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Coming out in West Virginia: Child Custody and Visitation Disputes Involving Gay Or Lesbian Parents

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COMING OUT IN WEST VIRGINIA:
CHILD CUSTODY AND VISITATION DISPUTES
INVOLVING GAY OR LESBIAN PARENTS

Jeffrey L. Hall

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I. INTRODUCTION

[The] [l]esbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a

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lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children.¹

Contrary to the beliefs of the justice of the Supreme Court of South Dakota above, most jurists in the vast majority of states reject the outright disqualification of a gay or lesbian parent (based solely upon such parent’s sexual orientation) from seeking custody or visitation rights with their minor children.² Rather, most states have “endorsed the requirement that there be a nexus between the conduct of the parent relied upon by the court and the parent-child relationship.”³ In other words, these courts hold that a parent’s sexual orientation should only be considered in a custody or visitation dispute if it is shown to adversely affect the child’s welfare, and the mere fact that a parent is a homosexual does not alone render him or her unfit as a parent.⁴

Courts are often faced with the question of whether the law should be tolerant of different lifestyles.⁵ In the context of child custody and visitation disputes, most courts have resolved the dilemmas posed by parents’ nonmarital

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² See Appendix to this Article [hereinafter “Appendix”], which contains a review of the case law of all 50 states, and classifies each state’s decision-making framework for child custody or visitation disputes involving a gay or lesbian parent. Twenty-five states employ a nexus approach, which requires a showing that the gay or lesbian parent’s lifestyle has an adverse affect on the minor children before such lifestyle can become a reason for denying or restricting custody or visitation. See, e.g., S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985). Seven states employ a per se approach, wherein a gay or lesbian parent is disqualified from seeking custody or visitation and/or has his or her custody or visitation restricted solely because of the lifestyle of the gay or lesbian parent, notwithstanding any showing of an adverse affect on the minor children. See, e.g., Roe v. Roe, 324 S.E.2d 691 (Va. 1985). The per se approach was apparently the approach Justice Henderson attempted to convince his colleagues to adopt in Chicione, 479 N.W.2d 891. Eight other states do not use the per se approach, but rather consider the parent’s sexual orientation as one of many factors to consider in the dispute. See Appendix.

³ S.N.E., 699 P.2d at 878.


sexual relationships with persons of the opposite sex by focusing on whether such relationships adversely impacted the children. However, when called upon to apply that same causal relationship standard to homosexual parents involved in child custody or visitation disputes, the courts have delivered varying results.

This Article reviews the expanding case law and commentary across this nation and discusses the modes of analysis employed by various courts to resolve whether a parent's sexual orientation should factor into custody or visitation rulings. In addition to classifying the decision-making framework employed by such courts, this Article evaluates the myriad of reasons given for continuing to restrict or deny custody or visitation rights to gay and lesbian parents. With this background, the Article then focuses on the status of this issue in West Virginia, including the results of a survey of West Virginia’s Family Law Masters. Finally, this Article offers certain suggestions for practitioners in West Virginia when

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8 See infra notes 69-75 and accompanying text.

9 See infra notes 84-104 and accompanying text.

10 Beyond the scope of this Article are the issues of custody or visitation disputes between gay or lesbian couples who have adopted children or disputes where a gay or lesbian non-biological party sues the other gay or lesbian biological parent for custody or visitation. For an examination of those issues, see, e.g., Yvonne A. Tamayo, Sexuality, Morality and the Law: The Custody Battle of a Non-Traditional Mother, 45 SYRACUSE L. REV. 853 (1994); Note, Family Law — Visitation Rights — New York Court of Appeals Refuses to Adopt Functional Analysis in Defining Family Relationships — Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), 105 HARV. L. REV. 941 (1992); Kimberly P. Carr, Allison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family, 58 BROOK. L. REV. 1021 (1992). While this Article will note certain cases involving a third party’s claim (e.g., a grandparent) against a gay or lesbian biological parent in a custody or visitation dispute, the issue of the standing of such third parties is beyond the scope of this Article. On this latter issue, see, e.g., Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995); Barry M. Parsons, Bottoms v. Bottoms: Erasing the Presumption Favoring a Natural Parent Over Third Parties — What Makes this Mother Unfit?, 2 GEO. MASON L. REV. 457 (1994); Henry J. Reske, Lesbianism at Center of Custody Dispute, 81 A.B.A. J. 28 (1995). See generally Barbara L. Shapiro, “Non-Traditional” Families in the Courts: The New Extended Family, 11 J. AM. ACAD. MATRIM. LAW. 117 (Winter 1993) [hereinafter Extended Family].

11 See infra notes 22-64 and accompanying text. See also Appendix.

12 See infra notes 84-104 and accompanying text.
confronted with a custody or visitation dispute involving a gay or lesbian parent. The United States Supreme Court has on at least two occasions provided specific guidance to the courts of this nation as to the standard of review to be applied to child custody or visitation disputes involving parents with nontraditional lifestyles. In Stanley v. Illinois, the Court was confronted with the question of whether an unwed biological father had standing to ask for custody of his minor child after the death of the biological mother. While noting that society may frown upon the lack of a nontraditional family setting posed by the father’s unwed status, the Court ruled that society’s biases could not overcome the presumption favoring a natural parent, especially where no proof was presented that the minor child would be harmed by granting the petition. Absent evidence of any nexus between the father’s unwed status and adverse impact on the child due to such status, the Court in Stanley suggested that the proper focus should lie with the best interests of the child and the competency of the father as a parent.

Despite Stanley’s requirement that the parent’s nontraditional lifestyle would be relevant only if there is a clear factual demonstration of a connection between the parent’s lifestyle and its adverse effect on the child’s welfare, the Court was called upon to address the issue again in Palmore v. Sidoti. In Palmore, a caucasian mother married a black male, and her former husband then sought a change in custody of the parties’ minor child, alleging, among other matters, that the child would be stigmatized by being raised in an interracial household. The lower courts apparently applied what amounted to an irrebuttable presumption that

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13 See infra notes 105-141 and accompanying text.
14 405 U.S. 645 (1972).
15 Id. at 657-58.
16 Id. at 658.
18 Id. at 430-31.
the mother's new lifestyle would be harmful to the child and awarded custody to the father.\textsuperscript{19}

In reversing the lower courts' decisions, the Court in \textit{Palmore} recognized that it could not control society's disfavor upon interracial households. However, the Court refused to give effect to such biases by upholding the award of custody to the father.\textsuperscript{20} While its decision was grounded upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Court once again rejected the presumptive approach that a nontraditional lifestyle would adversely affect the child.\textsuperscript{21} It would therefore appear that to adhere to the Court's rationale in both \textit{Stanley} and \textit{Palmore}, courts should limit their review of a parent's behavior or nontraditional lifestyle to whether the behavior directly affects the parent's minor children.

