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Just Molly and Me and Baby Makes Three — Or Does It? Child Custody and the Live-In Lover: An Empirical Study

Donald H. Stone†

I. Introduction

How do judges confronted with a parent living with a person of the opposite sex, outside of marriage, view such a relationship when child custody is at issue? Can a mother continue living with her boyfriend under the same roof as her children when a father seeks custody? Is a child adversely affected by a parent living in open and continuous cohabitation? When custody is an issue, do attorneys counsel cohabiting parents against continuing their relationships with their lovers? Do regional moral values or an individual judge's personal values have a dis-

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proportionate effect on the outcome of a custody dispute? What factors do judges consider when making custody awards? Many of these questions arise in cases involving custody disputes when a parent cohabits with a lover. This Article will analyze how attorneys advise cohabiting parents and how courts confronted with a mother or father living with a person other than their spouse without the benefit of marriage, or with a parent who commits adultery on one or two isolated occasions, resolve such custody disputes.

As a result of the enormous increase in the number of divorces in the United States, judges are confronted with more custody litigation than ever before. In the 1970s, the number of divorces doubled, surpassing one million per year.¹ During the 1980s, family breakups occurred at a rate of 1.2 million per year.² Recent projections indicate that 51.6% of present marriages will eventually end in divorce.³ Other predictions suggest that the divorce rate may reach an even higher level.⁴ Because one half of divorcing couples have children, the number of children involved in divorce has more than tripled in the past two decades.⁵ Recent census data show that over one in four children, representing 15.3 million children nationally, live in single parent homes.⁶

Society has gone to great lengths to protect and promote the integrity of the traditional family.⁷ To this end, children are

1. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SERIES 3, No. 19, NATIONAL ESTIMATES OF MARRIAGE DISSOLUTION AND SURVIVORSHIP: UNITED STATES (1980); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, No. 84, DIVORCE, CHILD, CUSTODY AND CHILD SUPPORT (1979).

2. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MONTHLY VITAL STATISTICS REPORT, Vol. 38, No. 12, Supp. 2, at 7 (May 15, 1990).

3. According to a study conducted by James Weed of the U.S. National Center for Health Statistics using 1985 data, it is projected that 51.6% of the marriages which began in 1985 will end in divorce. *The Life of a Marriage*, AMERICAN DEMOGRAPHICS, Feb. 1989, at 12.

4. H. DAVIDSON & K. GERLACH, LEGAL RIGHTS OF CHILDREN 233 (1984).

5. Weitzman, *Changing Families, Changing Laws*, 5 FAM. ADVOC. 5 (1982). According to 1987 data obtained from the U.S. National Center for Health Statistics, 52% of the divorcing couples in 1987 had children. MONTHLY VITAL STATISTICS REPORT, *supra* note 2, at 10.

6. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-20, No. 433, MARITAL STATUS AND LIVING ARRANGEMENTS: March, 1988 at 61 (1989).

7. The parent-child relationship has been cherished and highly protected by the courts because of the importance of the family unit in our society. In 1923, the United

removed from loving and caring parents who cohabit with lovers. Some courts have removed children from a cohabiting parent because of the fear of potential harm to them. Other courts have used their power to modify custody determinations in order to punish a parent for their moral indiscretions. A review of appellate decisions involving custody disputes shows that mothers who live with a lover have a significantly greater chance of losing custody of their children than do fathers in a similar situation.⁸ The fact that divorce creates financial hardship for many women⁹ may lead them to choose to live with a man for financial security.

Do courts exercise a double standard, being more forgiving of a father's adulterous activity than that of a mother's? Is society more forgiving of a man's moral shortcomings than a woman's? It is extremely rare for a court to remove children from a parent who lives in open cohabitation based on the testimony of an expert who articulates specific, concrete evidence of harm to the child.¹⁰ Part of the problem lies in the fact that judges hearing custody cases are given wide discretionary authority to interpret "the best interest of the child."¹¹

The empirical data contained in this Article is submitted to serve as a backdrop for purposes of elaboration and comparison.

States Supreme Court explored parents' rights to the custody, care, control, maintenance and companionship of their children, and held that an individual's right to marry and raise children was a fundamental liberty protected against all but compelling state interests. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1971) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection."). The traditional nuclear family has retained its place of primary importance in American culture as we enter the last decade of the twentieth century.

8. *See infra* notes 164-85 and accompanying text.

9. *See generally* McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351 (1987).

10. There are no definitive psychological studies on what effect a custodial parent's cohabitation has on a child. Note, *Custody and the Cohabiting Parent*, 20 J. FAM. L. 697, 713 (1981-82).

11. A review of child custody statutes reveals that courts are to apply the best interest standard. For example, the North Carolina child custody statute provides: "An order for custody . . . awarded . . . as will best promote the interest and welfare of the child." N.C. GEN. STAT. § 50-13.2 (1987). The Arkansas child custody statute states: "The award of custody . . . in accordance with the welfare and best interests of the children." ARK. STAT. ANN. § 9-13-101 (1987). For a review of state custody statutes *see infra* notes 217, 219-22.

Eighty-one attorneys from across the country were surveyed to elicit their opinions on these and other questions relating to child custody.¹² The attorneys surveyed have litigated custody cases in a majority of the states in this nation and their responses are compared by region.¹³ The responses of male and female attorneys are tabulated and compared, and demonstrate a statistical significance between the gender of lawyers and their responses to many of the questions in the survey.¹⁴ Additionally, the responses are compared and contrasted by the ages of the participating attorneys.¹⁵ Cases in the area of child custody are analyzed by dividing them into two categories: first, the per se category and second, the nexus between a parent's behavior and the effect on the child. Finally, a model statute addressing the factors a court should consider in adjudicating a custody dispute is presented.

II. Statistical Review of Custody Awards

Custody disputes are settled prior to trial in a significant number of cases. Approximately 70% of custody cases are resolved outside of court, while only 30% of cases are contested and reach final adjudication (see Graph 1).¹⁶

12. D. Stone, Custody Survey (June 1988) reproduced at Appendix A. The empirical study included a twelve page questionnaire sent to attorneys throughout the country who represent parents in child custody hearings. All of the attorneys surveyed were members of the American Bar Association's Custody Committee. Eighty-one attorneys, who have handled over 1,200 cases between June 1, 1987 and May 31, 1988, responded to the survey. D. Stone, Responses to Custody Survey.

13. *Id.* The Custody Survey encompassed 36 states and the District of Columbia. The data is divided among five regions, namely: Northeast (Connecticut, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, and Washington, D.C.); Southeast (Florida, Georgia, Louisiana, Mississippi, South Carolina, Tennessee, and Virginia); North-Central (Illinois, Indiana, Iowa, Michigan, Ohio, South Dakota, and Wisconsin); South-Central (Arkansas, Kansas, Missouri, Nebraska, Oklahoma, and Texas); and West (Alaska, California, Colorado, Hawaii, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming).

14. See Graphs 2, 4, 7, 8, 11, 12, 15, and 19. Of those responding to the Custody Survey, 41% were women and 59% were men.

15. See Graphs 2, 4, 7, 8, 11, 12, 15, and 19. The average age of the attorneys responding to the Custody Survey was forty years. Comparisons were made between attorneys under the age of forty and those over forty. The respondents possess an average of twelve years of practical experience.

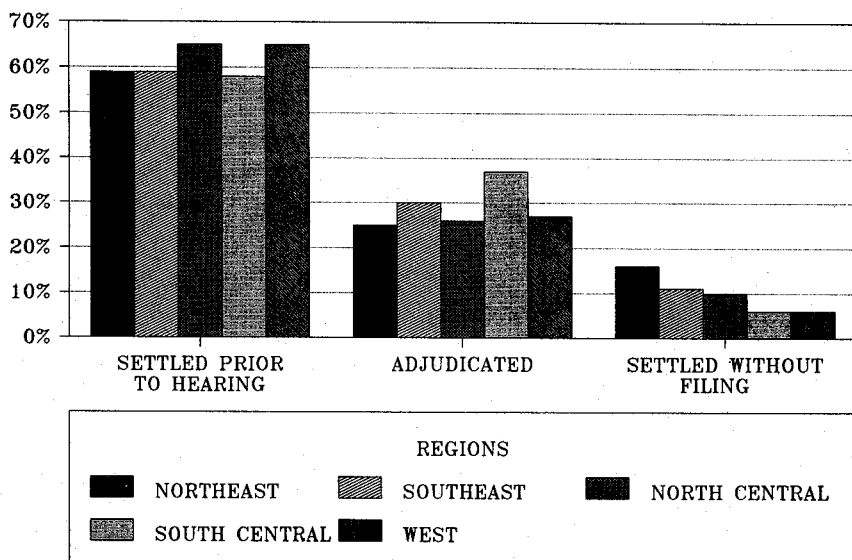
16. The South-Central region settled fewer custody cases than any other at a rate of approximately 65%. See Graph 1. One reason for this might be shorter court dockets,

Mothers are awarded custody of their children in a majority of the cases. In custody disputes that are resolved out of court, mothers are awarded custody in 61% of the cases, while fathers receive custody only 15% of the time. Joint custody is awarded in approximately 21% of the cases (see Graph 2).

Male attorneys and attorneys under the age of forty settled custody cases at a slightly higher rate than both female attorneys and attorneys over the age of forty. Significantly, male attorneys are more successful in securing custody awards for mothers than are female attorneys (see Graph 2).¹⁷

In the South-Central region, mothers lead fathers in custody awards in settled cases, at a rate of 72% to 20%. The Southeastern region follows closely behind, with mothers receiving custody awards in approximately 65% of the cases settled out of court and fathers receiving custody 20% of the time (see

HOW ULTIMATE OUTCOMES OF CUSTODY CASES ARE REACHED



GRAPH 1

resulting in less waiting time for a custody hearing to be held.

17. Male attorneys prevail in 66% of the disputes, while female attorneys succeed 55% of the time. See Graph 2.

Graph 3). Mothers in the West also receive custody in settled cases at higher rates than do fathers (see Graph 3).¹⁸

Joint custody awards are less favored. The West, with 22%, is the area of the nation with the highest percentage of joint custody dispositions in settled cases. Parents in the Southeast are the least likely to accept joint custody as the final resolution, accepting such a disposition in only 13% of the cases (see Graph 3).

In custody cases that go to trial, mothers receive custody of their children in even greater numbers than they do in cases that are settled.¹⁹ Judges seem to be less willing to make joint custody awards than do negotiating attorneys, possibly because judges demand that parents demonstrate an amicable relationship. Another reason why courts resist recommending joint custody arrangements in contested cases is that courts more often witness the failure of such arrangements. Failures are presented to courts for resolution; success stories are not.

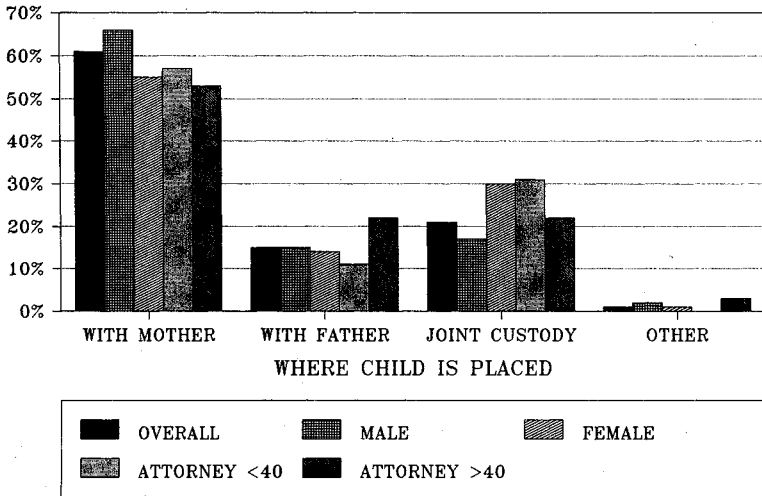
The courts of the North-Central region appear to be the most receptive to mothers seeking custody, awarding them custody of their children in over 80% of contested cases. Nevertheless, while courts in all regions of the country continue to award custody to mothers in greater numbers than to fathers, the Northeast may reflect a growing trend. Northeastern courts favor mothers over fathers at a rate of only 50% to 26%, with joint custody accounting for the remaining 24% (see Graph 5).

Attorneys who are forty years of age or older appear to be more successful in obtaining custody of children for the mother in contested cases, at a rate of 66%, compared to attorneys under forty, who obtain custody only 52% of the time. Similarly, female attorneys are more successful in obtaining custody for mothers in contested cases, at a rate of 65%, compared to 55% for male attorneys (see Graph 4). Therefore, one could conclude that a mother seeking custody of her children in a contested hearing will be more successful with a female or older attorney.

18. The gap is narrowing slightly, however, with mothers leading fathers 58% to 18%. See Graph 3.

19. In this scenario mothers prevail 65% of the time, with fathers being awarded custody in 29% of the cases. Joint custody is deemed appropriate in 6% of the cases. See Graph 4.

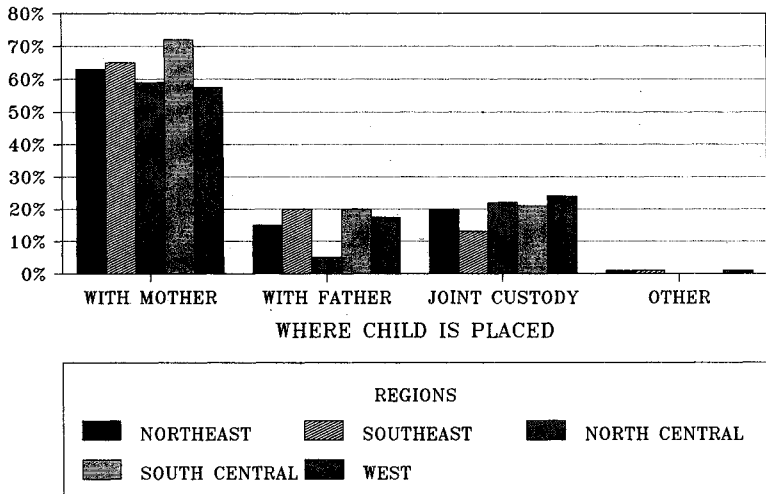
DISPOSITION OF CUSTODY CASES SETTLED PRIOR TO HEARING



* In response to this question, a percentage range was often given. When this occurred, an average value was used.

