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Douglas A. Steinberg

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# COMMENTS

## BOTTOMS v. BOTTOMS: A COMMENT

DOUGLAS A. STEINBERG\*

The Virginia Court of Appeals decision in *Bottoms v. Bottoms*<sup>1</sup> stands as an important affirmation of the rights of gay and lesbian parents throughout the country. According to some estimates, there are three million gay or lesbian parents in the United States, with eight to ten million children being raised in gay or lesbian households.<sup>2</sup> Whatever the exact number, many gay and lesbian parents feel that they have developed a "comfort zone" of acceptability in the court system.<sup>3</sup>

One year ago, however, a trial court judge in rural Virginia reminded these parents that they may not always get the same treatment as their heterosexual counterparts.<sup>4</sup> In September 1993 the Circuit Court for Henrico County ruled that, because Sharon Bottoms was involved in a homosexual relationship that was illegal under Virginia law, she was an unfit parent as a matter of law.<sup>5</sup> Custody of Sharon's only child, Tyler, was awarded to Sharon's mother, Kay Bottoms.<sup>6</sup>

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\* J.D. Candidate 1995, Marshall-Wythe School of Law, College of William & Mary. B.S. 1990, University of Wisconsin at Madison. The author would like to thank the Servicemembers' Legal Defense Fund and J. Connell for their support and assistance.

1. 444 S.E.2d 276 (Va. Ct. App. 1994).

2. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989) (citing *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 Fam. L. Rep. (BNA) 1512, 1513 (Aug. 25, 1987)); see also Sue Anne Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1 (estimating that eight to ten million children are being raised by four million gay men and lesbians); *Can Gays Make Good Parents?* (CNN television broadcast, Dec. 29, 1992) (estimating that 5000 children are born to lesbian mothers each year).

3. See Nan Hunter & Nancy Polikoff, *Custody Rights and Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 714-15 (1976); Steve Susoeff, *Assessing Children's Best Interest When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 859-60 (1985).

4. See Stephen B. Pershing, "Entreat Me Not to Leave Thee": *Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 289-90 (1994). See generally Paula L. Eitelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993) (discussing discrimination against lesbians in custody disputes).

5. *Bottoms*, 444 S.E.2d at 279.

6. *Id.* at 280.

The resulting legal battle that quickly captured national attention had its roots in rural Henrico County, Virginia. Sharon Bottoms married Tyler's father, Dennis Doustou, in December 1989 and was divorced in 1991 while pregnant with Tyler.<sup>7</sup> The final divorce decree awarded Sharon full custody of Tyler.<sup>8</sup> In May 1992 Sharon developed a relationship with a woman, April Wade.<sup>9</sup> While involved in this relationship, Sharon and Tyler regularly visited Kay's house. In January 1993, however, Sharon informed Kay that she and Tyler would visit Kay's house less frequently; Sharon told Kay that Kay's live-in boyfriend had sexually abused her as a child and she feared that Tyler could also become a victim of abuse.<sup>10</sup>

In response, Kay Bottoms petitioned the Juvenile and Domestic Relations District Court of Henrico County for custody of Tyler, alleging that Sharon was an unfit parent because of her lesbian relationship.<sup>11</sup> In March 1993, basing its decision on Sharon's lesbian relationship, the Juvenile and Domestic Relations Court ordered that custody be transferred from Sharon to Kay.<sup>12</sup> Sharon appealed the ruling and was granted *de novo* review in the Circuit Court of Henrico County.<sup>13</sup>

The circuit court awarded custody to Kay Bottoms and granted Sharon visitation rights on Mondays and Tuesdays.<sup>14</sup> The judge ruled that, as a condition of Sharon's visitation rights, April Wade could not be present during Sharon's visits with Tyler.<sup>15</sup> The court based the ruling on the uncontested fact that Sharon was involved in a lesbian relationship and had kissed and patted April in the presence of Tyler.<sup>16</sup> Although the trial judge stated that there was no specific case on point, he relied on the Virginia Supreme Court decision in *Roe v. Roe*<sup>17</sup> in concluding that Sharon's conduct was both illegal and immoral and rendered her *per se*

7. *Id.* at 278.