\textbf{A. Per Se Approach}

Notwithstanding the guidance from the United States Supreme Court, a minority of states still apply a rigid decision-making analysis when confronted with child custody or visitation disputes involving a gay or lesbian parent. These courts apply the equivalent of an irrebuttable presumption that a homosexual parent is unfit to have custody or visitation due to the parent's lifestyle, without regard to any proof of harm to the children.

For example, in \textit{Roe v. Roe},\textsuperscript{22} the Supreme Court of Virginia reviewed a child custody dispute wherein the father was involved in an active homosexual relationship in the same household as the parties' child.\textsuperscript{23} The trial court awarded partial custody to the father, but conditioned his award of custody on the father's

\textsuperscript{19} \textit{Id.} at 431.
\textsuperscript{20} \textit{Id.} at 433.
\textsuperscript{21} \textit{Id.} Beyond the scope of this Article is the argument that homosexual individuals involved in custody determinations are a "suspect class" entitled to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. For a discussion of that issue, see David S. Dooley, \textit{Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes}, 26 \textit{CAL. W.L. REV.} 395 (1990); Note, \textit{Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis}, 102 \textit{HARV. L. REV.} 617 (1989).
\textsuperscript{22} 324 S.E.2d 691 (Va. 1985).
\textsuperscript{23} \textit{Id.} at 692.
not sharing the same bedroom with any male lover while the child was present. The Virginia Supreme Court reversed and vested sole custody in the mother, stating that:

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

This type of judicially imposed morality requires no proof of harm to the child and renders any attempt by a gay or lesbian parent to show otherwise a useless endeavor.

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24 Id. The trial court found both the mother and father to be fit, competent, and devoted custodians. Id.

25 Id. at 694 (citations omitted). Not only did the court vest custody with the mother, but it also ordered a cessation of visitations in the father’s home, or in the presence of his male lover, while his current living arrangements continued. Roe, 324 S.E.2d at 694.

26 The court in Roe relied upon precedent which suggests that “[t]he moral climate in which children are to be raised is an important consideration for the court in determining custody. . . . An illicit relationship to which minor children are exposed cannot be condoned.” Id. at 693 (citing Brown v. Brown, 237 S.E.2d 89, 91 (Va. 1977)).

27 The court in Roe distinguished its earlier ruling in Doe v. Doe, 284 S.E.2d 799 (Va. 1981). Doe involved an attempt by a father and his new wife to terminate the parental rights of the biological lesbian mother. Doe, 284 S.E.2d at 800. The court denied the adoption and declined to hold that every lesbian mother or gay father was per se an unfit parent. Doe, 284 S.E.2d at 806. The Roe court distinguished Doe on the grounds that the impact of a day-to-day custody situation was not presented as in Roe and termination in an adoption case was final whereas custody determinations are subject to change upon different conditions. Roe, 324 S.E.2d at 694. The Roe court further explained that “[w]e refused to terminate all parental rights of the lesbian mother in Doe, but we stopped far short of finding her a fit and proper custodian for her son, or even of approving his visitations in her home, while her existing living arrangements continued.” Roe, 324 S.E.2d at 694.
The unbending decision-making espoused by the *Roe* court is followed by six other jurisdictions. These jurisdictions apparently believe that children's exposure to the homosexual lifestyle of their parent will harm the children, because of society's stigmatization of the household or because of the fear that the children will develop into homosexuals themselves (without the necessity of evidence to support such a belief). The arguments regarding stigmatization fly in the face of the dictates of *Palmore*. Moreover, the claim that children will become homosexuals has been roundly discounted by various studies which document that "the incidence of same-sex orientation among the children of gays and lesbians occurs as randomly and in the same proportion as it does among children in the general population . . . ."

B. Middle Ground Analysis

Realizing that the *per se* or irrefuttable presumption standard fails to comport with an actual analysis of the best interests of the child and/or an analysis of the competency of the parenting abilities of a gay or lesbian parent, a significant group of states reject the *per se* approach, but fail to go so far as to require that the homosexual parent's lifestyle adversely impacts the child's welfare. Rather, these jurisdictions adopt a middle ground approach, which, unfortunately, leads to varying results even within their own jurisdictions.

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28 See Appendix.

29 See, e.g., S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (expressing the concern that the child might have difficulty in developing a heterosexual relationship in the future due to exposure to his parent's homosexual lifestyle); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (stating that "[h]omosexuality is not openly accepted or widespread. We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen."). See also Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (relying upon a psychologist who testified that "homosexuality would be more likely to be learned by one who was exposed to it than by an individual who was not. . . . [H]omosexuality is a learned trait and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment.").

30 See supra notes 17-21 and accompanying text.

Representative of this middle ground approach is the case of *Constant A. v. Paul C.A.*, which involved a lesbian mother’s petition for expanded custody with her minor children. While the court rejected the argument that homosexuality *per se* is a basis for denying visitation or partial custody to a parent, it found that it is a relevant consideration in the dispute.

The court further held that “where there is a custody dispute between members of a traditional family environment and one of homosexual composition, the presumption of regularity applies to the traditional relationship and the burden of proving no adverse effect of the homosexual relationship falls on the person advocating it.” The court cited as its reasons for applying this rebuttable presumption the following: the homosexual relationship is illegal due to sodomy statutes; homosexual marriages are not permitted and are therefore not to be equated with heterosexual relations; the behavior of all persons in the home of the children falls within the purview of the court; the children will need counseling to deal with their mother’s lifestyle (since the mother is in counseling); and illicit heterosexual relationships should not be condoned so the same should be said for a lesbian relationship. The court specifically refused to adopt the nexus approach of other courts, where no consideration is to be given to the sexual preference unless concrete harm to the child is proven.