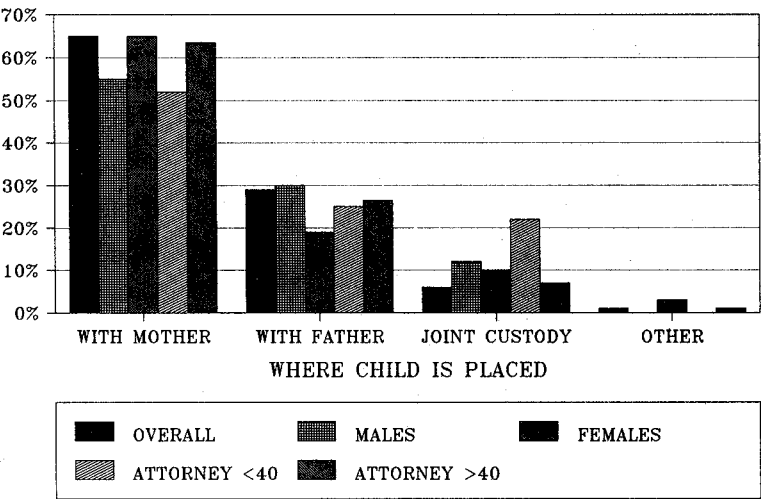
GRAPH 2

DISPOSITION OF CUSTODY CASES SETTLED PRIOR TO HEARING



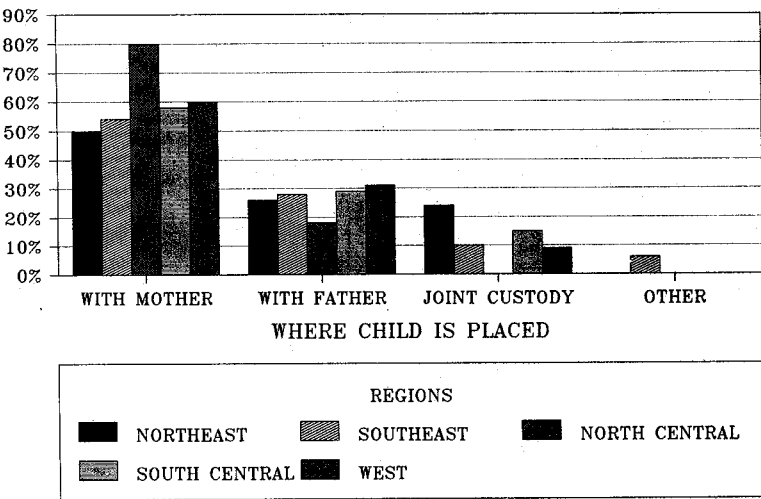
GRAPH 3

DISPOSITION OF CUSTODY CASES
ADJUDICATED AT COURT HEARING



GRAPH 4

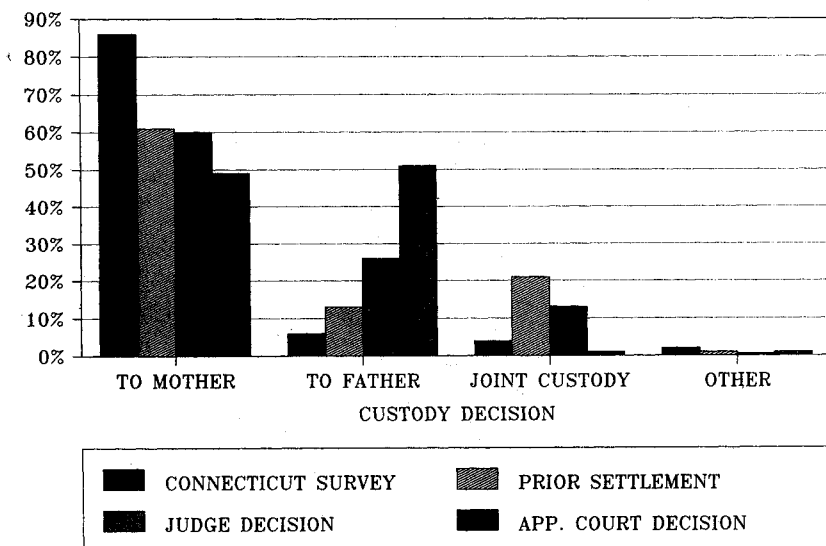
DISPOSITION OF CUSTODY CASES
ADJUDICATED AT COURT HEARING



GRAPH 5

Data collected from a variety of sources indicate that mothers continue to be awarded custody more frequently than fathers. Two surveys demonstrated that mothers received custody at a rate of 85%²⁰ and 60%²¹ respectively. In contrast, a review of 241 appellate custody cases conducted by the *Family Law Quarterly*,²² found custody awards to mothers in only 49% of the cases and to fathers in 51% of the cases (see Graph 6). A possible explanation for this inconsistency is that this data does not take into account the fact that the majority of custody cases are settled without a trial. As has been documented, mothers are awarded custody of their children in a majority of settled cases (see Graph 6), a fact not accounted for in the study. Additionally, fathers may be more likely than mothers to appeal trial court decisions, due in part to financial considerations.²³

DISPOSITION OF CASES AND FREQUENCY WITH WHICH EACH PARENT IS AWARDED CUSTODY



The first 2 columns correspond to our survey. The last 2 correspond to 1982 and 1984 surveys reported in *Family Law Quarterly*.

GRAPH 6

20. McLindon, *supra* note 9, at 367.

21. See Graph 6.

22. Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Court*, 18 FAM. L.Q. 1, 8-11 (1984).

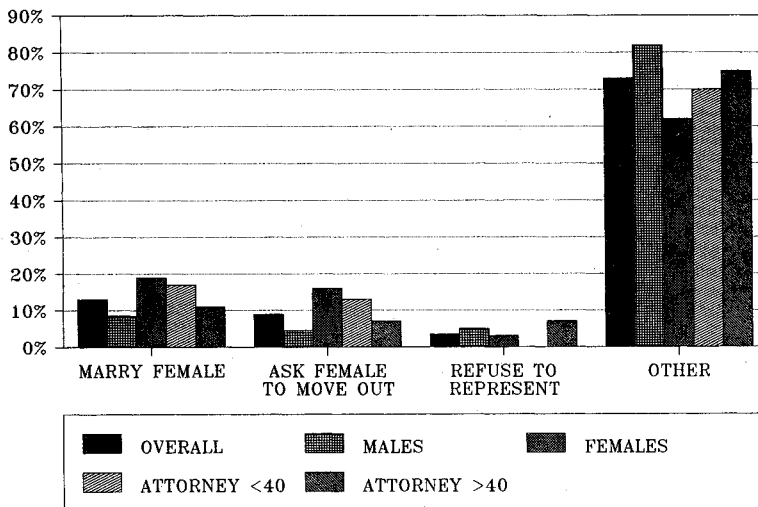
23. Many women experience a substantial decrease in their post-divorce income. McLindon, *supra* note 9, at 392.

A. *Influence of the Attorney's Age and Gender on Advice Given to Clients*

Because of the overwhelming numbers of custody cases that never go to trial, it is important to focus on the advice that attorneys offer clients who disclose that they are living with a lover. Does this advice vary depending on whether it is the mother living with a boyfriend or the father living with a girlfriend? Does the attorney's age or sex influence the advice given? Does the region of the country influence the advice offered by the attorney?

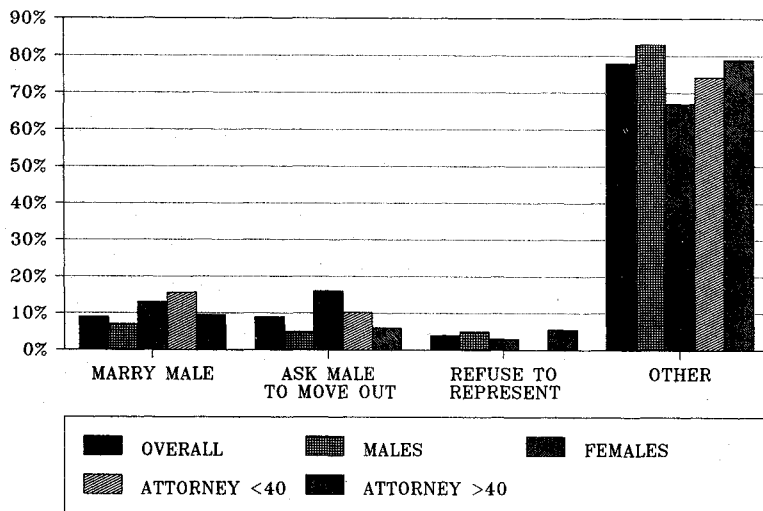
Attorneys surveyed advise a father with a live-in girlfriend to marry in 13% of the cases; the advice to "kick out" the lover is offered in 9% of the cases. Attorneys are slightly less likely to recommend marriage to the mother with a live-in boyfriend, offering it in 9% of the cases; the advice to "kick out" the lover is also offered in 9% of the cases (see Graphs 7 and 8).

ATTORNEY'S ADVICE TO CLIENT FATHER
WHEN COHABITING WITH FEMALE



GRAPH 7

ATTORNEY'S ADVICE TO CLIENT MOTHER WHEN COHABITING WITH MALE



GRAPH 8

Female attorneys are much more likely to take an interventionist role, advising their client to marry or “kick out” his lover.²⁴ Even more remarkable is that female attorneys advise the father with a live-in girlfriend to “kick out” his lover in 15.6% of the cases, while male attorneys offer this advice to fathers only 4.5% of the time (see Graph 7). When the client is a mother with a live-in boyfriend, female attorneys again are more outspoken in their advice. Female attorneys advise a mother with a live-in boyfriend to marry 12.9% of the time as compared to male attorneys who provide the same advice 6.8% of the time. Similarly, female attorneys advise the mother to “kick out” her lover in almost four times as many cases as male attorneys (see Graph 8).²⁵ Female attorneys also appear more likely to tell a

24. Female attorneys advise a father with a live-in girlfriend to marry 18.8% of the time, while only 9.1% of male attorneys give such advice. See Graph 7.

25. 16% and 4.5% respectively.

father to marry than to tell a mother to marry.²⁶ Perhaps this result is due to a recognition on the part of female attorneys that fathers are less likely to be awarded custody.²⁷ Hence, regularizing the father's marital status may remove at least one stumbling block to gaining custody of his children.

In comparing advice offered by attorneys under the age of forty with that offered by attorneys over forty, older attorneys are more likely to refuse to represent a client who admits to cohabiting with a lover.²⁸ Younger attorneys are more likely to advise fathers rather than mothers to marry, at a rate of 15.6% and 9.7% respectively (see Graphs 7 and 8).

B. *Regional Influence on Advice Given to Clients*

A review of the survey data by region shows significant patterns. In the Southeast, both male and female attorneys recommend that their client "kick out" his or her lover in 37.5% of the cases. In 50% of the cases in the Southeast, attorneys will advise that the lover either be kicked out or will simply refuse to represent the client (see Graphs 9 and 10). This advice appears sound when reviewing how Southern judges rule when confronted with a cohabiting parent.²⁹ What is remarkable is that half of the attorneys in the Southeast would agree to represent the client without advising the client to "kick out" the lover. In contrast, no attorney surveyed in the Western region would either refuse to represent such a client or advise that the lover be kicked out (see Graphs 9 and 10).

The advice from attorneys to "marry your lover" is never offered in the Southeast, while in the North-Central region it is given in many cases.³⁰ A possible explanation is that courts in the North-Central region appear to believe that a marriage license cures a parent's moral shortcomings.³¹ In essence, to

26. 18.8% and 12.9% respectively.

27. See Graph 6.

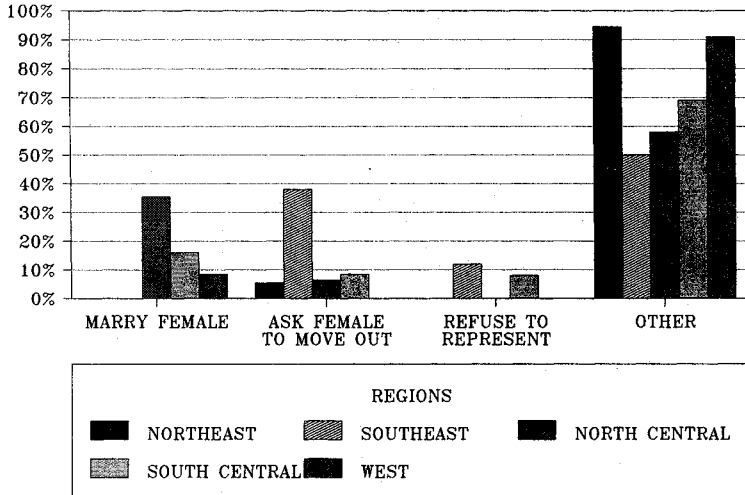
28. This occurs in 6.7% of the cases. See Graphs 7 and 8.

29. See *infra* notes 76-92 and accompanying text.

30. 35.7% of the attorneys surveyed recommend marriage to fathers and 23.1% recommend marriage to mothers. See Graphs 9 and 10.

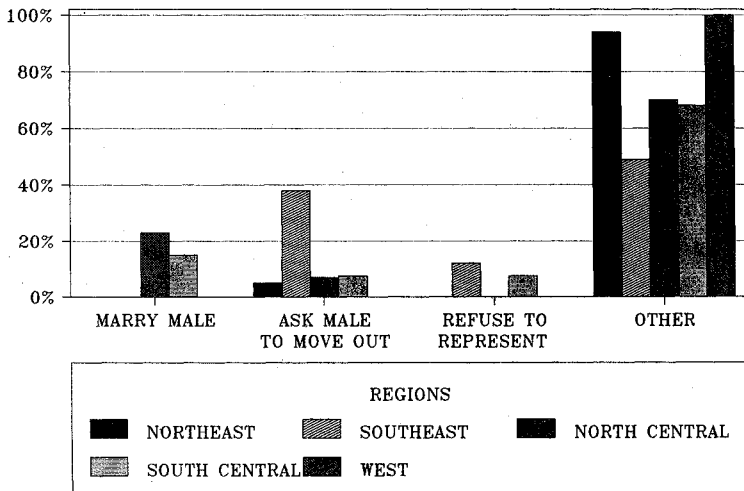
31. See *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (1978); *Greenfield v. Greenfield*, 199 Neb. 648, 260 N.W.2d 493 (1977); *Lapp v. Lapp*, 336 N.W.2d 350 (N.D. 1983); *Wyss v. Wyss*, 3 Ohio App. 3d 412, 445 N.E.2d 1153 (1982).

ATTORNEY'S ADVICE TO CLIENT FATHER
WHEN COHABITING WITH FEMALE



GRAPH 9

ATTORNEY'S ADVICE TO CLIENT MOTHER
WHEN COHABITING WITH MALE

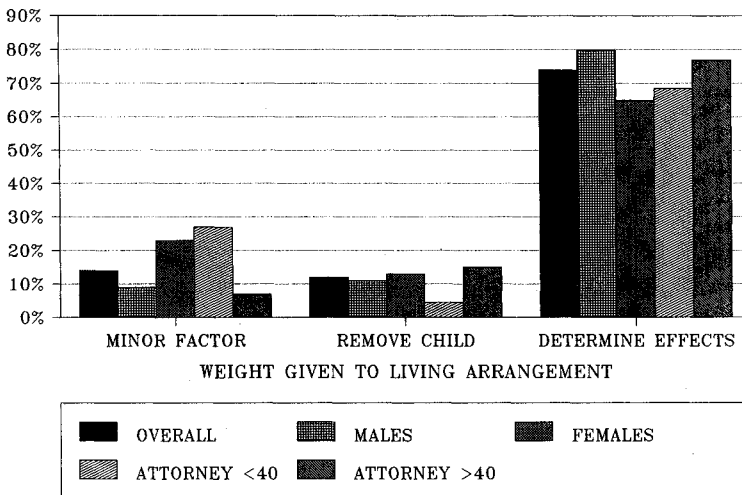


GRAPH 10

accommodate their perception of what is socially acceptable behavior for parents, judges have engaged in a form of social engineering. The concept of a parent running to the justice of the peace prior to a custody hearing to pacify an outraged judge has far-reaching implications.

Do courts confronted with a parent cohabiting with a lover view such a living arrangement, in and of itself, to be enough to warrant removing children from the home, or does it depend on the effect the living arrangement has on the welfare of the child? Approximately 12% of the attorneys believe that a parent's cohabitation with a lover, standing alone, is a sufficient ground for a court to remove custody from that parent. Attorneys age forty and over are twice as likely as younger attorneys to conclude that judges, without any evidence of harm to the child, would remove children from their father simply because of his cohabitation. Their advice to their clients reflects this perspective.