8. *Id.*

9. Opening Brief of Appellant at 2, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) (No. 1930-93-2).

10. *Id.* at 3.

11. *Bottoms*, 444 S.E.2d at 279.

12. Opening Brief of Appellant at 3, *Bottoms* (No. 1930-93-2).

13. *Id.* at 4.

14. *Bottoms*, 444 S.E.2d at 280.

15. *Id.* at 279. The trial judge also decided that Tyler could not visit Sharon in her home, regardless of whether April was present. Opening Brief of Appellant at 5, *Bottoms* (No. 1930-93-2).

16. *Bottoms*, 444 S.E.2d at 279.

17. 324 S.E.2d 691 (Va. 1985).

unfit to have custody.<sup>18</sup> In addition to Sharon's relationship, the trial court considered un rebutted evidence that Sharon cursed in Tyler's presence and made Tyler stand in a corner as a form of punishment.<sup>19</sup>

## I. PARENTS' RIGHTS IN VIRGINIA BEFORE *BOTTOMS*

### A. *The Rights of Parents in General in Virginia*

The United States Supreme Court has long recognized and protected parents' relationships with their children.<sup>20</sup> In *Stanley v. Illinois*,<sup>21</sup> the Supreme Court held that the care and custody of one's child is a fundamental constitutional right; state interference in the relationship can be justified only by a compelling state interest.<sup>22</sup> Virginia courts have followed the lead of the Supreme Court, and have a long-standing legal tradition of protecting the sanctity of parent-child relationships.<sup>23</sup> In *Walker v. Brooks*,<sup>24</sup> the Virginia Supreme Court ruled that "as between a natural parent and a third party, the rights of the parent are, if at all possible, to be respected, such rights being founded upon natural justice and wisdom, and being essential to the peace, order, virtue, and happiness of society."<sup>25</sup> The court had previously stated in *Judd v. Van Horn*<sup>26</sup> that "the law presumes that the child's best interests will be served when in the custody of

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18. *Bottoms*, 444 S.E.2d at 279.

19. *Id.*

20. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (guaranteeing the liberty to establish a home and bring up a child); see also *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that before a state may completely sever the rights of parents to their natural child, due process requires that the state prove permanent neglect by clear and convincing evidence); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that an unwed father is entitled to a hearing to determine his fitness as a parent before losing custody of his children); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that the custody, care, and nurturing of the child reside first in the parent whose primary function may not be supplanted or hindered by the state).

21. 405 U.S. 645 (1972).

22. *Id.* at 658 (Frankfurter, J., concurring).

23. See *Merritt v. Swimely*, 82 Va. 433 (1886) (deciding that legal rights of parents are essential to the peace, order, virtue, and happiness of society); see also *Williams v. Williams*, 66 S.E.2d 500 (Va. 1951) (holding that the rights of the parent, being founded on nature, are to be respected unless abandoned or relinquished); *Sutton v. Menges*, 44 S.E.2d 414 (Va. 1947) (holding that a natural parent has greater rights to his or her natural children than grandparents).

24. 124 S.E.2d 195 (Va. 1968).

25. *Id.* at 198.

26. 81 S.E.2d 432 (Va. 1954).

its parent."<sup>27</sup> The presumption for parental custody may be rebutted only if it is proven by clear and convincing evidence that custody with a parent has a direct adverse effect on the child.<sup>28</sup> The burden of showing the existence of circumstances that would deprive a parent of the right to custody is on the party opposing this right.<sup>29</sup>

If a party rebuts the presumption of parental custody, Virginia law requires courts to make a further determination: the best interests of the child. That is, "the parental and non-parental parties stand equally before the court, with no presumption in favor of either, and the question is the determination of the best interests of the child."<sup>30</sup> Considering these formidable hurdles established by the appellate decisions, it is difficult to imagine many sets of circumstances in which the courts of Virginia would pierce the presumption of parental custody.<sup>31</sup>

### *B. Gay and Lesbian Parents' Rights in Virginia Before Bottoms*

In recent history, the Virginia Supreme Court has ruled on only two cases involving the rights of gay and lesbian parents in custody disputes.<sup>32</sup> In *Doe v. Doe*,<sup>33</sup> the Virginia Supreme Court refused to adopt a per se rule of unfitness for gay or lesbian

27. *Id.* at 436.