Seven years after the decision in *Constant A.*, the Pennsylvania appellate court was again faced with an identical issue. In *Blew v. Verta*, the court found

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33 *Id.* at 2.
34 *Id.* at 9.
35 *Id.* at 5 (footnote omitted).
36 *Id.* at 4-5.
37 *Constant A.*, 496 A.2d at 6.
38 *Id.* at 8.
39 *Id.* at 9.
that the lower court's reliance on the *Constant A.* decision to restrict a lesbian mother's visitation rights was misplaced since the trial court based a finding of detriment to the child not on the mother's homosexual relationship, "but rather on other individuals' reaction to the mother's relationship." The decisions in these two Pennsylvania cases tend to illustrate the drawbacks to the middle ground (also known as the rebuttable presumption) approach.

The Supreme Court of Oklahoma also applies a middle ground approach, rejecting the *per se* analysis but falling short of adopting the nexus standard. In *M.J.P. v. J.G.P.*, the court noted that a best interests standard is applied in other states' cases involving homosexual parents and that the determining factor should be the effect the homosexual relationship has on the child. While on its surface this analysis might sound like the nexus approach which requires harm to the child to be shown before the homosexual parent's lifestyle becomes relevant, an examination of the "harm" the court found in *M.J.P.* reveals that the burden to disprove such "harm" still lies with the homosexual parent.

The *M.J.P.* court found that the child was harmed by the mother's lesbian relationship based upon the following "evidence" from a psychiatrist who testified at the trial: (1) as the child aged, he might be teased by people commenting on his mother's homosexuality; (2) it is in a child's best interest to be taught the prevailing morals of society, and a homosexual lifestyle is immoral; (3) the child would eventually have to choose between society's pressures that his mother's lifestyle is immoral and his mother's belief that there is nothing immoral with such relationship; and (4) the child might have problems during early adolescence with sex identification roles. Despite a total lack of showing of any particularized harm to the child in the case at bar, the court transferred custody to the father. This decision is even more confusing when one considers that the same psychiatrist upon which the court relied to find that the child was "harmed" also testified about a

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42 *Id.* at 35. The child in *Blew* was embarrassed, confused and angry over other people's reactions to his mother's lesbian relationship, but the court in *Blew* refused to yield to those prejudices, posing this query: "Would a court restrict a handicapped parent's custody because other people made remarks about the handicapped parent which embarrassed, confused and angered the child? We think not." *Id.*

43 640 P.2d 966 (Okla. 1982).

44 *Id.* at 968. The court stated that if the "effect" is found to be detrimental to the child, then the custody modification should be granted to the heterosexual parent. *Id.*

45 *Id.* at 969.

46 *Id.*
study involving homosexual and heterosexual mothers which revealed "essentially no difference in the development of the children or the relationships between mothers and their children or generally the problems that the mothers were having in raising their children." 47

C. The Nexus Requirement

Perhaps due to a dissatisfaction with the harshness of the per se approach and the unpredictability of the middle ground analysis, at least twenty-five states apply what has been referred to as a nexus requirement. In the nexus approach, the gay or lesbian parent's lifestyle must be shown to have an adverse impact upon the child before the issue of the parent's lifestyle becomes a relevant consideration in the dispute. 48 The burden to prove the adverse impact on the child rests with the heterosexual parent claiming the homosexual parent's lifestyle is producing such harm. 49

One of the leading cases adopting the nexus standard is Bezio v. Patenaude. 50 In Bezio, the trial court refused a lesbian mother's petition to regain custody of her minor children from their court ordered custodial guardian on the sole basis that the lesbian environment would adversely affect the welfare of the

47 M.J.P., 640 P.2d. at 968 (citing Mildred D. Pagelow, Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions, 5(3) J. HOMOSEXUALITY 189-204 (1981); Hitchens, Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases, 5(1) J. HOMOSEXUALITY 89-96 (1979/1980)). The psychiatrist also "opined a son raised in a homosexual home is not more likely to become a practicing homosexual than a son raised by a single woman living alone." Id. at 968-69.

48 See Appendix.

49 See, e.g., In re Diehl, 18 FAM. L. REP. (BNA) 1128, 1129 (Ill. App. Ct. 2 Dist., No. 2-90-1217, 11-22-91) ("We conclude that [the heterosexual father] has not borne his burden of demonstrating that the threat of serious endangerment necessary to restrict [the lesbian mother's] visitation with her daughter.").

Based on expert testimony adduced at the trial that homosexuality *per se* is irrelevant to parenting ability,\(^{52}\) the Supreme Judicial Court of Massachusetts reversed the trial court, holding that

A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children ‘simply because their households fail to meet the ideals approved by the community . . . (or) simply because the parents embrace ideologies or pursue life-styles at odds with the average.’\(^{53}\)

The court further held that the nexus standard could not be satisfied by judicial notice that a lesbian household would harm the child. Thus, the court clearly rejected the *per se* approach the trial court apparently employed.\(^{54}\)

The Supreme Court of Alaska also adopted the nexus approach in *S.N.E. v. R.L.B.*\(^{55}\) when it stated that “the scope of judicial inquiry is limited to facts directly affecting the child’s well-being[,] [with] . . . the requirement that there be a nexus between the conduct of the parent relied on by the court and the parent-child relationship.”\(^{56}\) The court intimated that the lower court entertained an unnecessary amount of evidence which established the mother was a lesbian, but failed to elicit any evidence showing that her lesbianism adversely affected the child. The court concluded that “it is impermissible to rely on any real or imagined social stigma attached to Mother’s status as a lesbian.”\(^{57}\)

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\(^{51}\) Bezio, 410 N.E.2d at 1215.

\(^{52}\) Id. at 1215-16.

\(^{53}\) Id. at 1216 (citing Custody of a Minor, 393 N.E.2d 379, 383 (Mass. 1979) and M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979)).

\(^{54}\) Id. at 1216.

\(^{55}\) 699 P.2d 875 (Alaska 1985).

\(^{56}\) Id. at 878. The court noted that circumstances such as a parent living in an adulterous relationship, bearing children out of wedlock, living in unstable relationships, and even the mental health of a parent is not relevant absent any indication of adverse effects on the child. Id. (citations omitted).

\(^{57}\) Id. at 879 (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
One cautionary note regarding courts’ approval of the nexus standard comes from a concurring opinion in a South Carolina case which applied this standard. In *Stroman v. Williams*, a concurring justice wrote that “[n]o moral judgment by us has been necessary because there is no evidence that her lifestyle had any relevancy to the welfare of the child . . . . We are not in the business of gratuitously judging the private lives of other people.”