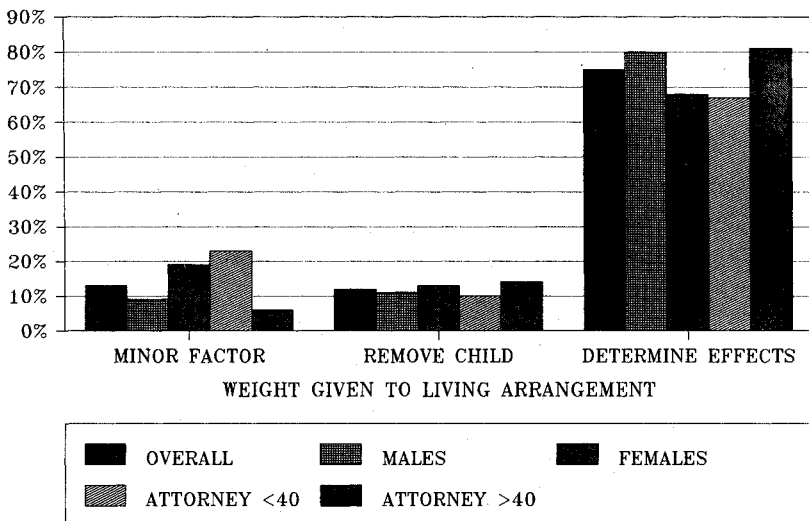
CUSTODY DISPOSITION BY COURT
WHEN FATHER COHABITING WITH FEMALE



• ACCORDING TO ATTORNEY

GRAPH 11

CUSTODY DISPOSITION BY COURT WHEN MOTHER COHABITING WITH MALE



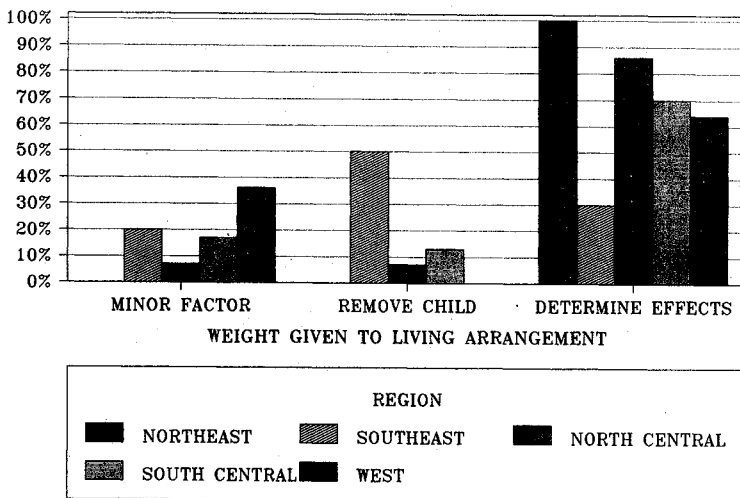
• ACCORDING TO ATTORNEY

GRAPH 12

A regional review of the survey data most clearly evidences a significant variation in the way courts address a parent's cohabitation in the custody context. In the Southeast, courts consider a father's living with a woman without the benefit of marriage as per se unfitness in 50% of the cases. When considering a mother with a live-in boyfriend, Southeastern courts are slightly more lenient, but still consider cohabitation, even without evidence of harm to the child, as per se unfitness in 40% of the cases. By comparison, courts of the Northeastern and Western regions never consider the parent's cohabitation a per se showing of unfitness (see Graphs 13 and 14). The variation between the Southeastern and the Western regions may be a reflection of community standards. On the other hand, courts may lag behind the times in reflecting community norms. Parents of minor children are cohabiting in all regions of the country.³² In the custody

32. Note, *Recognizing Contract and Property Rights of Unmarried Cohabitants in Wisconsin: Watts v. Watts*, 1988 Wis. L. Rev. 1093, 1093 n.1 (1988).

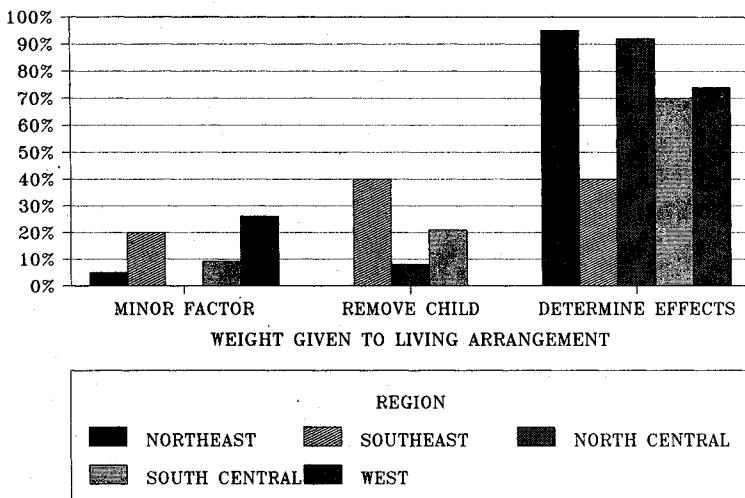
CUSTODY DISPOSITION BY COURT WHEN FATHER COHABITING WITH FEMALE



• ACCORDING TO ATTORNEY

GRAPH 13

CUSTODY DISPOSITION BY COURT WHEN MOTHER COHABITING WITH MALE



• ACCORDING TO ATTORNEY

GRAPH 14

context, perhaps the courts should take their heads out of the sand, look and listen to their communities, and determine whether such living arrangements are harmful to children.

Attorneys in custody disputes play a vital role in shaping the behavior of those parents who choose to live with a lover outside of marriage. Parents involved in such a living arrangement continue to face a challenge to retain custody of their children. Often, non-custodial parents use these relationships to seek removal of custody. Therefore, during the initial attorney-client interview, when it is revealed that the custodial parent is living with a lover, the attorney is immediately thrust into a position of influencing the client's future living arrangement. During attorney-client counseling, should the lawyer recommend marriage, or should he recommend that the lover be asked to leave the house, or, if both these alternatives are rejected, should the attorney refuse to represent the client?

According to one Tennessee attorney,³³ judges confronted with a parent seeking custody while living with a lover consider the parent's living arrangement as per se unfitness and remove the child from that parent's home. Recognizing the Tennessee courts' position on this matter, attorneys advise their clients to either get married or remove the lover from the home.³⁴ In contrast, one New York attorney handling custody cases claims he has no right or duty to tell a client to marry. In fact, if the boyfriend is of good character, he may "be an asset by providing a constant fatherly figure."³⁵ A California attorney, stating that "our courts do not get involved in the morality of the situation," claims that the Los Angeles County Superior Court is the "best place for a parent to litigate a custody case because the court will not show any interest in her private life."³⁶

33. D. Stone, Responses to Custody Survey. Attorneys from the Southeast region (Florida, Georgia, Louisiana, Mississippi, South Carolina, Tennessee and Virginia) reported that in 50% of child custody cases courts consider a parent living with a lover outside of marriage to be per se unfit. See Graphs 13 and 14.

34. D. Stone, Responses to Custody Survey.

35. *Id.*

36. *Id.* Attorneys from the Western region of the United States (Alaska, California, Colorado, Hawaii, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming) reported that their courts never consider a parent living with a lover outside of marriage to be per se unfit. See Graphs 13 and 14.

III. Review of Court Custody Decisions

Courts throughout the country have been confronted with the difficult issue of child custody when a parent openly and continuously cohabits with a lover. While some courts have side-stepped the fundamental question of whether such a living arrangement is harmful to the child, other courts have directly addressed this issue. Two approaches have been used by judges in awarding custody in such a situation. When the "per se" approach is applied, the fact that a parent cohabits with a lover outside of marriage will lead to a conclusive presumption by the court that custody should be removed from that parent. The second method of review articulated by the courts is the "nexus" approach, whereby the court scrutinizes whether there exists tangible and concrete evidence of a present adverse effect on the child. Under this approach, only if the court finds such evidence is custody removed from the cohabiting parent.

A. *The Per Se Category*

Courts following the per se standard of evaluation have held that a cohabiting parent should automatically lose custody of his or her children, even in the absence of tangible evidence of an adverse effect on the child. These courts cite different considerations to reach this conclusion, including peer teasing,³⁷ poor role modeling,³⁸ moral climate,³⁹ and lack of marriage plans.⁴⁰

In *Jarrett v. Jarrett*,⁴¹ the Illinois Supreme Court had to determine who should receive custody of three children, ages seven, ten and twelve, whose mother cohabited with her lover in

37. *Jarrett v. Jarrett*, 78 Ill. 2d 337, 349, 400 N.E.2d 421, 426 (1979) (the court was concerned that the children might be forced to explain their mother's lover to friends and to "endure their taunts and jibes") *cert. denied*, 449 U.S. 927 (1980).

38. *Beck v. Beck*, 341 So. 2d 580, 582 (La. App. 1977) (children learn behavior by example, particularly from their parents).

39. *Brown v. Brown*, 218 Va. 196, 199, 237 S.E.2d 89, 91 (1977) (the court noted that "the moral climate in which children are to be raised is an important consideration . . . in determining custody . . .").

40. *Hicks v. Hicks*, 214 Neb. 588, 590, 334 N.W.2d 807, 809 (1983) (the fact that the cohabiting mother had no marriage plans was an important consideration); *see also* *Batenhorst v. Batenhorst*, 205 Neb. 601, 288 N.W.2d 740 (1980) (the attitude and stability of character of each parent is among the many factors to be considered in determining the best interest of the child).

41. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

the family home without any plan to marry.⁴² The central issue was whether custody should be removed from the mother based on her open and ongoing cohabitation without a finding of a present adverse effect upon the children. The father of the children sought custody based on the theory that the current living arrangement would result in future harm to the children.

In this case, Jacqueline Jarrett had been granted a divorce from her husband, Walter Jarrett, on the grounds of extreme and repeated mental cruelty.⁴³ The court found that Jacqueline was a fit and proper person and awarded her custody of the three children. Approximately five months later, her lover moved into the home.⁴⁴ Upon learning of this, her ex-husband petitioned the circuit court of Cook County for modification of custody, stating that "Jacqueline's living arrangement was contrary to his own personal beliefs . . . and an improper moral climate."⁴⁵

Granting his petition, the trial court stated that it was "necessary for the moral and spiritual well-being and development" of the children that they reside with their father.⁴⁶ The court heard no evidence regarding an adverse effect on the children as a result of their mother's living arrangement.⁴⁷ Despite an absence of evidence that the mother was an unfit parent, the trial court concluded that the relationship "constitute[d] such a disregard for community standards as to endanger her children's moral well-being."⁴⁸ The trial court awarded Walter Jarrett custody of his three children.

The appellate court of Illinois reversed, concluding that there was no evidence to support a finding that Jacqueline was

42. *Id.* at 341, 400 N.E.2d at 422 (the mother did not want to remarry because she did not believe her relationship needed to be formalized and because the divorce decree required her to sell the family home within six months after remarriage).

43. *Id.* at 340-41, 400 N.E.2d at 421.

44. *Id.* at 341, 400 N.E.2d at 422.

45. *Jarrett v. Jarrett*, 64 Ill. App. 3d 932, 934, 382 N.E.2d 12, 14 (1978), *rev'd*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

46. *Id.* at 935, 382 N.E.2d at 14 (quoting the trial court opinion).

47. *Id.* at 937, 382 N.E.2d at 16. The appellate court noted that in the absence of any evidence of negative effects, it would decline to indulge in speculation as to what effects might possibly "raise their ugly heads" at some future time. *Id.* at 937, 382 N.E.2d at 16 (quoting *Gehn v. Gehn*, 51 Ill. App. 3d 946, 949, 367 N.E.2d 508, 511 (1977)).

48. *Jarrett*, 64 Ill. App. 3d at 936, 382 N.E.2d at 15.

an unfit parent.⁴⁹ The court noted that Jacqueline Jarrett, Wayne Hammon and the three children functioned as a family unit.⁵⁰ According to the court, the relationship between Jacqueline and Wayne was not relevant absent proof of a negative effect on the children. The appellate court refused to enter the battle regarding the morality of the mother's living arrangement, choosing instead to focus on the welfare and best interest of the children. The appellate court additionally held that the trial court abused its discretion when it imposed its own standard of moral fitness without any evidence on the record of harm to the welfare of the children.⁵¹

In what was to become a leading per se decision, the Illinois Supreme Court reversed, concluding that exposing the children to Jacqueline's living arrangement was harmful to their moral well-being and development.⁵² Jacqueline's continued cohabitation with Wayne Hammon, in the absence of any indication that the relationship would cease in the future, was critical to the court's decision. Had Jacqueline expressed her intention to marry Wayne Hammon, the court very likely would have permitted the children to remain with their mother. The court distinguished custody cases where the cohabiting mother planned to marry⁵³ from cases where there was no future plan to marry. The *Jarrett* court had previously held that past moral indiscretions of a parent were insufficient grounds for denying custody if the present conduct did not indicate a continuation of such behavior in the future.⁵⁴ But the *Jarrett* case challenged the court

49. *Id.* at 937, 382 N.E.2d at 16.

50. Hammon disciplined the children, helped them with homework, and played with them. *Id.*

51. *Id.*; see also *Hendrickson v. Hendrickson*, 49 Ill. App. 3d 160, 364 N.E.2d 566 (1977) (custody will not be changed unless it is established that change in circumstances renders modification in the best interests of the children).

52. The court supported the trial court's conclusion that the presence of Jacqueline and Hammon together with the children was injurious to the moral well-being and development of the children. *Jarrett*, 78 Ill. 2d at 347, 400 N.E.2d at 424.

53. See *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979); *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (1979); *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (1978). Jacqueline Jarrett relied on these cases, arguing that the moral indiscretion of a parent is insufficient grounds for denial of custody. *Jarrett*, 78 Ill. 2d at 348, 400 N.E.2d at 425.

54. *Jarrett*, 78 Ill. 2d at 347, 400 N.E.2d at 424 (quoting *Nye v. Nye*, 411 Ill. 408, 415, 105 N.E.2d 300, 303 (1952)).

to extend its prior ruling in *Nye v. Nye*⁵⁵ and to hold that past and present moral indiscretions of a parent are not sufficient grounds to deny custody. The court was unwilling to make such a leap. According to the court, Jacqueline's disregard for community standards of conduct sent the clear message that her children, too, could choose to ignore them.⁵⁶ The focus of the court's concern, was that the moral values Jacqueline was portraying to her children would have a negative effect on their future behavior.⁵⁷

The court in *Jarrett* rejected a requirement for tangible evidence of harm to the children.⁵⁸ Interpreting the state custody statute⁵⁹ to support its conclusion, the court explained that it was not necessary to wait and see if harm actually occurred. Rather, the potential for endangering a child's physical, mental, moral or emotional health was sufficient to justify removal of the children.⁶⁰ The court believed that open cohabitation adversely affects the mental and emotional health of children.⁶¹ The flaw in the court's reasoning was its failure to require concrete evidence of present harm. The court failed to offer any psychological or sociological basis for its conclusion that children are harmed when exposed to a parent living with a lover. Furthermore, the record was completely devoid of expert psychological testimony identifying the existence of actual harm to Jacqueline's children. The court itself hinted at this concern when it

55. 411 Ill. 408, 105 N.E.2d 300 (1952) (held that past moral indiscretions of a parent are insufficient grounds for denying custody if the parent's present conduct establishes the improbability of such lapses in the future). In *Jarrett*, the mother indicated she had no intention of terminating the relationship with her lover. 78 Ill. 2d at 347, 400 N.E.2d at 424.

56. *Jarrett*, 78 Ill. 2d at 346, 400 N.E.2d at 424; see also *Stark v. Stark*, 13 Ill. App. 3d 35, 299 N.E.2d 605 (1973); *Brown v. Brown*, 218 Va. 196, 237 S.E.2d 89 (1977).

57. *Jarrett*, 78 Ill. 2d at 346-47, 400 N.E.2d at 424-25.

58. *Id.*; see also *Vincent v. Vincent*, 420 So. 2d 1333 (La. App. 1982) (although mother saw nothing wrong with living with a man, the court found it to be a serious and damaging influence on the proper upbringing of a two and one-half year old child and declared the mother unfit).

59. Section 610 of the Illinois Marriage and Dissolution of Marriage Act directs trial courts to determine whether the child's present environment endangers seriously his physical, mental, moral or emotional health. ILL. ANN. STAT. ch. 40, para. 610 (Smith-Hurd 1977).

60. *Jarrett*, 78 Ill. 2d at 344, 400 N.E.2d at 423.