28. *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973). Virginia law enumerates five circumstances that rebut the presumption of parental custody. These circumstances are as follows: parental unfitness, *Forbes v. Haney*, 133 S.E.2d 533 (Va. 1963); prior order of divestiture, *McEntire v. Redfearn*, 227 S.E.2d 741 (Va. 1976); voluntary relinquishment, *Shortridge v. Deel*, 299 S.E.2d 741 (Va. 1976); abandonment, *Patrick v. Byerley*, 325 S.E.2d 99 (Va. 1985); and special circumstances that constitute an extraordinary reason to remove the child, *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986).

29. *Judd*, 81 S.E.2d at 436.

30. *Walker v. Fagg*, 400 S.E.2d 208, 211 (Va. Ct. App. 1991) (citing *Smith v. Pond*, 360 S.E.2d 885 (Va. Ct. App. 1987)).

31. *See Mason v. Moon*, 385 S.E.2d 242 (Va. Ct. App. 1989) (reversing a trial court's decision to award custody of a child to her grandparents due to a lack of evidence that the child would be adversely affected by living in the residence of her step-father, who had killed the child's father); *see also Phillips v. Kiraly*, 105 S.E.2d 855 (Va. 1958) (permitting a father, who took photographs of nude women and had been a "peeping tom," continued custody of his child); *Walker v. Fagg*, 400 S.E.2d 208 (Va. Ct. App. 1991) (upholding a custody award to a father convicted of killing his wife and the mother of both of his children; although the father was found unfit, the court still awarded custody based on the best interests of the child); *Ferris v. Underwood*, 348 S.E.2d 18 (Va. Ct. App. 1986) (awarding custody to a mother even though there was evidence that the mother's sister, a prostitute, frequently visited the house while the child was present).

32. *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

33. 284 S.E.2d 799 (Va. 1981).

parents, but did decide that evidence of a gay relationship was a proper factor in determining the best interest of the child and the parent's fitness.<sup>34</sup> Finding that the mother's lesbian relationship was not in itself enough to justify completely severing the ties between the natural mother and her son,<sup>35</sup> the court in *Doe* attempted to balance its admiration for the natural mother's dedication as a parent with its almost complete intolerance of the mother's lesbian relationship.<sup>36</sup> The only reason on which the court could have relied to deny custody was the mother's lesbian relationship, as there was ample evidence of the mother's parenting skills.<sup>37</sup> The court, finding no evidence of harm to the child from the lesbian relationship,<sup>38</sup> reversed the lower court's decision to sever the lesbian mother's parental rights, as it found she was a devoted and fit parent in all respects other than her sexual orientation.<sup>39</sup>

Four years later, the Virginia Supreme Court decided in *Roe v. Roe*<sup>40</sup> that a gay father's continuous homosexual relationship rendered him unfit and an improper custodian as a matter of law.<sup>41</sup> As in *Doe*, the gay parent was found to be an otherwise fit, devoted, and competent custodian.<sup>42</sup> Unlike *Doe*, however, the custody dispute was between two natural parents and Virginia law required the court to determine the best interests of the

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34. *Id.* at 806.

35. *Id.* The natural mother in *Doe* faced complete extinguishment of her parental rights because the child's step-mother petitioned the court for adoption. Subsequent to a divorce decree, the father and mother had joint custody of the child. The father and the step-mother filed a petition for adoption primarily due to concern over the effect on the boy of the mother's lesbian relationship. The trial court approved the adoption after deciding that the consent of the natural mother was withheld contrary to the child's best interest. *Id.* at 801.

36. The court closely examined the trial court's record and described the natural mother as an "exceptionally well-educated, stable, responsible, and sensitive individual . . . [who] exercised a selfless wisdom in caring for [her child]." *Id.* at 804. In contrast, the court commented that, "[r]egardless of how offensive we may find [the mother's] lifestyle, its effect on her son's welfare is not a matter of which we can take judicial notice." *Id.* at 805 (emphasis added). The court concluded its decision by personally beseeching the mother to terminate her lesbian relationship for the good of her son. *Id.* at 806.

