup>

The facts presented in *Bottoms* are substantially similar to those in *Pleasant* and *Ashling*. Both the *Pleasant* and *Ashling* decisions are legitimate efforts by appellate courts to consider neutrally a parent’s homosexual orientation, to balance the possible effects of that orientation with the benefits of maintaining the parent-child relationship, and to weigh the two in considering the child’s best interests. Both courts limited their determination to the evidence established at trial and refrained from interjecting presumptions about the morality of the parents’ sexual orientation. Both courts focused on the need to insure that regardless of the parents’ sexual orientation, the children were not exposed to sexual conduct.

Given the absence of any evidence of harm to Tyler’s welfare directly attributable to his mother’s interactions with April Wade or other lesbians while in his presence and the uncontested testimony of Sharon that she and Wade would never expose Tyler to sexual conduct of any kind, it would appear that Tyler’s best interests could be served by a visitation order that merely requires that Sharon and April refrain from any sexual activity in Tyler’s presence.

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<sup>83</sup> *Id.* at 642.

<sup>84</sup> *Id.* at 635. The Illinois Appellate Court applied a statutorily prescribed “endangerment standard” in deciding the case instead of the “best interests” standard, *id.* at 640, but its finding regarding the harmfulness of the mother’s conduct and the effect of her conduct on her son nevertheless are apposite to *Bottoms*’s situation.

<sup>85</sup> 599 P.2d 475 (Or. Ct. App. 1979).

<sup>86</sup> *Id.* at 476.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

## IV. CONCLUSION

Because Virginia case law continues to permit trial courts essentially unfettered discretion in making presumptions about the impact of a parent's sexual orientation in determining a child's best interests, Sharon Bottoms may fare no better in her next court appearance. Her circumstances make plain that any equitable custody and visitation determinations for gay and lesbian parents can occur only in courts that are required to decide cases on the evidence before them, such as actual proof of direct harm resulting from a parent's sexual conduct. The trial court's reconsideration of Bottoms's case (and possibly an appeal of that decision) may yet provide Virginia with the opportunity to remove gay and lesbian custody and visitation decisions from the court of public opinion and to return them to a forum that requires proof of direct harm. Until such time, however, it appears that Sharon Bottoms's parental rights, like those of other homosexual parents in Virginia and other traditionalist jurisdictions, will be determined not by her actions but by her status.