61. *Id.* at 349, 400 N.E.2d at 425.

noted that it was difficult to predict what psychological effect the mother's cohabitation would have on the children.⁶²

The majority distinguished its conclusion from the United States Supreme Court's opinion in *Stanley v. Illinois*,⁶³ explaining that it had closely scrutinized the individual facts of the case, and did not draw a conclusive presumption depriving all mothers who cohabit with a lover of custody of their children. It based its conclusion upon the fact that cohabitation was considered a misdemeanor in Illinois.⁶⁴ The infringement of the Illinois fornication statute⁶⁵ violated the expressed moral standards of the state and encouraged others to violate those standards as well.⁶⁶ This violation of moral standards was sufficient justification to conclude that the children were adversely affected even in the absence of specific findings of harm to the children.

This case drew two strongly worded dissents. The first found the children healthy, well adjusted and cared for and pointed out that neither the trial nor appellate courts had found the mother to be unfit.⁶⁷ The second dissent firmly expressed its position by stating: "[N]ot one scintilla of actual or statistical evidence of harm or danger to the children has been presented. To the contrary, . . . the children's welfare and needs were met."⁶⁸

As both the dissents in *Jarrett* and Justice Brennan's dissent to the United States Supreme Court decision denying certiorari concluded, there was no basis for presuming that Jacqueline's cohabitation would adversely affect her children.⁶⁹

62. *Id.* at 349, 400 N.E.2d at 426; see also *Gehn v. Gehn*, 51 Ill. App. 3d 946, 949, 367 N.E.2d 508, 511 (1977) (the court noted the difficulty in presenting objective evidence of the future effect of such conduct).

63. 405 U.S. 645 (1971) (the Supreme Court invalidated a conclusive presumption that an unwed father is unfit to exercise custody over his children).

64. *Jarrett*, 78 Ill. 2d at 337, 400 N.E.2d at 421.

65. Section 11-8 of the Criminal Code of 1961 provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." ILL. ANN. STAT. ch. 38, para. 11-8 (Smith-Hurd 1977).

66. *Jarrett*, 78 Ill. 2d at 346, 400 N.E.2d at 424.

67. *Id.* at 351, 400 N.E.2d at 426 (Goldenherish, J., dissenting).

68. *Id.* at 352, 400 N.E.2d at 427 (Moran, J., dissenting). The dissent noted that the majority used the seldom enforced fornication statute and utilized child custody as a vehicle to punish Jacqueline for her "misconduct." *Id.* at 352-53, 400 N.E.2d at 427.

69. 449 U.S. 927, 931 (1980) (Brennan, J., dissenting); see also *infra* notes 70-71 and accompanying text.

Justice Brennan recognized *Stanley* for what it stood for, that the interests of parents in the companionship, care, custody and management of their children "cannot be determined by the evidentiary shortcut of a conclusive presumption."⁷⁰ The United States Supreme Court prohibited custody modification based on a conclusive presumption of a serious adverse effect on the children's best interest. According to Justice Brennan, the *Jarrett* court followed this same logic by concluding that Jacqueline Jarrett's living arrangement, alone, caused an adverse effect on the well-being and development of her children, and thus rendered her an unfit parent.⁷¹

The *Jarrett* case is by no means the only case standing for the proposition that a parent who openly cohabits with a lover will lose custody of the children. In *Hicks v. Hicks*,⁷² the Nebraska Supreme Court upheld a custody award of a four year old daughter to her father because the mother was living with a man in a "frequent and continuous manner." Acknowledging that adultery cannot, as a matter of law, deprive a parent of custody,⁷³ the court nevertheless pointed out that it is hardly a "recommendation tending to prove fitness."⁷⁴ The *Hicks* court went to great lengths to point out that the mother had no plans to marry her lover.⁷⁵ However, the court stopped short of saying that all would be forgiven were the parties to marry.

In *Gibson v. Pierce*,⁷⁶ the Georgia court of appeals found that the remarriage of a cohabiting mother does not cure all ills. Nancy Gibson and James Pierce were divorced in March, 1984. Custody of their three-year old daughter was awarded to Nancy. Two months later, James petitioned the court for custody modification, claiming that on several occasions in May of 1984, Nancy's boyfriend had spent the night in her home while the child was present. Nancy married her boyfriend, David Gibson,

70. 449 U.S. at 930 (Brennan, J., dissenting).

71. *Id.*

72. 214 Neb. 588, 334 N.W.2d 807 (1983).

73. *Id.* at 590, 334 N.W.2d at 809.

74. *Id.* The court explained that "moral fitness and conduct of the parties . . . are of great significance in determining questions of custody." *Id.*; see also *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (1981).

75. *Hicks*, 214 Neb. at 590, 334 N.W.2d at 809.

76. 176 Ga. App. 287, 335 S.E.2d 658 (1985), *cert. denied*, 255 Ga. 525, 342 S.E.2d 467 (1986).

in August of 1984, two months before the custody hearing.⁷⁷

Despite the formalization of the relationship, the court was not persuaded to allow Nancy to retain custody. The court of appeals of Georgia focused, as in *Jarrett*, on the state's criminal fornication statute.⁷⁸ Admitting that the trial court relied on findings of fact that were "somewhat scanty," the court, nonetheless, removed custody of the child from her mother.⁷⁹ The court heard no evidence nor reached any conclusion that Nancy and her future husband "engaged in [any] inappropriate conduct in the presence of the child"⁸⁰ Nor did the court find any adverse effect to the well being of the minor child. Instead, evidence that Nancy and her fiancé had spent several nights together was found by the court to warrant a material change affecting the welfare of the child.⁸¹

Another important per se case was *Brown v. Brown*,⁸² decided by the Supreme Court of Virginia. The *Brown* court found that an otherwise fit parent, by reason of an adulterous relationship in the same home where her two sons resided, was not the proper person to have the care and custody of the children.⁸³ Using the presumption that because children learn by example they must be harmed by such a relationship,⁸⁴ the court sidestepped identifying any evidence of direct harm to the children. The evidence presented showed that Mrs. Brown properly cared for her children and her home,⁸⁵ but the court focused its attention solely on the relationship between Mrs. Brown and her lover.⁸⁶

77. *Id.* at 287, 335 S.E.2d at 658.

78. GA. CODE ANN. § 16-6-18 (1988).

79. *Gibson*, 176 Ga. App. at 287, 335 S.E.2d at 659.

80. *Id.*

81. *Id.*

82. 218 Va. 196, 237 S.E.2d 89 (1977).

83. *Id.* at 200, 237 S.E.2d at 92.

84. *Id.* at 199, 237 S.E.2d at 91; see also *Beck v. Beck*, 341 So. 2d 580, 582 (La. Ct. App. 1977) (mother's adulterous relationship rendered her unfit to have custody); *Denton v. Meshell*, 335 So. 2d 705, 706 (La. Ct. App. 1976) (mother living in open adultery held unfit to have custody).

85. *Brown*, 218 Va. at 198, 237 S.E.2d at 91.

86. *Id.* The Virginia Supreme Court remarked that the lower court "was only interested in hearing testimony on the relationship between Mrs. Brown and Leith." *Id.* at 198, 237 S.E.2d at 91.

The court of appeals of Louisiana in *Sherman v. Sherman*,⁸⁷ followed the per se standard adopted by several courts in the Southeastern United States. In this case, Mrs. Sherman admitted frequently sleeping with a man, but denied doing so in the presence of her three-year old son.⁸⁸ However, because the mother and her lover did not have separate residences, the court concluded that "their arrangement amounted to concubinage."⁸⁹ The court of appeals of Louisiana distinguished *Sherman* from *Cleeton v. Cleeton*,⁹⁰ where a mother and her lover had maintained separate residences and only occasionally stayed together overnight. Apparently, in Louisiana, a disregard for moral norms is acceptable as long as it is done discretely.

Like the Virginia court in *Brown*, the *Sherman* court presumed that the mother's living arrangement "must inevitably affect Jonathan adversely."⁹¹ Again, no expert testimony was presented to show that the child was adversely affected by his mother's actions.

Does a parent who cohabits with a lover, faced with a custody battle, satisfy the court by terminating such a relationship? Not necessarily. Promises to marry or to terminate the relationship in order to retain custody are insufficient to some courts when the moral climate in which children are raised is at stake. Courts appear to require mothers to wear the scarlet letter "A" on their chest for all eternity. An example of this position can be found in *Beck v. Beck*.⁹² In this case, Mrs. Beck attempted to "redeem herself by requiring her lover to move out of her trailer and discontinuing sexual relations with him."⁹³ The court was unpersuaded that the mother's change in her living arrangement was sufficient. Relying on an earlier custody case, it explained that: "Past misconduct forms an important consideration in de-

87. 441 So. 2d 469 (La. Ct. App. 1983).

88. *Id.* at 470.

89. *Id.* at 471.

90. 383 So. 2d 1231 (La. 1979).

91. *Sherman*, 441 So. 2d at 471. Recognizing facts similar to those in *Bagents v. Bagents*, 419 So. 2d 460 (La. 1982), the Court stated that "the mother's disregard for the observance of recognized moral norms, demonstrated by her living in concubinage with Waits, is a valid criterion for determining her unsuitability as a parent." *Sherman*, at 471.

92. 341 So. 2d 580 (La. Ct. App. 1977).

93. *Id.* at 582.

termining the present suitability of a parent."⁹⁴

Custody determinations should be based on the best interest of the child. The problem with these decisions is that the best interest of the child takes a back seat when the court disapproves of the life style of the parent. No longer does the court in these cases investigate which parent would better have primary responsibility for raising a child. Instead, the inquiry focuses on the court's perception of which parent is the more acceptable person morally.⁹⁵

B. *The Nexus Category*

Under the nexus approach, courts that are faced with a parent who cohabits with a lover scrutinize the relationship and its impact on the child to determine whether to modify a custody award. Under this standard, the courts review the evidence to determine if a parent's cohabitation does in fact adversely affect a child's welfare, thus necessitating removal. Of the sixty-three appellate custody cases reviewed for this survey that fall within the nexus category, fifty-seven involved a mother who was cohabiting, while only six involved a father who was cohabiting. In cases involving a cohabiting father, the father was always awarded custody.⁹⁶ As some commentators have remarked, a double standard exists whereby "[a] body of law has emerged which holds men and women engaged in extramarital affairs to a double standard"⁹⁷ Of the fifty-seven cases involving the cohabiting mother, the mother was awarded custody in 58% of the cases and the father in 42% of the cases.

Subsequent to *Jarrett*, the appellate court of Illinois in *In re Marriage of Olson*,⁹⁸ distanced itself from the holding of *Jarrett*, distinguishing the cases by whether or not the cohabitation of the parties was "open and notorious."⁹⁹ In *Olson*, unlike *Jar-*

94. *Borras v. Falgoust*, 285 So. 2d 583, 588 (La. Ct. App. 1973), writ denied, 289 So. 2d 161, cert. denied sub nom, *Harmon v. Falgoust*, 419 U.S. 854 (1974).

95. See Lowery, *The Wisdom of Solomon, Criteria for Child Custody From the Legal and Clinical Points of View*, 8 LAW AND HUM. BEHAV. 371, 379 (1984).

96. See *infra* notes 98-202 and accompanying text.

97. La Fave, *Origins & Evolution Of The "Best Interests of The Child" Standard*, 34 S.D.L. REV. 459, 498 (1989).

98. 98 Ill. App. 3d 316, 424 N.E.2d 386 (1981).

99. *Id.* at 319, 424 N.E.2d at 389; see also *In re Marriage of Smith*, 132 Ill. App. 3d

rett, the mother's admitted sexual relationship never occurred when the minor child was present, and the child was not aware of his mother's sexual intimacy with her lover. In *In re Marriage of Cripe*,¹⁰⁰ the appellate court of Illinois revisited the cohabitation debate with a slightly different twist. In *Cripe*, the mother was living in open and notorious adultery with a man, exposing the relationship to two daughters, aged seven years and ten months. The court distinguished *Jarrett* on the basis that there was no evidence to indicate that Mrs. Jarrett's immoral or illegal conduct would terminate in the future, while the evidence indicated that Mrs. Cripe and her paramour intended to marry.¹⁰¹ The court found that although Mrs. Cripe "had engaged in immoral or illegal conduct in the past," this "conduct was not expected to continue in the future."¹⁰²

Some courts assign great weight to the fact that a cohabiting parent marries her lover. For example, in *Sealy v. Sealy*,¹⁰³ the cohabiting mother married her paramour and was awarded custody of her two children. The court agreed that remarriage alone was an insufficient basis for awarding her custody,¹⁰⁴ however, "remarriage which restores 'moral fitness' has been recognized as a factor to be considered in awarding change of custody."¹⁰⁵

The court of appeals of Virginia in *Brinkley v. Brinkley*,¹⁰⁶

694, 479 N.E.2d 929 (1985) (finding no open and notorious cohabitation).

100. 183 Ill. App. 3d 37, 538 N.E.2d 1175 (1989); *see also* *Fisher v. Fisher*, 185 Neb. 469, 176 N.W.2d 667 (1970).

101. 183 Ill. App. 3d at 45, 538 N.E.2d at 1176 (changed circumstances warranting modification of custody order include those not previously known to the court, nor discoverable with reasonable diligence at time of entry of initial order).

102. *Id.* at 45, 538 N.E.2d at 1179; *see also* *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (1978). The court in *Rippon* held that "[o]nly when an open adulterous relationship exists with no possibility of marriage, as when the paramour is and remains married to another woman, is there sufficient grounds to remove custody from the mother." 64 Ill. App. 3d at 468, 381 N.E.2d at 73.

103. 295 S.C. 281, 368 S.E.2d 85 (Ct. App. 1988).

104. *Id.* at 284, 368 S.E.2d at 87 (citing *Fisher v. Miller*, 288 S.C. 576, 344 S.E.2d 149 (1986)) (remarriage alone is insufficient to warrant a change of custody).

105. *Id.*; *see also* *Stutz v. Funderburk*, 272 S.C. 273, 277, 252 S.E.2d 32, 34 (1979) (where the affair was sufficient to deprive her of custody, the mother's subsequent remarriage restored her moral fitness and was a strong factor supporting the restoration of her custody rights).

106. 1 Va. App. 222, 336 S.E.2d 901 (1985).

distinguished its decision from *Brown v. Brown*,¹⁰⁷ on the basis of the parties' discretion. The *Brinkley* court was persuaded that Mrs. Brinkley and her paramour were not committing adultery in the house where the child resided, and thus concluded that there was no evidence of any harmful effects to the child as a result of the adultery.¹⁰⁸ The court stated:

Evidence of adultery, without more, is an insufficient basis upon which to find that a parent is an unfit custodian of his or her child. . . . 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.¹⁰⁹

Courts generally appear more willing to accept a mother's sexual relationship that is short lived. For example, in *Marshall v. Marshall*,¹¹⁰ the court found the mother's brief affair insufficient to warrant removing custody of two minor children.¹¹¹ In *Bonette v. Bonette*,¹¹² when asked to remove custody of a three-year old daughter from her mother because of one instance of adultery, the court concluded that the "admitted moral lapse of the mother is not indicative of a continued course of conduct,"¹¹³ and held that custody should remain with the mother.

A somewhat different situation may arise when the behavior which gave rise to the custody dispute has terminated. Courts in some cases have become unsympathetic to parents seeking custody modification based on past indiscretions. In *Wyss v. Wyss*,¹¹⁴ Julia Wyss' live-in arrangement had terminated at the time of the custody hearing and Julia had since married her lover. In response to a challenge to her custody, the court clearly stated "[c]hange of custody cannot properly be used as a penalty

107. 218 Va. 196, 237 S.E.2d 89 (1977).

108. 1 Va. App. at 224, 336 S.E.2d at 902.

109. *Id.*

110. 282 S.C. 534, 320 S.E.2d 44 (1984).

111. *Id.* at 540-41, 320 S.E.2d at 48.

112. 276 S.C. 653, 281 S.E.2d 790 (1981); *see also* *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983) (where the record disclosed that the mother's live-in relationship was of a brief duration, she was permitted to retain custody).