37. *Id.* at 805.

38. *Id.* The court concluded that "[w]e take judicial notice of generally known or easily ascertainable facts" and refused to speculate as to the effect of the relationship on the child. *Id.* at 805 (citing *Ryan v. Commonwealth*, 247 S.E.2d 698 (Va. 1978)).

39. *Id.* at 806.

40. 324 S.E.2d 691 (Va. 1985).

41. *Id.* at 694.

42. *Id.* at 692.

child.<sup>43</sup> In examining the child's best interests, the court concluded, "[t]he conditions under which the child must live daily ... impose an intolerable burden upon her by reason of social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large."<sup>44</sup> The court presumed future harm to the child from social stigma despite a specific finding that there was no evidence that the father's conduct had an adverse effect on the child.<sup>45</sup>

In both *Roe* and *Doe*, the Virginia Supreme Court expressed outrage at what it considered immoral conduct by the parent.<sup>46</sup> In both cases, the trial record did not indicate actual harm to the child from the gay parent's relationship.<sup>47</sup> The difference in outcomes appears to be best explained by the much lower standard in *Roe*, in which a natural parent had petitioned for custody.<sup>48</sup> The question in *Doe* was whether to permanently terminate any substantive parental contact without evidence of parental unfitness.<sup>49</sup> The issue in *Roe* was different; after removing the child from the father's custody, the Virginia Supreme Court charged the trial court with allowing the father visitation rights in accordance with its decision.<sup>50</sup> The different results in these two cases turned on the Virginia Supreme Court's recognition of the distinction between transferring custody of a child and extinguishing parental rights.

## II. THE COURT OF APPEALS OF VIRGINIA DECISION

On June 21, 1994, the Court of Appeals of Virginia handed down its decision in *Bottoms v. Bottoms*.<sup>51</sup> *Bottoms* reversed the

43. *Id.* at 693. Virginia law requires that custody disputes be resolved by determining which result will best serve the welfare of the child. VA. CODE ANN. §§ 31-15 (Michie 1992), 20-107.2 (Michie Supp. 1994). The court in *Roe* refused to apply *Doe*, reasoning that an adoption is permanent, whereas custody agreements are constantly supervised and amended by the courts. *Roe*, 324 S.E.2d at 694.

44. *Roe*, 324 S.E.2d at 694. Apparently, the court chose not to apply the language of the then recent decision, *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that private racial biases and possible injury from such biases are not permissible considerations for removal of an infant child from the custody of her natural parent). See Pershing, *supra* note 4, at 305-06, for a discussion of *Palmore's* application to *Bottoms*.

45. *Roe*, 324 S.E.2d at 692.

46. *Id.* at 694; *Doe v. Doe*, 284 S.E.2d 799, 805 (Va. 1981).

47. *Roe*, 324 S.E.2d at 692; *Doe*, 284 S.E.2d at 805.

48. *Roe*, 324 S.E.2d at 694.

49. *Doe*, 284 S.E.2d at 805. The court stated that "[t]he most drastic and far-reaching action that can be taken by a court of equity is to enter a final order of adoption. Such an order severing the ties between a parent and a child is ... final ... and ... devastating." *Id.*

50. *Roe*, 324 S.E.2d at 694.

51. 444 S.E.2d 276 (Va. Ct. App. 1994).

decision of the circuit court regarding Sharon Bottoms' fitness as a matter of law.<sup>52</sup> The court of appeals limited, but did not completely eliminate, the application of *Roe* to custody cases between a parent and a third party.<sup>53</sup> By adopting *Doe*, Virginia now requires a nexus between the parent's sexual orientation and an adverse impact on the child; in embracing this standard, Virginia has joined a growing majority of states.<sup>54</sup>

#### A. *The Court's Approach to the Lesbian Relationship*

The court of appeals first reviewed the record for evidence of Sharon's fitness as a parent, apart from her lesbian relationship.<sup>55</sup> Although Sharon may not be an ideal parent, the court found that her conduct fell short of neglect or abuse sufficient to render her an unfit custodian.<sup>56</sup> After reviewing Sharon's conduct as a

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52. *Id.* at 281 (citing *Doe*, 284 S.E.2d at 806).