While courts may not explicitly judge the private lives of litigants, the morality of a parent’s lifestyle is at least implicitly considered by several courts that follow the nexus approach, including South Carolina. For example, in *Maradie v. Maradie*, a Florida appellate court suggested that a trial court can consider a parent’s sexual conduct in judging moral fitness, but in considering such moral fitness, the focus should be placed on whether the parent’s behavior has a direct impact on the welfare of the child.

The advice of one New Jersey appellate court applying a nexus approach regarding the concern over morals is particularly revealing. In *M.P. v. S.P.*, the court stated,

If [the lesbian mother] retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to

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59 *Id.* at 707.


61 22 FAM. L. REP. (BNA) 1470 (Fla. 1st Dist. Ct. App., No. 95-4068, 7/16/96).

62 *Id.*

the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.\textsuperscript{64}

\textbf{D. States Which Have Not Addressed the Issue}

Ten states have yet to specifically address whether a parent's sexual orientation should be considered in a child custody or visitation dispute. Notwithstanding the lack of reported opinions involving homosexual parents in these jurisdictions, certain decisions may lend guidance to a prediction of the possible results in such states. For example, in Montana, one legal commentator notes that while no state supreme court precedent exists to guide practitioners,\textsuperscript{65} the Montana Supreme Court has held that it would "not look favorably upon district courts that rely upon any unfounded fears that may be brought into the courtroom."\textsuperscript{66} The author notes that Montana's high court "restricted the scope of judicial consideration to the parent's behavior as it directly affected his child."\textsuperscript{67} If followed, this precedent in Montana suggests that a nexus approach would be applied in child custody or visitation disputes involving a gay or lesbian parent.\textsuperscript{68}

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\textsuperscript{64} Id. at 1263. The court stated that if it were to strip the lesbian mother of custody due to fears regarding moral development, it would send the wrong message to the children, the parties, and other litigants. "Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. . . . It diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others." \textit{Id.}
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\textsuperscript{66} Id. at 202 (reviewing \textit{In re Marriage of D.F.D.}, 862 P.2d 368 (1993)). \textit{In re Marriage of D.F.D.} involved an attempt by a custodial mother to severely restrict the visitation rights of her former husband, who had exhibited past tendencies as a transvestite. \textit{In re Marriage of D.F.D.}, 862 P.2d at 369. Despite evidence which showed that the father's behavior posed no threat of harm to the child, the trial court granted the mother's requests because the father's conduct might harm the child. \textit{In re Marriage of D.F.D.}, 862 P.2d at 370-71.
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\textsuperscript{67} Runnette, \textit{supra} note 65, at 203.
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\textsuperscript{68} Runnette argues persuasively in her Article that the decision in \textit{In re Marriage of D.F.D.} applies a nexus approach and that "mere presumptions will not suffice to establish a nexus." \textit{Id.} at 204.
\end{flushright}
In *Smith-Helstrom v. Yonker*, a mother engaged in a nonmarital sexual relationship subsequent to a divorce (in which she was awarded custody of her minor child), prompting her ex-husband to petition for a custody change based in part on the wife's new relationship. The father failed to present any evidence that the wife's relationship harmed the children. The Supreme Court of Nebraska reversed the trial court's award of custody to the father, stating that while evidence of the moral fitness of the parents, including sexual conduct, can be considered as a factor, absent a showing that the mother's cohabitation adversely affected the child, no weight would be assigned to such factor. While this decision may not specifically adopt a nexus approach, it clearly rejects the notion that a parent's nontraditional lifestyle will in and of itself act as a detriment to the parent in the custody or visitation dispute.

Decisions in other states, if their rationale are followed, also suggest that a nexus approach would be employed, or, at the very least, the burden of proof would be placed upon the party claiming a parent's lifestyle is relevant to the proceeding. For example, the Court of Appeals of Idaho implicitly approved the nexus approach when it ruled that a mother's post-divorce cohabitation with another man is relevant only upon a stated connection between the mother's cohabitation and some present demonstrative harm to the child's welfare. The Supreme Court of Delaware also addressed the issue of a parent's post-divorce adulterous

69 544 N.W.2d 93 (Neb. 1996).

70 Id. at 96. The original divorce decree prohibited the mother from cohabiting with men to whom she was not married. Id. at 101.

71 Id. at 101.

72 Id. Nebraska courts have consistently held that a party's sexual conduct, including nonmarital cohabitation in the same home as where the children reside, does not justify a custody change unless the children are adversely affected by the living arrangements or are exposed to any sexual activity. See Kennedy v. Kennedy, 380 N.W.2d 300 (Neb. 1986); Krohn v. Krohn, 347 N.W.2d 869 (Neb. 1984). West Virginia has similar precedent, and when confronted with a case involving an alleged lesbian mother, the West Virginia court applied a nexus requirement. See infra notes 114-119 and accompanying text.

73 Roeh v. Roeh, 746 P.2d 1016, 1019 (Idaho 1987), cited with approval in Craig v. McBride, 639 P.2d 303, 311 (Alaska 1982) ("[E]vidence of the life-style, habits, or character of a custody claimant is relevant only to the extent that it may be shown to affect the person's relationship to the child."). The court in *Roeh* reversed the award of custody to the father since the mother's subsequent cohabitation "was not shown to have any nexus with the child's best interests." *Roeh*, 746 P.2d at 1018.
cohabitation in *A.S. v. M.S.* The court held that it is proper to consider a parent’s adulterous conduct as it affects the proper development of a child’s moral character, but that the burden of showing harmful conduct lies with the parent asserting such conduct is relevant.

The recent decision of a Hawaii trial court invalidating that state’s law prohibiting gay or lesbian couples from applying for marriage licenses, also suggests that a nexus approach would be employed in a custody or visitation dispute involving a gay or lesbian parent. In *Baehr v. Miike*, the trial court in Hawaii looked extensively at the issue of the harm that would occur if the law was invalidated, and it ruled that the state’s interest would not be harmed by granting the petition. Although the decision is on appeal, the trial court presumably suggested that it would be tolerant of gay or lesbian parents involved in custody or visitation disputes, particularly if their conduct produces no harm to the children.

Gauging the result in the state of New Hampshire is uncertain. In *In re Opinion of the Justices*, the New Hampshire Supreme Court upheld its state law prohibiting adoptions by homosexuals. Whether this decision forecasts troubling signals for gay or lesbian parents involved in child custody or visitation disputes is unclear. Besides New Hampshire, Florida is the only other state which by statute bars adoptions by homosexuals. Notwithstanding such statute, recent decisions by the Florida courts have applied a nexus approach to homosexual parents in custody disputes.