113. *Bonette*, 276 S.C. at 656, 281 S.E.2d at 791; *see also* *Lockard v. Lockard*, 193 Neb. 440, 227 N.W.2d 581 (1975) (adulterous relationship of the mother was not a continuing one and caused no harm to the children; therefore it was not determinative of whom should be awarded custody).

114. 3 Ohio App. 3d 412, 445 N.E.2d 1153 (1982).

for past misconduct where the misconduct is not continuing and not shown to materially adversely affect the child."¹¹⁵ The court found no evidence that the children were exposed to any sexual conduct or materially affected by the paramour relationship.¹¹⁶

Courts sometimes articulate a need to protect children from harm as a reason to carefully review a parent's cohabitation. In several cases, courts have come up empty handed when they have searched for harm to the children as a result of such a relationship. In *Wellman v. Wellman*,¹¹⁷ the court found no evidence in the record to find a negative impact on the children as a result of the mother's cohabiting with her lover.¹¹⁸ In *Ritchey v. Ritchey*,¹¹⁹ the court saw no proof that any sexual misconduct by the mother "adversely affected the child, nor would it have an adverse effect on him in the future."¹²⁰

Some courts are unwilling to intervene by removing custody from a parent in order to accomplish moral first aid. In *Cleeton v. Cleeton*,¹²¹ the court refused to deprive a mother of custody of her children as a result of evidence that her paramour occasionally stayed overnight with her and her daughters.¹²² The court described it as traumatic to consider removing these children from their mother, stating "to change custody of these girls would punish their mother for past behavior when there is no proof of a detrimental effect on her daughters. An award of custody is not a tool to regulate human behavior."¹²³

115. *Id.* at 414, 445 N.E.2d at 1156.

116. *Id.*; see also *Boatsman v. Boatsman*, 697 P.2d 516 (Okla. 1984) (court held that change of custody was not warranted where there was no evidence that the mother's relationship was permanent or had caused an adverse impact on the child).

117. 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980).

118. *Id.* at 999, 164 Cal. Rptr. at 152-53.

119. 208 Neb. 100, 302 N.W.2d 372 (1981).

120. *Id.* at 104, 302 N.W.2d at 375; see also *Commonwealth ex rel Myers v. Myers*, 468 Pa. 134, 360 A.2d 587 (1976) (existence of a non-marital relationship without a showing that the children were adversely affected was not sufficient to take custody from the mother). But see *In re Marriage of Welbes*, 327 N.W.2d 756 (Iowa 1982) (mother's living arrangement had yet to have an adverse effect on the child, but the court nevertheless deprived the mother of custody).

121. 383 So. 2d 1231 (La. 1979).

122. *Id.* at 1235-36; see also *Benton v. Benton*, 520 So. 2d 534, 534-35 (Ala. Civ. App. 1988) (father was unable to meet burden of proving that mother's living arrangement had a detrimental effect on the child and that transferring custody would "materially promote" the best interest of the child).

123. *Cleeton*, 383 So. 2d at 1236; see also *Stephenson v. Stephenson*, 404 So. 2d 963

Several West Virginia cases have addressed the standard that courts should apply in custody disputes involving a cohabiting parent. In *Stacy v. Stacy*,¹²⁴ the court required the parent to refrain from "grossly immoral behavior"¹²⁵ In *J.B. v. A.B.*,¹²⁶ the court prohibited a parent's conduct that was "so outrageous,"¹²⁷ and, in *Bickler v. Bickler*,¹²⁸ it required evidence that a parent was guilty of "gross immorality" to revoke custody.¹²⁹

Two Ohio cases have addressed a cohabiting parent in a similar light. In *Wyss v. Wyss*,¹³⁰ the court relied on the state's custody statute,¹³¹ which examines whether the child's present environment significantly endangers his physical health or emotional development.¹³² A second Ohio case, *In re Burrell*,¹³³ required "clear and convincing" evidence to warrant state intervention in custody cases.¹³⁴

(La. 1981) (court found no evidence to indicate that the mother's relationship with her paramour had a detrimental effect on her daughter); *Gutierrez v. Gutierrez*, 420 So. 2d 712, 713 (La. Ct. App. 1982) (trial judge's discretion in awarding custody to mother upheld notwithstanding her conduct "contrary to moral standards").

124. 332 S.E.2d 260 (W. Va. 1985).

125. *Id.* at 262.

126. 161 W. Va. 332, 242 S.E.2d 248 (1978). The court stated that:

Acts of sexual misconduct . . . may not be considered as evidence going to the fitness of the mother for child custody unless her conduct is so aggravated, given contemporary standards, that reasonable men would find that immorality, *per se*, warranted a finding of unfitness because of the deleterious effect upon the child of being raised by a mother with such a defective character.

Id. at 333, 242 S.E.2d at 251; *see also* *Goetz v. Carpenter* 367 S.E.2d 782 (W. Va. 1988) (using substantially similar language).

127. *J.B.*, 161 W. Va. at 345, 242 S.E.2d at 256.

128. 344 S.E.2d 630 (W. Va. 1986).

129. *Id.* at 632; *see also* *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987) (acts of sexual misconduct by a mother may not be considered in determining child custody unless this conduct is likely to have a deleterious effect upon the child).

130. 3 Ohio App. 3d 412, 445 N.E.2d 1153 (1982); *see also supra* notes 109-11 and accompanying text.

131. OHIO REV. CODE ANN. § 3109.04 (Anderson 1989).

132. 3 Ohio App. 3d at 414, 445 N.E.2d at 1156; *see also* *Ohland v. Ohland*, 141 Vt. 34, 442 A.2d 1306 (1982) (change of circumstances alone is a prerequisite for a modification of custody order); *Davis v. Davis*, 422 So. 2d 680 (La. Ct. App. 1982) (although illicit sexual activity alone is not sufficient to deprive a parent of custody, its detrimental effects on children can be considered in the determination of what is in their best interest).

133. 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979).

134. *Id.* at 39, 388 N.E.2d at 739; *see also* *In re Rex*, 3 Ohio App. 3d 198, 200, 444

Enlightened courts have begun to demand proof of actual concrete harm to justify removing children from a cohabiting parent. In *Swain v. Swain*,¹³⁶ the court of special appeals of Maryland was unwilling to "presume a harmful effect"¹³⁶ when a parent engaged in adultery, but instead held that a chancellor must weigh, "not the adultery itself, but only any actual harmful effect that is supported by the evidence."¹³⁷ The mere possibility of future harm was insufficient. In *Kennedy v. Kennedy*,¹³⁸ the Supreme Court of Nebraska took a bold step by recognizing the mother's current husband, with whom she lived for six months prior to their eventual marriage, as having a positive effect on the children.¹³⁹

Unfortunately, for every case disregarding the mother's cohabitation, a case exists emphasizing the importance and significance of such a relationship. In *Johnson v. Johnson*,¹⁴⁰ the court identified specific harm to a four and one-half year old daughter as a result of her mother's living with her lover. The court focused on the child's "anxiety over the situation," and the child's loss of a relationship with her biological father, as well as the mother's financial instability¹⁴¹ caused by her cohabitation. In *Haak v. Haak*,¹⁴² the court was persuaded that the mother's relationship with her boyfriend was harmful to the two children, ages seven and five, because the children "were able to recognize

N.E.2d 482, 484 (1981) (court emphasized that the relevant statute required a showing of "damage to the physical, mental, moral or emotional development of the child").

135. 43 Md. App. 622, 406 A.2d 680 (1979).

136. *Id.* at 629, 406 A.2d at 683; *see also In re Marriage of J.A.F.*, 602 S.W.2d 227 (Mo. App. 1980) (court required conduct to be gross, promiscuous, open, or antisocial).

137. *Swain*, 43 Md. App. at 629, 406 A.2d at 684; *see also Fontenot v. Fontenot*, 714 P.2d 1131 (Utah 1986) (court found no evidence indicating that the children were directly exposed to or affected by their mother's sexual behavior).

138. 221 Neb. 724, 380 N.W.2d 300 (1986).

139. *Id.* at 726, 380 N.W.2d 302; *see also supra* text accompanying note 35; *accord Woodruff v. Woodruff*, 418 So. 2d 775 (Miss. 1982) (court found that a five and one-half year old child had no understanding of the significance of the mother's short affair).

140. 422 So. 2d 1013 (Fla. Dist. Ct. App. 1982).

141. *Id.* *But see* *Lisenby v. Lisenby*, 419 So. 2d 354 (Fla. Dist. Ct. App. 1982) (finding no adverse effects caused by the mother's relationship); *Culpepper v. Culpepper*, 408 So. 2d 782 (Fla. Dist. Ct. App. 1982) (finding no adverse effects caused by the mother giving birth to an illegitimate child). A strong argument could be made that these examples are not directly attributable to the mother's cohabitation, but could be explained by the parties separation.

142. 323 N.W.2d 128 (S.D. 1982).

the impropriety of their mother's conduct."¹⁴³

In *Shioji v. Shioji*,¹⁴⁴ the court upheld the father's custody relying heavily on evidence that revealed the mother's living arrangement caused the children "embarrassment and discomfort in their own relationships with close family members, who viewed defendant's conduct as immoral and repugnant."¹⁴⁵

The strongly worded dissent of Justice Zimmerman in the *Shioji* case addressed a major factor overlooked in these decisions: nearly one-quarter of the nation's families are headed by single parents, with the result that children are becoming the "primary casualties on the domestic battlefield."¹⁴⁶ According to Justice Zimmerman, courts must recognize the need for stability for children of divorce. Relying on *Hogge v. Hogge*,¹⁴⁷ he advocated a two-part test to be met before a custody order is modified. First, there must be a determination that a substantial and material change of circumstances has occurred. Only after such a finding should the trial court take the second step and determine de novo which custodial arrangement best serves the interest of the child. As in *Hogge*, the presumption is against changing custody. There must be a finding, according to Justice Zimmerman, of "some material relationship to and substantial effect on parenting ability or the functioning of a presently existing custodial relationship."¹⁴⁸

Justice Zimmerman recognized that discontented and jealous ex-spouses might look for any evidence that their ex-spouses are not remaining chaste, hoping to convince a court that the change in circumstances warrants custody modification. In his view, to invite the relitigation of groundless claims of changed circumstances would cause great hardship and injustice to children of divorce who so desperately require stability.

Furthermore, Justice Zimmerman continued, it would ulti-

143. *Id.* at 130; see also *Spaulding v. Spaulding*, 278 N.W.2d 639 (S.D. 1979) (court believed children, ages eight and seven, were old enough to be harmed by their mother's marital misconduct).

144. 712 P.2d 197 (Utah 1985).

145. *Id.* at 200.

146. *Id.* at 202 (Zimmerman, J., dissenting).

147. 649 P.2d 51 (Utah 1982).

148. *Shioji*, 712 P.2d at 202 (Zimmerman, J., dissenting) (quoting *Becker v. Becker*, 694 P.2d 608, 610 (1984)).

mately result in "rewarding the ex-husband who instituted this meritless custody challenge . . . encouraging more ex-spouses to bring on baseless attempts to change custody" ¹⁴⁹ Justice Zimmerman described the trial court's findings as "no more than an after-the-fact attempt to rationalize the initial decision." ¹⁵⁰ He noted that the mother's sexual conduct was private and discreet, her relationship with her boyfriend was stable and serious, and her boyfriend had developed a positive and healthy relationship with the children. ¹⁵¹ Justice Zimmerman concluded that the trial court's finding that the mother's relationship caused the children embarrassment was "drawn from a blank page." ¹⁵²

Several courts have drawn a distinction between a parent's discreet sexual affair and one which was open and notorious. In *Matter of Marriage of Maddox*, ¹⁵³ the parties' eight year old daughter saw her mother in bed with her boyfriend. ¹⁵⁴ According to expert testimony, the child was emotionally damaged as a result of this lifestyle. The *Maddox* court distinguished its conclusion from *Matter of Marriage of Niedert*, ¹⁵⁵ where the mother engaged in a discreet sexual affair which did not itself justify a change of custody.

In *Queen v. Queen*, ¹⁵⁶ the Maryland Court of Appeals vacated the trial court's ruling because of its heavy reliance on the mere existence of a sexual relationship between the husband and a woman not his wife, and remanded for a true determination of the best interests of the child. ¹⁵⁷ The trial court had failed to assess whether or not "that relationship . . . [had resulted in] such a harmful effect on the child as to outweigh other factors in favor of granting custody to the father." ¹⁵⁸

149. *Id.* at 206-07 (Zimmerman, J., dissenting).

150. *Id.* at 203 (Zimmerman, J., dissenting).

151. *Id.*

152. *Id.* at 204 (Zimmerman, J., dissenting).

153. 56 Or. App. 345, 641 P.2d 665 (1982).

154. *Id.* at 349, 641 P.2d at 667; *see also* *Gustafson v. Gustafson*, 376 N.W.2d 290 (Minn. App. 1985) (the court relied on a state statute which provided that if the child's present environment endangered his physical or emotional health, the harm likely to be caused by a change of environment is outweighed by its advantages).

155. 28 Or. App. 309, 559 P.2d 515 (1977).

156. 308 Md. 574, 521 A.2d 320 (1986).

157. *Id.* at 589-90, 521 A.2d at 328.

158. *Id.* at 590, 521 A.2d at 328. In fact, the court noted that other factors to be considered in this determination include:

In *Marlatt v. Marlatt*,¹⁵⁹ the court focused on a mother's choosing cohabitation over the best interest of her four year old son. As the court pointed out, the mother "substantially defaulted in her maternal obligations,"¹⁶⁰ putting her own interest in her adulterous affair over her son's interest. The mother's responsibility and position as a role model was also the key ingredient of the custody dispute in *Hill v. Hill*.¹⁶¹ If a court believes that a mother has disregarded this important role by choosing to place her sexual life before the interests of her child, it can be extremely harsh. In *Medlen v. Sims*,¹⁶² the court found that the

the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on child, and, if he or she is old enough to make a rational choice, the preference of the child.

Id. at 587-88, 521 A.2d at 327 (quoting *Hild v. Hild*, 221 Md. 349, 357, 157 A.2d 442, 446 (1960)).

159. 427 So. 2d 1285 (La. Ct. App. 1983).

160. *Id.* at 1289.

161. 421 So. 2d 408 (La. Ct. App. 1982).

162. 420 So. 2d 272 (Ala. Civ. App. 1982). In *Bell v. Bell*, the Georgia court of appeals, quoting from the appellant's brief, noted the changing societal standards in the area of extramarital relationships:

We know that in 1854, the Courts frowned upon couples living together without the present benefit of matrimony as in the case of *Lindsey v. Lindsey*, 14 Ga. 657, at page 660, we find the following judicial approval of the double standard: 'Upon principles of abstract ethics, there may be no difference in the sin of the man and the woman, who violate the laws of chastity. In the eye of the omniscient God, the weak and erring woman may not be (to say the least,) the more sinful and degraded of the two. But we do know, that in the opinion of society, it is otherwise. The man may notoriously sin in this regard; and yet, sometimes, retain a position of respectability, or quasi respectability, by means of which his relations and those of his family, with decent people, are maintained; his children may associate with such persons, and be educated to become good and useful members of society. But otherwise it is with the frail female; for when once she sins after this sort, she sins against society. Easy is the descent, with her, then, to an Avernus of utter and irremedial ruin, where her associations are with the vulgar, the vile and the depraved. If her children be with her, their characters must be, more or less, influenced and formed by the circumstances which surround them.'

This, however, is not 1854, but is 1979. While the trial court's beliefs probably reflect the standards of our society through the first half of this century, they simply are no longer an accurate rule by which we may not gauge issues of morality in today's world. Among today's young adults, the defendant is conducting herself in a manner which we believe to be generally acceptable to society.