53. The court did not entirely limit the application of *Roe* to custody disputes between two parents. Some of the court's conclusions in *Roe* concerning the level of exposure of a homosexual parent's relationship to his or her child may affect a trial court's determination of fitness in either a parent versus parent or a parent versus third party dispute. See *infra* text accompanying notes 63-70.

54. Only two states, Virginia and Missouri, have found gay or lesbian parents per se unfit. *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987); *Roe*, 324 S.E.2d 691 (Va. 1985). A large number of states require a nexus, similar to the *Bottoms* standard, between the parent's sexual orientation and an adverse impact on the child. See *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (requiring a nexus between a parent's homosexuality and an adverse impact on the child); see also *Birdsall v. Birdsall*, 197 Cal. App. 3d 1024 (Ct. App. 1988); *Peyton v. Peyton*, 457 So. 2d 321 (La. Ct. App. 1984); *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re Jacinta M.*, 764 P.2d 1327 (N.M. Ct. App. 1988); *Guinan v. Guinan*, 477 N.Y.S.2d 830 (App. Div. 1984); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); *In re Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986); *B.L.V.B. v. E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (requiring a connection between the sexual orientation of a parent and an adverse effect on the child). A few states have created a rebuttable presumption that the gay or lesbian parent has an adverse impact on the child. See *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987) (applying a rebuttable presumption of adverse impact on the child); see also *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981); *Hall v. Hall*, 291 N.W.2d 143 (Mich. Ct. App. 1980); *Jacobson v. Jacobson*, 314 N.W.2d 79 (N.D. 1981); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Constant A. v. Paul C.A.*, 496 A.2d 5 (Pa. Super. Ct. 1985) (applying a rebuttable presumption of adverse impact on the child). See generally Note, *Custody Denials to Parents in Same Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

55. The court found that Sharon Bottoms had spanked her son "too hard" twice, swore occasionally in Tyler's presence, made Tyler stand in the corner, and occasionally had been slow in changing Tyler's diapers. The court also found that Sharon had lived in four different residences and had four different relationships in three years, had not been regularly employed, and left Tyler with Kay for a week without telling Kay how to get in touch with her. *Bottoms v. Bottoms*, 444 S.E.2d 276, 281 (Va. Ct. App. 1994).

56. "At all times, Sharon Bottoms either cared for the child or assured that proper care was provided for the child." *Id.*



parent, the court analyzed Sharon's lesbian relationship in light of the *Roe* decision. First, the court rejected Kay's argument that the *Roe* decision stood for the proposition that a gay or lesbian parent is unfit *per se*.<sup>57</sup> According to the court, the specific language of *Roe* required an examination of the circumstances surrounding the gay or lesbian parent before determining parental fitness.<sup>58</sup> The court also distinguished *Roe* from the instant case by examining the different legal standards applied to the two custodial situations.<sup>59</sup> Under Virginia law, in a custody dispute between two biological parents, a court is required to base its custody decision on the child's best interests.<sup>60</sup> Thus, in *Roe*, the court awarded custody under the best interests standard without ever deciding that the gay parent was unfit.<sup>61</sup> In a custody dispute between a parent and a non-parent, however, a different standard should be applied. The parent must be declared unfit before the court may inquire into the best interests of the child.<sup>62</sup>

Finally, the court distinguished the two cases on a factual basis by comparing the level of exposure to intimate behavior between the gay parent and partner.<sup>63</sup> The court found similarities between the behavior of Sharon Bottoms and the father's behavior in *Roe*; Sharon Bottoms had hugged, kissed, and displayed affection toward her partner in the presence of her child.<sup>64</sup> Nonetheless, the court decided that Sharon Bottoms' conduct was more acceptable than that of the father in *Roe*, whose daughter had witnessed the father and his partner hugging, kissing, and sleeping in bed together.<sup>65</sup> According to *Roe*, the daughter was distressed at seeing such conduct by her father and other individuals

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57. *Id.* at 283.

58. *Id.* "Although we decline[] to hold that every lesbian mother or homosexual father is *per se* an unfit parent, . . . [this] father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law." *Roe*, 324 S.E.2d at 694.