**E. Application of Decision-Making Framework**

Regardless of which analysis courts employ, the results for gay or lesbian parents continue to be dictated by which standard is employed. Not surprisingly, of the fifteen cases in the seven jurisdictions employing the *per se* analysis (as cited

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75 *Id.* at 725-26.
77 *Id.* at 2010-11.
78 530 A.2d 21 (N.H. 1987).
80 See, e.g., Maradie v. Maradie, 22 FAM. L. REP. (BNA) 1470 (Fla. 1st Dist. App., No. 95-4068, 7/16/96).
in the Appendix to this Article), decisions in fourteen of those cases were favorable to the relief sought by the heterosexual parent. 81 Similarly, in those eight jurisdictions applying a middle ground analysis, eleven of thirteen decisions were favorable to the relief sought by the heterosexual parent. 82 Relief sought by gay and lesbian parents received strong support in those jurisdictions requiring a nexus between the parent’s lifestyle and the effects on the children. Of the fifty-one cases in the twenty-five nexus jurisdictions, the gay and lesbian parents prevailed in thirty-nine of those cases. 83 Overall, forty-two of the seventy-eight cases cited in the Appendix in the forty states which employ one of the three standards of review were favorable to the relief sought by the gay or lesbian parent. The most common reasons cited for continuing to deny or restrict custody or visitation to a gay or lesbian parent can be summarized by the following representative cases.

1. Societal Stigmatization

In S. v. S., 84 the Court of Appeals of Kentucky relied upon the testimony of examining psychologists who reported that because of the social stigma attached to homosexuality, the child would be teased, embarrassed, and isolated. 85 Because of this potential for future harm, the court awarded custody to the heterosexual parent, quoting the psychologist’s report stating that “[t]here would seem to me to be no

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81 The only case arguably favorable to the gay parent in the seven per se jurisdictions is Woodruff v. Woodruff, 260 S.E.2d 775 (N.C. Ct. App. 1979). In Woodruff, the court permitted the gay father overnight visitation with his child, but severely restricted the visits by prohibiting the visits to occur around the father’s male lover or any other males. Id. at 777.

82 Only the decisions in A. v. A., 514 P.2d 358 (Or. App. 1973) (granting custody to gay father but to be supervised by juvenile authorities) and Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992) (restricting lesbian mother’s custody not warranted) can be construed as favorable of those 13 cases listed in the Appendix under the middle ground approach.


84 608 S.W.2d 64 (Ky. Ct. App. 1980).

85 Id. at 66.
rational reason for purposely submitting a child to these additional and potentially debilitating influences.\textsuperscript{86}

2. Child Will Become Homosexual

The court in \textit{S. v. S.} also relied upon another common fear in stripping custody from a lesbian mother. The court intimated that the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future."\textsuperscript{87} An appellate court in Tennessee also appears to share the view of the \textit{S. v. S.} court. The Tennessee court relied upon a psychiatrist's testimony that "homosexuality is a learned trait and it would be very difficult for [a child] to learn and approximate sex role identification from a homosexual environment."\textsuperscript{88} More bluntly, an appellate court in Missouri restricted a lesbian mother's visitation rights because "[i]f the court does not need to wait... till the damage is done. If the child's situation is such that damage is likely to occur as her sexual awareness develops with the approach of young womanhood, the court may in a proper case remove her from the unwholesome environment."\textsuperscript{89}

3. Child Will Contract AIDS

In \textit{H.J.B. v. P.W.},\textsuperscript{90} the noncustodial mother sought a change in custody due in part to the gay father's lifestyle and the fact that he tested positive for the Human

\textsuperscript{86} \textit{Id. See also} Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (stating that homosexuality is generally socially unacceptable and the children could be exposed to ridicule and teasing by other children); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (holding that while homosexuality might be acceptable to the mother, "yet who would place a child in a milieu where she might be inclined toward it? She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness."); David L. Weiden, \textit{Stigmatization and Discrimination: Visitation Rights of Noncustodial Homosexual Parents and the Effect of Parental Deprivation on Children}, 69 DEN. U. L. REV. 513, 530-32 (1992); Rosenblum, \textit{supra} note 50, at 1677-80. \textit{See also} supra note 26 and accompanying text.

\textsuperscript{87} \textit{S. v. S.}, 608 S.W.2d at 66.


\textsuperscript{90} 628 So. 2d 753 ( Ala. Civ. App. 1993).
Immuno-deficiency Virus ("HIV"). In granting the mother's petition, the court focused on the fact that the father concealed his gay lifestyle and his medical condition "which could have a significant bearing on the . . . best interests of the child . . . ." Apparently the court's fear regarding the father's HIV status was all that was required to strip him of custody, since no actual evidence was presented as to how his medical condition affected the child.

4. Moral Development of Child

In J.P. v. P.W., the court restricted the gay father's visitation so that he could not visit his children in the presence of his male lover or any other males in his household. The court stated that it could not ignore the impact of the father's lifestyle on the child's development of morals, values, character, and virtue during the child's formative years. Related to the argument that a parent's homosexual lifestyle will harm the moral development of a child is the proposition that since homosexuals engage in illegal sexual conduct by virtue of states' sodomy laws, their illegal conduct can be considered in a custody dispute as an improper example to

91 Id. at 754-55.
92 Id. at 755.
93 Relying on studies that demonstrate that HIV cannot be contacted through casual contact between household members, various courts and commentators have roundly criticized the "fear of AIDS" as a ground to deny or restrict custody or visitation to a homosexual parent. See, e.g., Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (holding that termination of AIDS-infected father's visitation rights was not required where medical evidence and studies at time of trial showed AIDS was not transmitted through everyday household contact); North v. North, 648 A.2d 1025 (Md. App. 1994) (expressing that the denial of overnight visitation to gay father infected with HIV not supported by the evidence since, if there was a fear of transmission to the child, it could as easily occur during daylight hours); Doe v. Roe, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988) (holding that a gay father who petitioned for visitation was not required to undergo AIDS test since overwhelming weight and consensus of medical opinion is that the HIV virus is not spread casually, with no risk of infection through close personal contact or sharing of household functions); Rosenblum, supra note 50, at 1682-84; Dooley, supra note 21, at 422-23; Weiden, supra note 86, at 528-30; Claudia G. Catalano, Annotation, Child Custody and Visitation Rights of Person Infected with AIDS, Annot., 86 A.L.R.4th 211 (1991).
94 772 S.W.2d 786 (Mo. Ct. App. 1989).
95 Id. at 789. The court in J.P. concluded by announcing that "[w]e see no salutary effect for the young child by exposing him to the [father's] miasmatic moral standards." Id.
the children regarding respect for the law. A concurring justice in *Thigpen v. Carpenter* noted that the people of Arkansas have declared through legislative enactment that sodomy is immoral, unacceptable, and criminal conduct. Therefore, the court can consider this clear public policy in a custody case particularly "where, as here, the [lesbian mother] has declared her fixed determination to continue that course of illegal conduct for the rest of her life, in a home in which the children also reside, and to justify her conduct to her children if and when they find her out."  