154 Ga. App. 290, 291-92, 267 S.E.2d 894, 895-96 (1980) (emphasis in original).

The court of appeals of Georgia was unpersuaded, and upheld the 1854 *Lindsey* case. *Id.* at 291, 267 S.E.2d at 896.

mother had placed her entertainment and social pursuits ahead of her regard for her two children.¹⁶³

A review of cases in which fathers cohabited with women without the benefit of marriage suggests that a double standard can rear its ugly head when courts demand that mothers, but not fathers, lose custody of their children when they choose to be sexually active outside of marriage. For example, in *In re Marriage of Thompson*,¹⁶⁴ the same court which decided *Jarrett*¹⁶⁵ awarded custody to a father who committed adultery during his marriage, explaining that *Jarrett* did not establish a conclusive presumption that a child is harmed merely because a custodial parent cohabits with a member of the opposite sex.¹⁶⁶ Considering the circumstances, this enlightened court assigned great weight to the healthy relationship that existed between the father and his son in awarding the father custody. Interestingly, the dissent in *Thompson* revealed some startling facts which, were the mother cohabiting instead of the father, might have led to a different result. For example, Justice Underwood pointed out that in addition to the father's illicit affairs, the abduction of his son from Mrs. Thompson, and threats to potential witnesses, he also had two children from a former marriage, a daughter whom he had not seen in nine years and a son whom he had never seen. It was further observed that the father was under a court order to pay \$100 weekly for the support of these children, had lost his job, and had instituted bankruptcy proceedings.¹⁶⁷ Were the mother to have engaged in such behavior, the court would have undoubtedly reached an opposite conclusion.

Custody decisions lend themselves to the imposition of the particular moral perspectives of individual judges. In *Truitt v.*

163. *Medlen*, 420 So. 2d at 273.

164. 96 Ill. 2d 67, 449 N.E.2d 88, *cert. denied*, 464 U.S. 895 (1983).

165. 78 Ill. 2d 337, 400 N.E.2d 421 (1979).

166. *Thompson*, 96 Ill. 2d at 78, 449 N.E.2d at 93.

167. *Id.* at 80, 449 N.E.2d at 94 (Underwood, J., dissenting); *see also* *Smith v. Smith*, 464 So. 2d 97 (Ala. Civ. App. 1984) (husband who engaged in sexual relations after his divorce, sometimes in his home, did not lose custody because the court found no substantial detriment to the child); *Dunlap v. Dunlap*, 475 N.E.2d 723 (Ind. Ct. App. 1985) (court permitted father to retain custody although he was living with a woman in the same home as his six year old daughter). *But cf.* *Carr v. Carr*, 480 So. 2d 1120 (Miss. 1985) (mother who committed adultery lost custody of her children).

Truitt,¹⁶⁸ the Michigan court of appeals reversed and remanded a custody dispute involving a father who permitted his girlfriend to spend weekends with him while his daughters were present in the home. The court ordered the rehearing of the custody matter before a different circuit judge, due to the trial judge's "apparent moral indignation."¹⁶⁹ In *Fort v. Fort*,¹⁷⁰ the appeals court admonished the trial court to "avoid making moral judgments on the life-styles of proposed custodial parents"¹⁷¹

Courts continue to place a great deal of weight on the moral atmosphere of the home, although it appears to be a difficult concept to grasp. For example, in *Larson v. Larson*,¹⁷² the court noted that "[t]he moral values which Sheryl has demonstrated"¹⁷³ were injurious to the children, and thus upheld the award of custody to the father. Following similar reasoning, the court in *Wilson v. Upell*¹⁷⁴ awarded a father custody to provide a "more moral atmosphere for Amanda."¹⁷⁵ The court in *L.W. v. G.W.*¹⁷⁶ similarly concluded that moral fitness is a "matter of prime concern for the court"¹⁷⁷ in awarding custody.

It is enlightening to review how courts address custody determinations when both mother and father are guilty of extra-marital affairs. Do both parents lose custody to a third party? Does the parents' conduct balance out? In *Bagents v. Bagents*,¹⁷⁸ the father had an adulterous affair during his marriage, while the mother, after her divorce, began living with a married man. The court recognized that neither parent was a

168. 172 Mich. App. 38, 431 N.W.2d 454 (1988).

169. *Id.* at 47, 431 N.W.2d at 458; *see also In re Marriage of J.H.M.*, 544 S.W.2d 582 (Mo. Ct. App. 1976) (court noted mother's affair had harmful effects on the children and that mother tried to instill in the children disrespect for the father).

170. 12 Mass. App. Ct. 411, 425 N.E.2d 754 (1981).

171. *Id.* at 415, 425 N.E.2d at 757. *But cf. Powell v. Powell*, 665 S.W.2d 312 (Ky. 1984) (court stated that the question is whether the parent's misconduct is likely to adversely affect the child).

172. 294 N.W.2d 616 (N.D. 1980).

173. *Id.* at 619.

174. 119 Mich. App. 16, 325 N.W.2d 611 (1982).

175. *Id.* at 20, 325 N.W.2d at 613.

176. 534 S.W.2d 826 (Mo. Ct. App. 1976).

177. *Id.* at 829; *see also T.B.G. v. C.A.G.*, No. 53791 (Mo. Ct. App. Nov. 8, 1988) (LEXIS, States library, Mo file), *rev'd on other grounds*, 772 S.W.2d 653 (Mo. 1989).

178. 419 So. 2d 460 (La. 1982).

"model of morality."¹⁷⁹ Although the mother married her paramour, the court was not impressed with her claim that the child benefitted from her previous cohabitation.¹⁸⁰ On the whole, the court found that the father's adulterous affair with a seventeen year old girl, presumably outside the marital home, was less disturbing than the mother's affair in the home. Thus, custody of the minor child was placed with the father.¹⁸¹

Nix v. Nix,¹⁸² another case in which both the mother and father were involved in extramarital affairs, had a similar result.¹⁸³ The facts showed that the mother had a sexual affair with a married man shortly before her divorce although the affair terminated when the father petitioned for custody.¹⁸⁴ The evidence also revealed that the father had sexual relations with his girlfriend, although the father did not cohabit with her. The court distinguished the behavior of the father from that of the mother, noting that the mother's ongoing relationship was "immoral, failed to set a proper example for the minor children, and resulted in harm to the children."¹⁸⁵

Many court decisions are based on whether the child is exposed to the parent's sexual relations. In *Patterson v. Patterson*,¹⁸⁶ although the mother and father engaged in sexual relations with individuals other than each other, there was no proof that the sexual relationships occurred in the presence of the children; while the court heard evidence that the mother had sexual relations when the children were present in the house, it discounted the effect of such behavior because the children neither witnessed, nor were ever aware of, such conduct.¹⁸⁷ This enlightened opinion was written the same year that another court, in *Cole v. Cole*,¹⁸⁸ reached a similar result based on com-

179. *Id.* at 462.

180. *Id.* But see *Griffin v. Griffin*, 424 So. 2d 1228 (La. Ct. App. 1982) (court refers to a "reformation rule," whereby a mother is not unfit because of an adulterous relationship as long as she reforms by way of marriage or termination of the relationship).

181. *Bagents*, 419 So. 2d at 463.

182. 17 Ark. App. 219, 706 S.W.2d 403 (1986).

183. *Id.* at 220, 706 S.W.2d at 403.

184. *Id.* at 221, 706 S.W.2d at 404.

185. *Id.* at 222, 706 S.W.2d at 404.

186. 399 So. 2d 846 (Ala. Civ. App. 1980).

187. *Id.* at 848.

188. 274 S.C. 449, 265 S.E.2d 669 (1980).

parable facts. The *Cole* decision may have hinged on the fact that the father's adultery occurred during the parties' marriage, while the mother's adultery was limited to the period following the couple's legal separation.¹⁸⁹

A review of recent cases suggests that courts may have begun to turn the corner, refusing to consider a parent unfit to care for a child based solely on adulterous activities. For example, in *Kean v. Kean*,¹⁹⁰ the court concluded that although both parties had sexual relations with individuals other than their spouses,

it is generally accepted that adultery, standing alone, does not require a change of custody It is only in those instances where the moral conduct of the offending spouse is so gross, promiscuous, open or coupled with other types of antisocial behavior as to directly affect the physical, mental, economic or social well-being of a child that a change is warranted.¹⁹¹

The courts of West Virginia focus on the primary caretaker standard expressed by *David M. v. Margaret M.*,¹⁹² requiring adherence to the state custody statute.¹⁹³ The West Virginia courts accept restrained normal sexual behavior and intervene only when "the child is a party to, or is influenced by, such behavior."¹⁹⁴

Courts seem to breathe a sigh of relief when marriage is on the horizon. According to some, the magic of marriage cures all ills when moral unfitness is alleged. In *Woodruff v. Woodruff*,¹⁹⁵ where the mother married the man she had an adulterous affair

189. *Id.* at 453, 455, 265 S.E.2d at 671.

190. 754 S.W.2d 922 (Mo. Ct. App. 1988).

191. *Id.* at 925; see also *Sanderson v. Tryon*, 739 P.2d 623, 627 (Utah 1987) ("Moral character is only one of a myriad of factors the court may properly consider in determining the child's best interest.").

192. 385 S.E.2d 912 (W. Va. 1989) (quoting *Garska v. McCoy*, 278 S.E.2d 357, 363 (1981)). The guidelines described by *Garska* to identify the primary caretaker are reproduced at text accompanying *infra* note 226.

193. W. VA. CODE § 48-2-15 (Supp. 1990).

194. *David M. v. Margaret M.*, 385 S.E.2d 912, 924 (W.Va. 1989); see also *J.B. v. A.B.*, 161 W. Va. 332, 242 S.E.2d 248 (1978) (isolated acts of sexual misconduct are not relevant to a mother's fitness).

195. 418 So. 2d 775 (Miss. 1982); see also *Heckle v. Heckle*, 266 S.C. 355, 223 S.E.2d 590 (1976) (where mother's adulterous relationship was known to the trial court, modification of custody sought on the ground of her adulterous behavior was denied because there was no change of circumstances).

with one week before the custody hearing, the court declared that her earlier behavior had no material adverse effect on the child. The Supreme Court of South Carolina in *Stutz v. Funderburk*¹⁹⁶ was most impressed with the mother marrying her paramour, and awarded her custody of her children. Previously the trial court had awarded custody to the child's father, based primarily upon the finding that the mother was living with a man while he was married to someone else.¹⁹⁷ The Supreme Court of South Carolina expressed its approval, stating: "The illicit relationship of appellant has ended through marriage . . . [t]he record abundantly supports the conclusion that the mother is now morally fit"¹⁹⁸

The court of appeals of Arkansas also heard a custody dispute involving a mother who, after living with a man under the same roof as her five year old son and fifteen year old daughter, married her lover as the custody petition was being filed in trial court.¹⁹⁹ The court, while not condoning the parent's promiscuous conduct, seemed to go out of its way to point out that the mother's lover was an active participant in rearing the children.²⁰⁰ This resulted in a custody award to the mother.

The Supreme Court of Nebraska in *Koch v. Koch*²⁰¹ chose to concentrate on other factors to deny custody to a mother who was involved in an extramarital relationship. In awarding custody to the father, the court emphasized his participation in household chores during the marriage, washing the clothes, bathing the child, reading to her and doing the dishes. The court noted that he remained employed during the marriage. On the other hand, the mother, according to the court, did not maintain

196. 272 S.C. 273, 252 S.E.2d 32 (S.C. 1979).

197. *Id.* at 275, 252 S.E.2d at 33; *see also In re Marriage of Winn*, 190 Mont. 73, 618 P.2d 870 (1980) (mother temporarily lived with a man outside of marriage but was married when the case was heard on appeal).

198. *Stutz*, 272 S.C. at 276, 252 S.E.2d at 33; *see also Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70, 73 (1978) (the court, citing *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952), stated "[e]ven previous open adulterous conduct, once the mother has married the paramour and reestablished a good home, is not grounds for change of custody.").

199. *Anderson v. Anderson*, 18 Ark. App. 284, 288, 715 S.W.2d 281, 221 (1986); *see also Lapp v. Lapp*, 336 N.W.2d 350 (N.D. 1983) (father married his lover prior to the appellate argument of the case).

200. *Anderson*, 18 Ark. App. at 288, 715 S.W.2d at 221.

201. 209 Neb. 896, 312 N.W.2d 294 (1981).

a clean home, her employment history was unstable and she expressed uncertainty about her future earnings. The court chose to disregard the mother's extramarital affair, focusing instead on the child's emotional relationship with her parents, the respective environment offered by both parents, and the health of the child.²⁰²

It is difficult to know what the decisive factor really is in a custody dispute. Often one must read between the lines to discover if what the court articulates as its reasons are in fact its true reasons for making custody determinations. Perhaps when courts are given more specific guidance as to what criteria should be considered in custody disputes, they will refrain from injecting their own moral values into an already emotional situation.

C. *The Effect of Cohabitation on Visitation and Adoption Rights*

Parents seeking visitation privileges face similar problems when they choose to cohabit with their lovers. Trial courts in several states have prohibited visitation when a parent lives with a lover. For example, in *Robinson v. Robinson*,²⁰³ an enlightened appellate judge reversed the denial of a mother's visitation rights based on the trial judge's "shocked conscience" at this conduct.²⁰⁴ The trial court in *Snyder v. Snyder*²⁰⁵ prohibited a father from exercising any visitation rights with his four children, referring to him as morally bankrupt.²⁰⁶ The appellate court reversed the trial court's decision, preventing this parent's lifestyle from being the sole factor by which his or her morality

202. *Id.* at 899, 312 N.W.2d at 296; *see also* *Kringel v. Kringel*, 207 Neb. 241, 244, 298 N.W.2d 150, 153 (1980) (the court affirmed the award of custody to the father because he had stabilized his marital problems and his future goals; the mother had neither resolved these problems nor determined her immediate future plans with regard to the children).

203. 5 Va. App. 222, 361 S.E.2d 356 (1987).

204. *Id.* at 226, 361 S.E.2d 358 (the trial judge referred to "the light of human experience" in making his decision to restrict visitation).

205. 170 Mich. App. 801, 429 N.W.2d 234 (1988); *see also* *Jones v. Haraway*, 537 So. 2d 946 (Ala. Civ. App. 1988) (reversing the trial court, the appellate court held that there was no evidence that it would be in the child's best interest to terminate overnight visits).

206. *Snyder*, 170 Mich. App. at 804, 429 N.W.2d at 236.

is judged.²⁰⁷

Cohabiting couples are also prevented from adopting children by state statutes that specifically allow married couples or single adults to adopt, but do not similarly permit two single adults to jointly adopt a child.²⁰⁸ In *Matter of Robert Paul P.*,²⁰⁹ the New York Court of Appeals declared that the state adoption statute should not be used as a quasi-matrimonial vehicle to provide non-married partners with a legal imprimatur for their sexual relationship, be that relationship heterosexual or homosexual in nature.²¹⁰ The court of appeals further suggested that as a matter of state policy the legislature, not the courts, should address the right of homosexual or heterosexual lovers to adopt.²¹¹

However, several courts have begun to recognize cohabitation and attach legal significance to it. For instance, in *MacGregor v. Unemployment Insurance Appeals Board*,²¹² the court acknowledged that the nonmarital relationship established by the couple was sufficient to permit one member of the relationship to be eligible for unemployment insurance when she terminated her employment in order to follow her nonmarital partner and biological child to another state.²¹³ Because children benefit greatly from being raised by two parents, perhaps state legislatures will recognize and permit loving partners who choose not to marry to qualify as adoptive parents.

207. *Id.* at 806, 429 N.W.2d at 237; see also *Elizabeth A.S. v. Anthony M.S.*, 435 A.2d 721 (Del. Super. Ct. 1981) (the court reversed a lower court ruling that failed to permit a proper evidentiary inquiry into the effect upon the child of the parent's adulterous conduct during visitation).

208. See, e.g., N.Y. DOM. REL. LAW § 110 (McKinney 1988); IOWA CODE ANN. § 600.4 (West 1981); N.C. GEN. STAT. § 48-4 (1984).

209. 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984).

210. *Id.* at 236, 471 N.E.2d at 425, 481 N.Y.S.2d at 653.