59. *Bottoms*, 444 S.E.2d at 283.

60. *Brown v. Brown*, 237 S.E.2d 89, 91 (Va. 1977).

61. *Roe*, 324 S.E.2d at 693-94; *Bottoms*, 444 S.E.2d at 283.

62. "[T]he presumption of parental fitness must be rebutted before a court may consider whether a third party would be a fit or proper custodian." *Bottoms*, 444 S.E.2d at 280 (citing *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973)). See *supra* notes 23-31 and accompanying text.

63. *Bottoms*, 444 S.E.2d at 283.

64. *Id.*

65. *Id.*

at her father's residence.<sup>66</sup> The record in *Bottoms* contained no evidence of illegal activities committed in Tyler's presence and no evidence of emotional or psychological harm to Tyler.<sup>67</sup> The court distinguished the actions in the two cases by the level of exposure to intimate sexual behavior.

The court's analysis indicates a sliding scale of "outness," or homosexual behavior, that a gay or lesbian parent may display to his or her child.<sup>68</sup> Although the proper level of intimate contact to which a child should be exposed is an open question, the court expressed strong reservations about contact that probably would be ignored in a heterosexual relationship.<sup>69</sup> For example, the decision points to the fact that Sharon "displayed *some* affection toward her lesbian partner."<sup>70</sup> It seems unlikely that a court would even note a display of affection between heterosexual partners.

#### B. *The Court's Approach to the Sodomy Issue*

The court in *Bottoms* reduced, but did not eliminate, the negative impact of evidence of gay or lesbian consensual intercourse in violation of Virginia's sodomy law.<sup>71</sup> The court disagreed with the trial court's conclusion that evidence of a violation of the sodomy law by a lesbian or gay parent, without evidence of harm to the child, overcomes the presumption of parental fitness.<sup>72</sup> In making this determination, the court relied on *Ford v. Ford*<sup>73</sup> and *Sutherland v. Sutherland*.<sup>74</sup> Both *Ford* and *Sutherland* found that

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66. The evidence in *Roe* cited by the court in *Bottoms* is from the mother's petition for a temporary restraining order. *Id.*; *Roe v. Roe*, 324 S.E.2d 691, 692 (Va. 1985). The distress of the child in *Roe* is noted only in the mother's petition. *Id.* The court in *Roe* made a finding of a lack of emotional harm from the gay parent's conduct. *Id.* The behavior condemned in *Roe* is the child's knowledge that the two men shared a bedroom and the child's exposure to men hugging and patting each other on the behind. *Id.* at 693. In contrast to the court's finding, the behavior of the same sex couples in front of the children in both cases appears almost identical. *Id.*; *Bottoms*, 444 S.E.2d at 283.

67. *Bottoms*, 444 S.E.2d at 283.

68. "Where a parent exposes a child to an illicit sexual relationship, as in *Roe*, the Supreme Court has upheld denying a parent custody; however, where the parents shielded the child from illegal heterosexual adultery, as in the *Ford* and *Sutherland* cases, we have held the parents not to be unfit." *Bottoms*, 444 S.E.2d at 283 (emphasis added).

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.* at 281. "A parent's private sexual conduct, even if illegal, does not create a presumption of unfitness." *Id.* at 282; see *infra* note 77.

72. *Id.* at 281-82.

73. 419 S.E.2d 415 (Va. Ct. App. 1992).

74. 414 S.E.2d 617 (Va. Ct. App. 1992).

a heterosexual parent's violation of Virginia's adultery statute is only one factor that the court should consider in making a custody determination.<sup>75</sup> The court in *Bottoms* held that "proof that the parent is engaged in private, illegal sexual conduct or conduct considered by some to be deviant, in the absence of proof that such behavior or activity poses a substantial threat of harm to a child's emotional, psychological, or physical well being" will not justify removal of a child from the custody of her natural parent.<sup>76</sup>

The reference to "deviant behavior" may indicate that the same close scrutiny would not apply to a heterosexual parent who violated the sodomy law.<sup>77</sup> A further indication that the court in *Bottoms* was more concerned with same sex sodomy than heterosexual sexual misconduct is the court's failure to criticize the trial judge's obvious bias in applying the sodomy law to Sharon Bottoms without applying the lewd and lascivious cohabitation statute to Kay Bottoms.<sup>78</sup> If the premise is that violation of the various state morality statutes by parents may produce harm to the child, silence toward the heterosexual couple's moral failings does not indicate an evenhanded approach. The *Bottoms* decision prohibits Virginia trial courts from automatically removing a child from a gay or lesbian parent upon presentation of

75. *Ford*, 419 S.E.2d at 417; *Sutherland*, 414 S.E.2d at 618.