5. Child May Be Molested

Certain courts have prohibited gay and lesbian parents from exercising their visitation rights in the presence of their homosexual lovers or friends implicitly due to the fear that the children might be sexually molested. For example, in *In re J.S. & C.*, the court entered such a restriction on the gay father’s visitation and relied on testimony that "it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction ..." In one of the earliest reported opinions on the subject of homosexual parents involved in custody or visitation disputes, a Pennsylvania court granted the heterosexual mother the sole discretion to determine the gay father’s visitation rights. The court stated that "[w]e think the cumulative weight of the evidence is to the effect that the children in the

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96 In *L. v. D.*, the court noted that homosexual practices have been condemned since the beginning of recorded history, that deviate sexual intercourse with another person of the same sex is a crime (in Missouri), and that homosexual practices are not within the privacy of marriage (as discussed in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). *L. v. D.*, 630 S.W.2d 243 (Mo. Ct. App. 1982).


98 *Id.* at 514 (Cracraft, J., concurring). *See infra* note 131 and accompanying text. *See also* Weiden, *supra* note 86, at 533-35; Dooley, *supra* note 21, at 414-17; Rosenblum, *supra* note 50, at 1673-77.


100 *Id.* at 96. Several other courts have severely restricted visitation rights of gay and lesbian parents at least tacitly approving the argument that the children would be harmed if left in the presence of the parent’s homosexual lovers or friends. *See, e.g.*, Irish v. Irish, 300 N.W.2d 739 (Mich. Ct. App. 1981); White v. Thompson, 569 So. 2d 1181, 1185 (Miss. 1990); Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1996); Weiden, *supra* note 86, at 528; Susoeff, *supra* note 31, at 880-81; Rosenblum, *supra* note 50, at 1684 -1685.
custody of [the father] may be exposed to improper conditions and undesirable influences.\textsuperscript{101}

6. Nexus Proven

In \textit{In re Marriage of Martins}\textsuperscript{102} the court applied a nexus approach to find that children were adversely affected by their lesbian mother's lifestyle.\textsuperscript{103} In reaching the conclusion to transfer custody to the father, the court relied on facts at trial showing that the mother spent less time with the children while she was pursuing her new lifestyle; that she had numerous roommates in the household which bothered the children and created an unstable environment; and that the children developed behavioral problems and had to undergo counseling after the mother acknowledged her lesbianism to them.\textsuperscript{104}

III. ANALYSIS OF ISSUE UNDER WEST VIRGINIA LAW

A. Family Law Masters Survey

Although the West Virginia Supreme Court of Appeals has issued at least one opinion directly involving a lesbian parent in a custody dispute,\textsuperscript{105} a recent survey of West Virginia’s Family Law Masters suggests that the court may likely be faced with the issue again.\textsuperscript{106} Of the eighteen Masters who responded to the

\textsuperscript{101} Com. ex. rel. Bachman v. Bradley, 91 A.2d 379, 382 (Pa. Super. Ct. 1952). The trial court in Bradley also restricted the father's visitations, although less severely than the appellate court, noting that "realizing [the father's] sexual tendencies, the Court is reluctant to have any male companions living at the house when the children spend the night with the [father]." \textit{Id.} at 381.

\textsuperscript{102} 645 N.E.2d 567 (Ill. App. Ct. 1995).

\textsuperscript{103} \textit{Id.} at 574.

\textsuperscript{104} \textit{Id. See also} Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992). In Chicoine, the court applied a nexus standard of review but also found that the children were harmed by the lesbian mother's lifestyle. The facts adduced at trial showed that the mother and her lover were affectionate toward each other in the presence of the children, the children were taken to gay bars on at least two occasions, and the children were permitted to sleep in the same bed as the mother and her lover. \textit{Chicoine}, 479 N.W.2d at 893-94.

\textsuperscript{105} Rowsey v. Rowsey, 329 S.E.2d 57 (W. Va. 1985).

\textsuperscript{106} WEST VIRGINIA FAMILY LAW MASTERS SURVEY (1996) (unpublished survey) (on file with author). Survey conducted by the author of this Article by mail from Jan. 17, 1996 to Feb. 9, 1996 [hereinafter SURVEY OF MASTERS]. All 26 Family Law Masters (including the author) received a copy
survey, thirteen have presided over at least one case involving a gay or lesbian parent.\textsuperscript{107} All of the responding Masters were unanimous in the belief that a gay or lesbian parent is not \textit{per se} disqualified from seeking custody or visitation of their minor children due solely to such parent's lifestyle.\textsuperscript{108} Thirteen of the eighteen Masters believe that the fact a parent is gay or lesbian is one of many factors to consider in a best interest analysis, whereas fourteen of the eighteen Masters believe the parent's lifestyle would become irrelevant where the parent's lifestyle is not shown to adversely affect the children.\textsuperscript{109}

Predominantly, lesbian mothers as opposed to gay fathers were involved in custody or visitation disputes.\textsuperscript{110} The number of disputes were evenly divided between original divorce proceedings and modification disputes.\textsuperscript{111} Masters granted relief favorable to the gay or lesbian parent because the parent's lifestyle did not adversely affect the children. Additionally, other unrelated factors weighed in such parent's favor.\textsuperscript{112} When relief was denied to the gay or lesbian parent, the Masters, except for one case, cited reasons other than the lifestyle of the gay or lesbian parent in their recommendations.\textsuperscript{113}

Gauging by the number of cases involving a gay or lesbian parent as reported by the survey of Masters, it is likely the issue will again be the subject of review by the Supreme Court of Appeals of West Virginia. As such, the balance of this Article analyzes current law in West Virginia to determine how the court