211. *Id.* at 239, 471 N.E.2d at 427, 481 N.Y.S.2d at 655. For a discussion of child custody determinations where one parent is homosexual, see D. Stone, *The Moral Dilemma; Child Custody When One Parent is a Homosexual or Lesbian: An Empirical Study*, SUFFOLK U.L. REV. (1991) (forthcoming).

212. 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984).

213. *Id.* at 207, 689 P.2d at 454, 207 Cal. Rptr. at 824. The court noted that this decision maintained and preserved the family relationship, even though the parties were not married.

IV. Guidelines for Determining Child Custody

What factors do judges consider in making custody determinations? Do judges need specific guidance as to what factors they should consider in making child custody decisions? Part IV will examine state statutes, review mandated and suggested factors, and propose a model statute to assist courts in determining child custody.

A. *Existing Guidelines for Determining Child Custody*

The "tender years" doctrine, once the guiding principle in custody litigation, has its roots in an 1830 Maryland High Court of Chancery decision, *Helms v. Franciscus*.²¹⁴ The Maryland court asserted that "[t]he father is the rightful and legal guardian of all his infant children; . . . Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father."²¹⁵ Today, however, the tender years doctrine has substantially lost acceptance by courts in most states.²¹⁶ In fact, the majority of state statutes are clear in their direction to courts that the "best interest of the child" is the guiding light for judges to follow in custody determinations.²¹⁷

214. 2 Bland 544 (Md. High Ct. Ch. 1830).

215. *Id.* at 563.

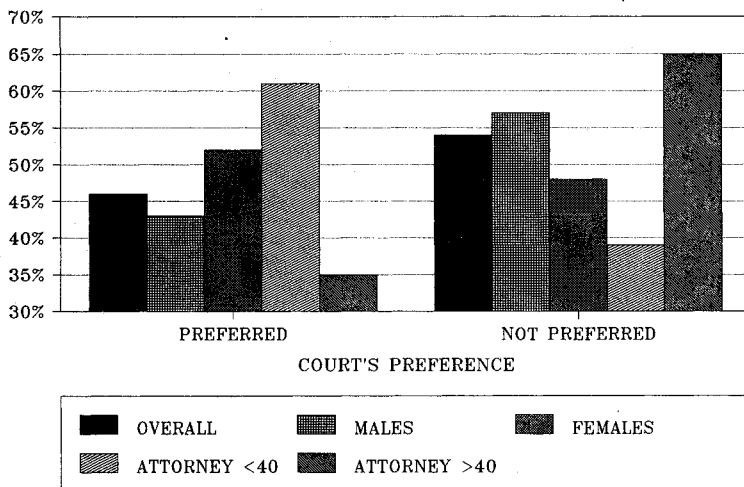
216. R. HOROWITZ & K. GERLACH, *LEGAL RIGHTS OF CHILDREN* 236 (1984).

217. Various state statutes list several factors for the court to consider in custody decisions. *See, e.g.*, ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-332 (1976); COLO. REV. STAT. § 14-10-124 (1987); DEL. CODE ANN. tit. 13, § 772 (1981); FLA. STAT. § 61.13 (1985 & Supp. 1990); IDAHO CODE § 32-717 (1983); ILL. REV. STAT. ch. 40, para. 602 (Smith-Hurd 1980 & Supp. 1990); IND. CODE § 31-1-11.5 -21 (1987); KAN. STAT. ANN. § 60-1616 (1983); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984); MICH. COMP. LAWS § 722.23 (1968); MINN. STAT. § 518.17 (1990); MISS. CODE ANN. § 93-5-24 (1972); MO. REV. STAT. § 452.375 (1990 & Supp. 1990); MONT. CODE ANN. § 40-4-212 (1979); N.D. CENT. CODE § 14-09-06.2 (1981); VT. STAT. ANN. tit. 15, § 665 (1989).

However, other states simply state that custody will be determined based on the best interest or welfare of the child. *See, e.g.*, ARK. STAT. ANN. § 9-13-101 (1987); CONN. GEN. STAT. § 46b-56 (1986); IDAHO CODE § 32-1005 (1983); N.H. REV. STAT. ANN. § 458:17 (1983 & Supp. 1989); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1989); NEV. REV. STAT. § 125.480 (1987); N.C. GEN. STAT. § 50-13.2 (1987); 23 PA. CONS. STAT. ANN. § 5303 (Purdon 1990); S.C. CODE ANN. § 20-3-160 (Law Co-op 1985); TENN. CODE ANN. § 36-6-101 (Supp. 1989); WASH. REV. CODE ANN. § 26.09.002 (Supp. 1990); W. VA. CODE § 48-2-15 (Supp. 1990); WYO. STAT. § 20-2-113 (1987).

According to a nationwide study, mothers continue to be awarded custody of their children in a disproportionate number of cases.²¹⁸ The eighty-one attorneys surveyed reported that courts were awarding custody exclusively to mothers in 60% of the cases, exclusively to fathers in 26% of the cases, and joint custody 13% of the time (see Graphs 15 and 16).

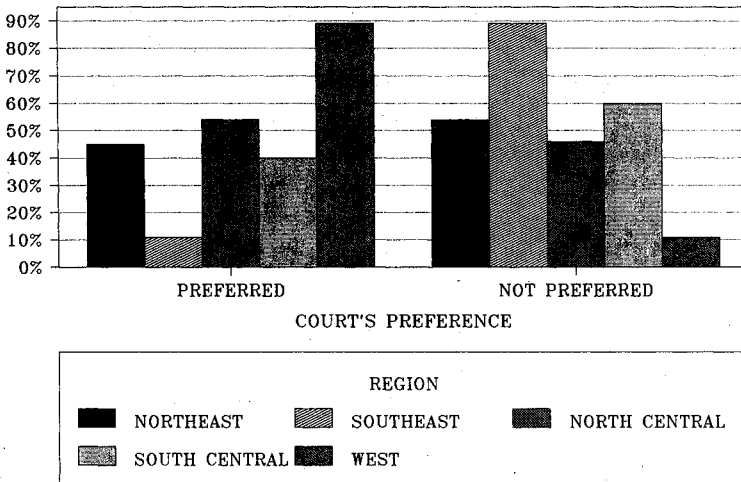
JOINT CUSTODY PREFERENCE BY COURT



GRAPH 15

218. McClindon, *supra* note 9, at 367 (survey of divorce and custody cases during the 1980's in New Haven, Connecticut produced data showing custody awards exclusively to the mother in 86% of the cases and exclusively to the father in only 8% of the cases). *But see* Atkinson, *supra* note 22, at 10 (review of 241 reported custody cases decided nationwide in 1982 revealed that fathers were awarded exclusive custody in 51% of the cases and mothers were awarded exclusive custody in 49% of the cases).

JOINT CUSTODY PREFERENCE BY COURT



GRAPH 16

Many state statutes enumerate specific factors to guide judges in awarding custody.²¹⁹ State legislators have recognized that empowering judges to decide custody disputes based on the vague best interest of the child standard leaves too much discretion to judges while offering little guidance. Courts are, therefore, instructed to explore the mental and physical well-being of the child to determine what is in the child's best interest.²²⁰ Moreover, a majority of state legislatures take into account the parents' mental and physical health²²¹ as well as the child's pref-

219. See *supra* note 217.

220. See, e.g., ARIZ. REV. STAT. ANN. § 25-332 (1976); COLO. REV. STAT. § 14-10-124 (1987); DEL. CODE ANN. tit. 13, § 772 (1981); IDAHO CODE § 32-717 (1983); IND. CODE § 31-1-11.5 -21 (1987); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984); LA. CIV. CODE ANN. art. 146 (West Supp. 1990); MICH. COMP. LAWS § 722.23 (1968); MO. REV. STAT. § 452.375 (1990 & Supp. 1990); MONT. CODE ANN. § 40-4-212 (1979); OHIO REV. CODE ANN. § 3109.04 (Anderson 1989); VA. CODE ANN. § 20-107.2 (1950).

221. See, e.g., ARIZ. REV. STAT. ANN. § 25-332 (1976); COLO. REV. STAT. § 14-10-124 (1987); DEL. CODE ANN. tit. 13, § 772 (1981); FLA. STAT. § 61.13 (1985 & Supp. 1990); IDAHO CODE § 32-717 (1983); ILL. REV. STAT. ch. 40, para. 602 (Smith-Hurd 1980 & Supp. 1990); IND. CODE § 31-1-11.5 -21 (1987); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984);

erence.²²² Statutes have acknowledged the significance of identifying which parent best fulfills the primary caretaker role to the child, and to this end have placed great importance on the parent-child relationship before making a custody decision.²²³

For example, the West Virginia legislature adopted a sex-neutral custody provision.²²⁴ In applying the legislative directive, the West Virginia courts have distanced themselves from a maternal preference and adopted a "primary caretaker parent" preference. In *Garska v. McCoy*,²²⁵ the court defined the primary caretaker as the parent who takes primary responsibility for the following caring and nurturing duties:

- (1) preparing and planning of meals;
- (2) bathing, grooming and dressing;
- (3) purchasing, cleaning, and care of clothes;
- (4) medical care, including nursing and trips to physicians;
- (5) arranging for social interaction among peers after school . . . ;
- (6) arranging alternative care, i.e. babysitting, day-care, etc.;
- (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;

LA. CIV. CODE ANN. art. 146 (West Supp. 1990); MICH. COMP. LAWS § 722.23 (1968); MINN. STAT. § 518.17 (1990); MO. REV. STAT. § 452.375 (1990 & Supp. 1990); MONT. CODE ANN. § 40-4-212 (1979); N.D. CENT. CODE § 14-09-06.2 (1981); OHIO REV. CODE ANN. § 3109.04 (Anderson 1989); VA. CODE ANN. § 20-107.2 (1950).

222. See, e.g., ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-332 (1976); COLO. REV. STAT. § 14-10-124 (1987); CONN. GEN. STAT. § 46b-56 (1986); DEL. CODE ANN. tit. 13, § 772 (1981); FLA. STAT. § 61.13 (1985 & Supp. 1990); GA. CODE ANN. § 19-9-1 (1982 & Supp. 1990); HAW. REV. STAT. § 571-46 (1985 & Supp. 1989); IDAHO CODE § 32-717 (1983); IND. CODE § 31-1-11.5 -21 (1987); KAN. STAT. ANN. § 60-1616 (1983); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984); LA. CIV. CODE ANN. art. 146 (West Supp. 1990); MICH. COMP. LAWS § 722.23 (1968); MINN. STAT. § 518.17 (1990); MO. REV. STAT. § 452.375 (1990 & Supp. 1990); MONT. CODE ANN. § 40-4-212 (1979); NEB. REV. STAT. § 42-364 (1988); NEV. REV. STAT. § 125.480 (1987); N.H. REV. STAT. ANN. § 458:17 (1983 & Supp. 1989); N.D. CENT. CODE § 14-09-06.2 (1981); OHIO REV. CODE ANN. § 3109.04 (Anderson 1989); OKLA. STAT. tit. 12, § 12.77 (1989); TENN. CODE ANN. § 36-6-101 (Supp. 1989); UTAH CODE ANN. § 30-3-10 (1989).

223. See *supra* notes 219-22. The attorneys surveyed agree that the courts should investigate the existing relationship between parent and child. Attorneys have recognized the importance of a stable environment in addition to the preference of awarding custody to the primary caretaker. D. Stone, Responses to Custody Survey.

224. W. VA. CODE § 48-2-15 (1986 & Supp. 1990).

225. 167 W. Va. 59, 278 S.E.2d 357 (1981).

(8) disciplining, i.e. teaching general manners and toilet training;

(9) educating, i.e. religious, cultural, social, etc. and,

(10) teaching elementary skills, i.e., reading, writing and arithmetic.²²⁶

The West Virginia rule is gender-neutral both in its application and on its face.²²⁷ To apply this formula, testimony is elicited from lay witnesses, including the parents themselves, teachers, neighbors and relatives to determine who best fulfills the definition of primary caretaker. The court inquires into which parent does the lion's share of the chores. After determining who is the primary caretaker, the court must finally determine whether that parent is a "fit parent."²²⁸ The court does not compare the mother and father, focusing instead on whether the primary caretaker achieves a passing grade on an objective test, dispensing with the need for experts.²²⁹ In applying this test the Supreme Court of Appeals of West Virginia held that restrained normal sexual behavior did not rise to an unfitness level, but required an inquiry as to whether the child was a party to, or influenced by, this behavior.²³⁰

The concrete, specific guidance offered by the West Virginia statute is thus likely to lead to a more objective and predictable outcome in custody litigation. Unfortunately, not all state statutes provide such a framework. Most judges are guided by their own individual standards.²³¹ As a result, a double stan-

226. *Id.* at 69-70, 278 S.E.2d at 363.

227. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180 (1984). The author concedes the list of criteria usually spells "mother."

228. To pass the test of being a fit parent, a person must:

- (1) feed and clothe the child appropriately;
- (2) adequately supervise the child and protect him or her from harm;
- (3) provide habitable housing;
- (4) avoid extreme discipline, child abuse, and other similar vices; and
- (5) refrain from immoral behavior under circumstances that would affect the child.

David M. v. Margaret M., 385 S.E.2d 912, 924 (W. Va. 1989).

229. *Id.*

230. *Id.*

231. J. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985) (there is very little empirical data concerning the effect of the custodial parent's post-divorce sexual behavior upon the child's adjustment).

dard — excusing a father's sexual indiscretions while punishing a mother for similar conduct — is apparent in some decisions.²³² Some commentators have remarked that judges' individual values are especially tested when a cohabiting parent seeks to retain custody.²³³

Attorneys were questioned regarding what factors they believed were most likely to be considered by the courts in awarding custody (see Table I). Table I also lists the factors that were actually considered by appellate courts adjudicating custody disputes.

The Uniform Marriage and Divorce Act (UMDA),²³⁴ drafted by the Special Committee on Marriage and Divorce of the National Conference of Commissioners on Uniform State Laws, provides a list of significant factors for judges to consider when making custody determinations.²³⁵ The model guidelines recommend that courts not consider the proposed custodian's conduct when it does not affect his or her relationship with the child.²³⁶ The commissioners adopted the best interests of the child rule, noting, however, that this test requires a maternal preference to be used to tip the scales when young children are involved and all other factors are equal.²³⁷

After carefully examining the responses of the attorneys to the survey, analyzing case law and the UMDA, a model custody statute follows.

232. La Fave, *supra* note 97, at 498-500.

233. Wadlington, *Sexual Relations*, 63 VA. L. REV. 249, 264 (1977).

234. UNIF. MARRIAGE AND DIVORCE ACT, 9a U.L.A. 147 (1973).

235. The recommended guidelines are:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, siblings, and any other person who may significantly affect the child's best interests;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved. *Id.* § 402.

This act has been adopted by Arizona, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington. Colorado has adopted Parts I - IV. *Id.* at 147.

236. *Id.* § 402.

237. *Id.* § 402 comment.

TABLE 1

Factors Used In Deciding Custody Cases (Percent)

<i>Factors</i>	<i>Attorneys²³⁸ Surveyed</i>	<i>State²³⁹ Statutes</i>	<i>Appellate²⁴⁰ Ct. Decisions</i>
Maintain stable environment	53	26	23
Preference for primary caretaker	52	26	6
Child abuse and neglect	37	23	8
Mental and physical health of parent (including alcohol and drug problems)	30	54	9
Automatic preference for mother	17	--	4
Physical and mental health of child	17	60	--
Child's preference	12	83	11
Interference with visitation	12	34	3
More time available to spend with child	12	3	5
Moral fitness (includes non-marital heterosexual relationships and homosexual relationships)	6	23	14
Relationship with parents, sibling, and significant others	--	66	5

238. D. Stone, Responses to Custody Survey.

239. Review of state statutes that list three or more factors. See *supra* note 217.

240. J. Atkinson, *supra* note 22, at 9-10.

B. *Proposed Guidelines for Determining Child Custody*

The court, in making a custody determination, shall consider the following factors:

1. The role that each parent has played, and will play, in the upbringing and care of the child, with preference given to the primary caretaker.
2. The ability of each parent to maintain a stable environment and a stable and secure relationship with the child.
3. The existence of physical, sexual, or verbal child abuse or neglect.
4. The preference of the child. This preference shall be given significant weight when the child is 12 years of age or older, depending on his or her intelligence and maturity.
5. The mental and emotional needs of the child.
6. The mental health of the parent, including substance abuse.
7. The moral fitness of the parent if it has a direct, present, and causative adverse effect on child.