76. *Bottoms*, 444 S.E.2d at 282.

77. See Pershing, *supra* note 4, at 295 (noting anti-gay bias in examinations of sexual conduct). The Virginia sodomy law applies equally to both heterosexual and homosexual intercourse. The statute provides that "if any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she will be guilty of a Class 6 felony." VA. CODE ANN. § 18.2-361 (Michie 1993). A survey of sex practices among heterosexual couples found that 90% of couples have engaged in fellatio and 93% have engaged in cunnilingus. PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 236 (1983).

78. VA. CODE ANN. § 18.2-345 (Michie 1993) (providing that any persons, not married to each other, who lewdly and lasciviously associate and cohabit together are guilty of a class 1 misdemeanor). The record indicates that Kay Bottoms was cohabiting with a boyfriend during the time that she cared for Tyler and for seventeen years in which she reared Sharon. *Bottoms*, 444 S.E.2d at 278-79. While the lewd and lascivious cohabitation offense is a misdemeanor rather than a felony, this distinction is not critical. Sodomy is a class six felony, VA. CODE ANN. § 18.2-361 (Michie 1993), and lewd and lascivious cohabitation is a class one misdemeanor, VA. CODE ANN. § 18.2-345 (Michie 1993). In Virginia, a class six felony is punishable by incarceration of between one and five years, or incarceration of less than one year or a fine of less than \$2500, or both. VA. CODE ANN. § 18.2-10(f) (Michie Supp. 1994). The punishment for a class one misdemeanor is the same as the alternative sentence for a class six felony: incarceration of not more than a year or a fine of not more than \$2500, or both. VA. CODE ANN. § 18.2-11(a) (Michie Supp. 1994). See Pershing, *supra* note 4, at 296 ("Not surprisingly, there are no reported domestic relations decisions in which a heterosexual parent has been denied custody or any other parental right based on a sodomy or similar statute.").

credible evidence of a violation of the sodomy law.<sup>79</sup> The *Bottoms* decision is consistent with a number of decisions from other states that require a showing of adverse impact on the child from a gay or lesbian parent in a custody dispute, despite sodomy statutes that proscribe intimate contact between same sex couples.<sup>80</sup> Whether Virginia courts will treat same sex sexual issues in custody disputes in the same manner as analogous heterosexual issues remains to be seen.

### III. CONCLUSION

The *Bottoms* decision does not represent the final word on lesbian custody rights in Virginia. *Bottoms* is similar to *Doe* in its willingness to accept evidence of harm to the child from homosexual relationships. In both decisions, a Virginia court allowed a lesbian mother to retain custody of her child despite strong reservations about her lesbian relationship. In both decisions, the person attempting to take custody away from the lesbian parent put forth very little direct or scientific evidence of harm to the child from the parent's lesbian relationship. Future litigation on this issue may revolve around conflicting scientific evidence, as each side calls a parade of experts who will testify to the harm, or lack thereof, to the child.<sup>81</sup> The issue of gay or lesbian parental unfitness as a matter of law is dead, but the issue of actual harm to the child may have a long and eventful life in Virginia.

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79. *Bottoms*, 444 S.E.2d at 283.

80. See *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983); see also D.C. CODE ANN. § 16-911(a)(5) (1981) (stating that sexual orientation is not dispositive in determining custody); D.C. CODE ANN. § 16-914(a) (1981) (stating that sexual orientation is not dispositive in determining visitation rights; these statutes were enforced concurrently with the District's sodomy law until September 19, 1993, when the sodomy law was repealed); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987) (holding that adverse effect on the child is the critical factor).

81. Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451 (1978).