\textsuperscript{107} \textit{Id.} Six of the 13 Masters have presided over two or more such cases. Only one Master has presided over five or more such cases. \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{SURVEY OF MASTERS, supra note 106.} Of the 13 Masters who have presided over a case involving a homosexual parent, 22 cases involved a lesbian mother and six cases involved a gay father. \textit{Id.}

\textsuperscript{111} \textit{Id.} All responses combined, the Masters have heard 14 cases involving original divorce proceedings and 14 modification actions. \textit{Id.}

\textsuperscript{112} \textit{Id.} Of the 28 cases reported by the 13 Masters, 16 were favorable to the relief sought by the gay or lesbian parent. \textit{SURVEY OF MASTERS, supra note 106.} Of those 16 cases, four were settled by agreement of the parties. \textit{Id.}

\textsuperscript{113} \textit{Id.} Of the 12 cases decided favorably to the relief sought by the heterosexual parent, five were settled by agreement of the parties, six were based on factors other than the homosexual parents' lifestyle, and one Master cited such lifestyle for the decision. \textit{Id.}
should decide the issue, and suggestions will be made for practitioners litigating this unique type of dispute.

B. West Virginia Case Law

Barring a total retreat from existing case law in West Virginia, gay or lesbian parents involved in a custody or visitation dispute should expect that the issue of their lifestyle will be irrelevant unless coupled with demonstrable proof that the lifestyle adversely impacts the children. The issue of what standard of review should be applied in cases involving homosexual parents was settled in Rowsey v. Rowsey.114

In Rowsey, the mother was awarded custody of her two minor children in the initial divorce proceeding, but her custody was conditioned on her ceasing contact with a known lesbian and limiting her right to take the children out of the county (presumably to prevent further contact with the lesbian).115 Subsequent to the final divorce order, the father sought a change in custody based on his former wife's continued relationship with the lesbian referred to in the divorce decree and her travel outside the county with the children to visit with the lesbian.116 Without making any finding that the alleged change in circumstances adversely affected the children, the trial court awarded custody to the father.117

The Supreme Court of Appeals of West Virginia had no trouble in reversing the trial court’s decision. The West Virginia Supreme Court stated that “[a] change of custody based on a speculative notion of potential harm is an impermissible exercise of discretion.”118 Such an abuse of discretion mandated reversal since the record was devoid of evidence documenting any adverse impact on the children caused by the mother’s continued relationship with the reputed lesbian or by her travel outside the county to visit such lesbian.119

115 Id. at 59. Neither party appealed the final divorce decree. Id.
116 Id. at 59-60.
117 Id.
118 Rowsey, 329 S.E.2d. at 61.
119 Id. The court restored custody to the mother and removed the travel restriction unless it could be shown that such restriction would serve the children’s best interests. Id. at 62.
The court’s decision in *Rowsey* affirmed several prior decisions which required a nexus between the parent’s lifestyle or conduct and the alleged harm to the children. For example, in *Porter v. Porter*, the court stated,

Our case law clearly indicates that a change of custody is not justified where, as here, the only basis for the court’s decision is the existence of an extramarital relationship on the part of the parent originally awarded custody. There must also be a showing that the parent’s relationship with another adult has a deleterious effect upon the child and that the child will materially benefit from the change of custody.

The rationale of *Porter* which dictates a nexus requirement has been adhered to strictly in West Virginia. For example, in *Moses v. Moses*, the court held that “in a domestic custody situation the focus of an examination of a parent’s conduct is not normally on whether the conduct is morally pure, but upon whether the conduct has a deleterious effect upon the children.”

The court encountered a related issue involving a mother’s extramarital affair with a man, who was alleged to be previously involved in homosexual relationship in the case of *M.S.P. v. P.E.P.* Although the trial court in *M.S.P.* found the mother to be the primary caretaker of the parties’ three and five year old children, it nonetheless awarded custody to the father, finding the mother unfit because of the “moral atmosphere which exists in the home of [the mother],

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120 Id. at 60 (citing, e.g., Porter v. Porter, 298 S.E.2d 130 (W. Va. 1982)).

121 298 S.E.2d 130 (W. Va. 1982).

122 Id. at 132. *See also* S.H. v. R.L.H., 289 S.E.2d 186, Syl. Pt. 3 (W. Va. 1982) (“Where one parent has been awarded the custody of minor children by the court and that parent either remarries or undertakes a relationship with another adult who is either a permanent resident or regular overnight visitor in the home, the remarriage or existence of such extramarital relationship constitutes a sufficient change of circumstances to warrant a reexamination of child placement; however, neither remarriage nor an extramarital relationship *per se* raises any presumption against continued custody in the parent originally awarded such custody.”). *Id.*


125 358 S.E.2d 442 (W. Va. 1987).
resulting from visits of her close friends, who are bi-sexual or homosexual, [which] does not appear to be a fit and proper place for the children to reside." The Supreme Court of Appeals of West Virginia, which again had no trouble in reversing the trial court because the record contained no evidence that the mother’s relationship with the alleged homosexual had a negative impact upon the children, stated that “[a]dverse effects upon the children must be demonstrated before a divorcing parent’s subsequent associations, standing alone, can be the basis for finding a parent who is the primary caretaker, unfit to have custody of her minor children.”

The nexus standard enunciated in Rowsey and M.S.P. should continue as the mode by which Masters and courts will decide future custody or visitation disputes involving gay or lesbian parents. This standard is an evidence-based test that requires a factual finding of harm to a child before relief can be granted adverse to the homosexual parent. Practitioners representing gay or lesbian parents should nonetheless expect to encounter many of the same arguments various courts have relied upon to deny relief to such parents.

To counter the common fear that children raised by a homosexual parent might themselves become homosexual, the practitioner should be prepared in rebuttal to offer expert testimony by a psychologist or psychiatrist familiar with the

126 Id. at 444. The father who sought custody in M.S.P. admitted he had no evidence that any unhealthy or immoral conduct occurred around his children. Id. at 445.

127 Id.

128 See, supra notes 106-113 and accompanying text. The results of the SURVEY OF MASTERS supports this proposition. See supra notes 106-13 and accompanying text. Moreover, determinations of child custody are guided by the best interests of the child, which demands that the decisions be premised on competent evidence rather than unsubstantiated assumptions. See In re Custody of Cottrill, 346 S.E.2d 47 (W. Va. 1986); Thomas v. Thomas, 327 S.E.2d 149, Syl. Pt. 2 (W. Va. 1985).