Regardless of the child's age, no preference should be accorded either parent in a custody dispute. The separation of siblings should not be contemplated without compelling reasons. The best interest of the child should be afforded paramount consideration.

V. Conclusion

The decision on behalf of a parent to undertake custody litigation is of major importance, both in terms of the emotional and financial investment.²⁴¹ The importance of stability for a child whose family is being permanently disrupted by divorce cannot be understated. An individual's emotional development is shaped during childhood. The way children feel about themselves, the nature in which they interact with others, and the coping mechanisms they develop are all related in large measure to their relationship with their parents. Divorce can disrupt the delicate bond that exists between parent and child, a bond that may or may not crack depending in significant part on the custody and visitation decision made by a judge.

241. Over half of the attorneys surveyed receive in excess of \$3000 to represent a parent in a contested custody case. See Graph 17.

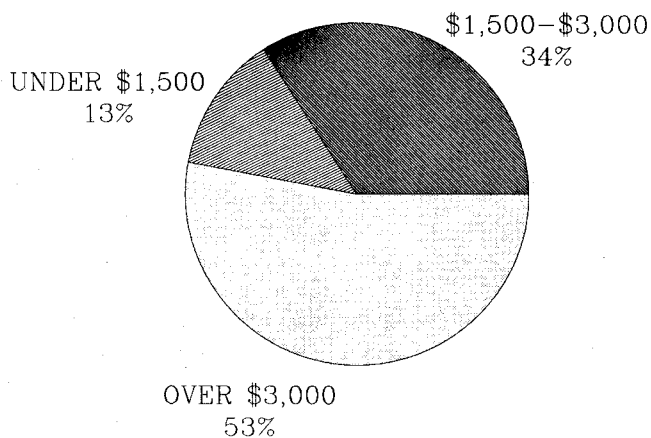
Parents who live with a lover continue to risk losing custody of their children. Factors such as the judge's moral perspective as well as one's geographic residence continue to dictate the outcome of many custody decisions. Additional psychological research is needed to assist courts in determining whether a cohabiting parent's living situation is harmful to the well-being of the child. Despite the existence of strong beliefs as to the effect of such a situation, empirical data is lacking to assist courts in assessing actual present or future harm to children. Until more research is available, courts should limit their inquiry to concrete evidence that a parent's living situation results or does not result in harm to the child. Future harm to the child should not be a consideration, until the underlying cause of such harm can be clearly identified. As states provide greater direction to the courts regarding what factors are relevant in custody decisions we will begin to see an end to decisions that are based on a particular judge's preconceived notions and speculation.

The proposed statute places heavy emphasis on the need to maintain a stable and secure relationship between parent and child. An important benchmark is the track record of the relationship between parent and child. Courts should explore the role each parent has played and will continue to play in the care and control of the child. The needs of the parents should be secondary to the child's paramount need for stability. Moreover, the courts need to pay more attention to the child's preference when the child possesses the intelligence and maturity to be capable of expressing such a preference.

Confronted with parents who choose to live with partners without the benefit of marriage, courts possess the ability to prevent the parental bond from cracking apart. Without a showing that a parent's cohabitation has a direct and concrete adverse effect on the child, the parents' sexual behavior should be irrelevant. The burden of proving an adverse effect should rest on the parent asserting that it is harmful. Judges must understand society's norms and values before they assume the role of protecting them.²⁴² Courts must squarely face the need to offer the child a stable home. Ultimately, the more capable parent should be awarded custody. This will be the only sure way of protecting a child of divorce.

242. Lowery, *supra* note 95, at 378-79.

OVERALL AVERAGE ATTORNEY'S FEES



GRAPH 17

APPENDIX
Custody Questionnaire

Demographics

- A. Age:_____ Sex:_____
- B. Number of years practiced law: _____
- C. Number of attorneys in firm: _____
- D. What specific training have you received to prepare you for representation of clients in child custody hearings? _____

- E. State the names and city/state of the courts in which you have represented clients in child custody hearings: _____

The following questions relate to the period of time from June 1, 1987, through May 31, 1988. Please limit your responses to this time frame:

1. Number of custody cases you have handled between 6/1/87 - 5/31/88:
- 1-5 _____ 11-5 _____ 21-25 _____
- 6-10 _____ 16-20 _____ over 25 _____
2. Of the number of custody cases you have handled between 6/1/87 - 5/31/88, in what percentage of these cases did you represent?
- Mother _____
- Father _____
- Other Relative (please state) _____
- Child _____
- Other (please state) _____

3. Of the number of custody cases you have handled between 6/1/87 - 5/31/88, place a percent in each category describing the final disposition of the case.

Settled without lawsuit filed _____

Settled prior to hearing _____

Court order _____

4. Of the number of custody cases you have handled between 6/1/87 - 5/31/88, what percent of these cases were appealed to a higher court by you _____; by opponent _____.

5. Of those cases appealed to a higher court, what percent were reversed? _____

6. Of the number of custody cases you have handled between 6/1/87 - 5/31/88, state in percentages the outcome of the case:

A. Of those custody cases settled prior to court hearing:

Child placed with mother _____

Child placed with father _____

Joint custody award[ed] to both
parents _____

Child custody award[ed] to social services
agency _____

Child custody award[ed] to another party
(please list) _____

Of the custody cases involving more than one child, and settled prior to court hearing, state in percentages the cases in which siblings were separated from each other _____

B. Of those contested custody cases that were decided by a court, state in percentage the outcome of the case:

Child placed with mother _____

Child placed with father _____

Joint custody award[ed] to
both parents _____

Child custody award[ed] to social services
agency _____

Child custody award[ed to another party
(please list) _____

Of those decided by a court, percent in which siblings
were separated from each other _____

7. Custody Dispute Between Mother and Father

Often child custody cases involve serious moral issues. In your initial interview with a client seeking your legal assistance for the purpose of child custody litigation, what advice would you give the client involving the following fact pattern?

I. You are contacted by a mother of a child. Mother of child (child is of average intelligence and 5 years old) is divorced from father of child. Child had been living with mother and father birth to age 3. Father moved out when child was 3. Mother awarded custody. Mother had no live-in boyfriend at that time. Child continued living with mother. For past 6 months, mother has a live-in boyfriend (sharing same bed). Mother and boyfriend have no current plans to marry. What do you tell mother of child? (I understand that courts usually consider many factors in arriving at child custody awards, and I realize you are not privy to all the facts of both parties.) (Mark only one response with an "X".)

- (a) Get married to boyfriend _____
 - (b) Kick boyfriend out of the house _____
 - (c) Do not discuss the subject; it is none of your business _____
 - (d) Refuse to represent mother until she marries boyfriend or kicks him out of house _____
 - (e) Other (please explain) _____
- _____
- _____

II. If this case went to trial, what do you predict that the judge you have appeared before most frequently, in the custody cases you have handled, would do after learning of this living arrangement, assuming other party is not involved in such a living arrangement. (Mark only one response with an "X".)

- (a) Consider mother's living arrangement as a minor fac-

tor in determining custody award _____

- (b) Consider mother's living arrangement as per se unfitness and remove child from home of mother _____
- (c) Determine if child is adversely affected psychologically by mother's living arrangement; if so, remove child; if not, disregard as a factor _____

If your judge considers child is adversely affected by mother's living arrangement, on the average, at what age do you believe the judge will determine that a parent's living arrangement (unmarried persons of the opposite sex) does adversely affect the child which warrants removal of the child?

- (a) All ages _____
- (b) Age 3 and above _____
- (c) Age 5 and above _____
- (d) Age 7 and above _____
- (e) Age 10 and above _____
- (f) Age 13 and above _____
- (g) Age 15 and above _____
- (h) Other, please explain _____

Would the sex of the child make a difference in your responses to the last three questions; if so, please explain:

III. The facts of this case are slightly altered — the father of the child has been living with a girlfriend for the last 6 months. Father and child have been living together since child was born. Mother moved out when child was 3. At that time, father was not living with a girlfriend. You represent father. Mother claims this living situation is immoral (adversely affects child) and seeks custody. Father was awarded custody of child at age 3, now mother is petitioning for custody claiming father's living arrangement is adversely affecting child. What do you tell father of child? (Mark only one response with an "X").

- (a) Get married to girlfriend _____

- (b) Kick girlfriend out of the house _____
 - (c) Do not discuss the subject; it is none of your business _____
 - (d) Refuse to represent father until he marries girlfriend or kicks her out of house _____
 - (e) Other (please explain) _____
-
-

IV. How would the judge you have appeared before most frequently on custody litigation rule on such a case? (Mark only one response with an "X".)

- (a) Consider father's living arrangement as a minor factor in determining custody award _____
- (b) Consider father's living arrangement as per se unfitness and remove child from home of father _____
- (c) Determine if child is adversely affected psychologically from father's living arrangement; if so, remove child; if not, disregard as a factor _____

If your judge considers child is adversely affected by father's living arrangement, on the average, at what age do you believe the judge will determine that a parent's living arrangement (unmarried persons living with persons of the opposite sex) does adversely affect the child which warrants removal of the child? (Mark only one response with an "X".)

- (a) All ages _____
 - (b) Age 3 and above _____
 - (c) Age 5 and above _____
 - (d) Age 7 and above _____
 - (e) Age 10 and above _____
 - (f) Age 13 and above _____
 - (g) Age 15 and above _____
 - (h) Other, please explain _____
-
-

Would the sex of the child make a difference in your responses to the last three questions; if so, please explain:

V. Custody dispute between mother and father. Mother of child is divorced from father of the child. Child is of average intelligence and 5 years of age. Child has been living with mother and father from birth to age 3. Father moved out when child was 3. Child continued to live with mother. Mother has a live-in lover, another woman, sharing same bed. Mother states that she is a lesbian and believes she is capable of caring for her child and continuing to maintain an open homosexual relationship. The child is aware that the mother is living with a woman sharing the same bed. What do you tell mother who seeks legal assistance for the purpose of pending custody litigation? (Mark only one response with an "X".)

- (a) Kick woman friend out of the house _____
 - (b) Do not discuss the subject; it is none of your business _____
 - (c) Refuse to represent the mother unless she kicks the woman friend out of the house _____
 - (d) Other (please explain) _____
-
-

VI. If this case went to trial and the presiding judge was the judge that you have appeared before most frequently in the custody cases you have handled, what do you believe the likely outcome of the case will be if it goes to a hearing? The father of the child claims this living situation is immoral and adversely affects the child and seeks custody. Mother of the child was awarded custody of this child when child was age 3. The child is now age 5. The mother of the child has been living in this homosexual relationship for the past six months. (Mark only one response with an "X".)

- (a) Consider mother's living relationship as a minor factor in determining custody award _____
- (b) Consider mother's living relationship as per se unfit-

ness and remove child from home of mother _____

- (c) Determine if child is adversely affected psychologically from mother's living arrangement. If so (nexus) remove child; if not, disregard as a factor _____

If your judge considers child is adversely affected by mother's homosexual living arrangement, on the average, at what age do you believe the judge will determine that a parent's living arrangement (live-in homosexual relationship) does adversely affect the child, which warrants removal of the child?

- (a) All ages _____
 (b) Age 3 and above _____
 (c) Age 5 and above _____
 (d) Age 7 and above _____
 (e) Age 10 and above _____
 (f) Age 13 and above _____
 (g) Age 15 and above _____
 (h) Other, please explain _____

Would the sex of the child make a difference in your responses to the last three questions; if so, please explain:

VII. The facts are slightly altered — the father of the child has been living with another man in a homosexual relationship for the last six months. Father and child have been living together since child was born. Mother moved out of house when child was 3. Father was awarded custody. At that time, father was not living with a man. Mother has filed for custody. You represent father. Mother claims the living situation is immoral and adversely affects the child and seeks custody. Father was awarded custody of child at age 3, at which time father was not living in a homosexual relationship. Mother is presently seeking custody, claiming this living arrangement is immoral and adversely affects the child. What do you tell father who seeks legal assistance for the purpose of pending custody litigation? (Mark

only one response with an "X".)

- (a) Kick man friend out of the house _____
 - (b) Do not discuss the subject; it is none of your business _____
 - (c) Refuse to represent the father unless he kicks the man friend out of the house _____
 - (d) Other (please explain) _____
-
-

If your judge considers child is adversely affected by father's homosexual living arrangement, on the average at what age do you believe the judge will determine that a parent's living arrangement (live-in homosexual relationship) does adversely affect the child, which warrants removal of the child?

- (a) All ages _____
 - (b) Age 3 and above _____
 - (c) Age 5 and above _____
 - (d) Age 7 and above _____
 - (e) Age 10 and above _____
 - (f) Age 13 and above _____
 - (g) Age 15 and above _____
 - (h) Other, please explain _____
-
-

Would the sex of the child make a difference in your responses to the last three questions; if so, please explain:

8. Review of custody awards, discussions with judges and attorneys, and reviewing of state custody statutes have helped to identify the factors courts consider upon making custody awards. Please read the following list of factors and select the top three that you believe are the most significant to judges on the custody cases you have handled in the period of time from

6/1/87 - 5/31/88. Mark the most significant factor with a "MX" and the two other important factors with an "S".

Automatic Preference for Mother _____

Preference for Primary Caretaker _____

More Time Available to Spend with Child - Gain
Custody _____

Separation of Siblings _____

Physical Accommodations of Parent's Home _____

Physical Health of Parents _____

Maintain Stable Environment _____

Provide Religious Training (church/synagogue
attendance) _____

Child Abuse or Neglect _____

Alcohol and Drug Problems of Parent _____

Mental Instability of Parent _____

Perjury and Other False Statements _____

Interference with Visitation _____

Frequent Change of Residence _____

Parent's Plan to Move Out of State _____

Nonmarital Heterosexual Relationships _____

Homosexual Relationships _____

Negative Relationships with Stepparent/Stepsiblings _____

Positive Relationships with Stepparent/Stepsiblings _____

Help from Grandparents/Relatives _____

Follow Child's Preference _____

Mental Health of Child _____

Physical Health of Child _____

Reasons for Parents' Separation _____

School Adjustment of Child _____

Financial Abilities of Parents to Care for Child (Parent's
Employment and Income _____)

Parents' Long-Standing Community Ties _____

Education of Parents _____

History of Visitation by Parent _____

9. The rules of evidence at your custody hearings were (please
mark with an "X"):

Strictly interpreted _____

Loosely interpreted _____

Nonexistent _____

10. Average length of child custody hearing _____

11. Average amount of time you have spent on each hearing
(i.e. interviewing, research, travel, telephone, and the hearing,
etc.) _____

12. Is joint custody preferred in courts? _____

13. Is a guardian ad litem appointed to represent the child in
contested custody cases? Mark an "X" for your response.

Always _____

Sometimes _____

Never _____

14. If your state statute provides a listing of factors a court
should consider in making child custody awards, please cite such
statute. _____

15. The average fee you charge a client (parent) for representa-
tion on a contested custody case which does not get appealed

\$100-\$500 _____

\$500-\$1,000 _____

\$1,000-\$1,500 _____

\$1,500-\$2,000_____

\$2,000-\$3,000_____

\$3,000 and over_____

16. Any comments or suggestions _____

I understand that this questionnaire which I am completing for Donald H. Stone will be used as data for his research and scholarly writing. I give Mr. Stone permission to use direct quotations from this questionnaire at his discretion. I understand that I will retain anonymity in the writing of the article.

Date

Name (please print)

Telephone

Signature

Address