129 Arguably, the requirement of a nexus between the parent’s sexual orientation and alleged harm to a child should have increased force in a modification proceeding since West Virginia’s standard for modification favors maintaining stability for the child. That heightened evidentiary standard for modification actions was set forth in Cloud v. Cloud, 239 S.E.2d 669, Syl. Pt. 2 (W. Va. 1977) (“To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child.”). Accord Phillips v. Phillips, 425 S.E.2d 834, Syl. Pt. 2 (W. Va. 1992).

130 See supra notes 84-104 and accompanying text.
various studies and commentary that reject such a bias.\textsuperscript{131} Similarly, the use of a physician experienced in the treatment of HIV/AIDS would be useful to dispel the fear that the children might contract AIDS.\textsuperscript{132} The argument raised in certain states that a gay or lesbian parent is unfit because he or she engages in alleged criminal conduct such as sodomy should be dismissed as without merit since West Virginia abolished its sodomy statute in 1976 and replaced it with crimes defining sexual assault or abuse (which would have no application between consenting adults).\textsuperscript{133}

What defense, if any, that may be necessary to address the argument that the homosexual parent’s lifestyle affects the moral development of a child might be determined from existing case law in West Virginia. In \textit{Kenneth L.W. v. Tamyra S.W.},\textsuperscript{134} the court reversed a trial court ruling which awarded custody of the parties’ minor children to the father based upon the unfitness of the mother. The mother allegedly had affairs with another man, even though the evidence clearly showed the mother was the primary caretaker.\textsuperscript{135} The court stated that

> in resolving a child custody issue, this Court will not concern itself with the adulterous conduct of a parent absent a deleterious effect upon the children. “[R]estrained normal sexual behavior does not make a parent unfit. The law does not attend to traditional

\textsuperscript{131} See, e.g., Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983). In Doe, the court relied upon testimony of three of the four psychiatrists who testified at trial that the lesbian mother’s lifestyle, in and of itself, would not adversely affect the minor child. The court specifically relied on one psychiatrist’s study comparing children of single parent heterosexual and single parent homosexual households, finding “no difference in the minor children and no evidence of sexual dysfunction” of the minor children in the homosexual parents’ households. \textit{Id.} at 296. \textit{See also} Pleasant v. Pleasant, 628 N.E.2d 633 (Ill. App. Ct. 1993). In Pleasant, the court rejected a psychiatrist’s fear that the child might be confused about gender roles and his own sexual identity due to the mother’s lesbianism, since the psychiatrist failed to testify that the child in fact had a gender role identity problem. \textit{Id.} at 641-42.

\textsuperscript{132} See, e.g., Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (refusing to restrict a HIV-positive father’s visitation since expert medical testimony presented at trial established that AIDS was not transmitted through everyday household contact); Jane W. v. John W., 519 N.Y.S.2d 603 (App. Div. 1987) (relying heavily on the father’s treating physician that the possible transmittal of AIDS did not require limitations on his visitations); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987) (granting overnight visitation privileges to a homosexual father and relying on studies that AIDS or other HIV-associated diseases are not contracted by casual household contact).

\textsuperscript{133} See \textit{W. VA. CODE} § 61-8B-1 to -18 (1997) (enacted 1976). Lack of consent resulting either from forcible compulsion or incapacity to consent is an element of every offense of sexual assault or abuse. \textit{Id.}

\textsuperscript{134} 408 S.E.2d 625 (W. Va. 1991).

\textsuperscript{135} \textit{Id.} at 630.
concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior.”

In focusing the inquiry of morality upon whether the children are affected, the court in *Kenneth L.W.* was relying on the settled rule that a parent’s sexual misconduct will not be considered as evidence of unfitness unless it is “so aggravated, given contemporary moral standards, that reasonable men would find [the] immorality, *per se*, warrant[s] a finding of unfitness because of the deleterious effect upon the child of being raised by [such a parent].”

Although the decision in *Kenneth L.W.* may not be clear as to what constitutes aggravated conduct of immorality that would warrant a *per se* finding of unfitness, the decision in *Kenneth L.W.* makes it abundantly clear that before such a finding can be made, it must be coupled with a showing that such immorality has a deleterious impact upon the child. Thus, the argument regarding the moral development of the child can be defeated by showing, for example, that the homosexual parent’s sexual practices are kept discreet in the same manner that a court would disregard an attack upon the morals of a heterosexual parent engaging in nonmarital sexual conduct that does not adversely impact the children. However, where such conduct adversely influences the children, the practitioner can expect the court or Master to consider the same in a fitness determination of the parent.

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138 In *Tucker v. Tucker*, 881 P.2d 948 (Utah Ct. App. 1996), the court made a similar ruling to that of the West Virginia court in *Kenneth L.W.*, when it stated that while it questioned a lesbian mother’s lack of moral example for her child by exposing the child to her lesbianism, the same was not linked with the mother’s ability to nurture her child or to be a supportive parent, and was therefore not a ground to deny her custody. *Id.* at 954. Declaring a parent unfit, whether based on a *per se* finding due to aggravated conduct of immorality or upon other grounds, is not an easy task in West Virginia given the heightened level of evidence required to make such a finding. In order to separate a child from its parent on the ground of unfitness of the parent, there must be cogent and convincing proof of that fact. *State ex. rel. Kiger v. Hancock*, 168 S.E.2d 798, 801 (W. Va. 1969).

139 *See supra* notes 102-104 and accompanying text (discussing conduct of a homosexual parent that adversely impacted the minor children). The issue of the morality of children's exposure to the lifestyle of their homosexual parent was at least implicitly laid to rest by the court in *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987) (rejecting the trial court's finding that the mother's household, which included her male homosexual friend, was not morally fit). *See supra* notes 125-127 and
It is unlikely that a practitioner representing a gay or lesbian parent will have to seriously address the argument that the minor children might be stigmatized by such a parent’s lifestyle. Even if evidence is presented that the minor children have been teased or harassed by others regarding their parent’s lifestyle, it is hoped that no Master or court will countenance such bigotry by denying or restricting custody or visitation upon such ground. In addition to the preceding suggestions on how to address the various arguments a gay or lesbian parent might encounter, counsel may also wish to enlist the assistance of various organizations concerned with the rights of gay and lesbian parents.

accompanying text.

140 SURVEY OF MASTERS, supra note 106. Of those Masters who made a recommendation denying or restricting the custody or visitation rights of a gay or lesbian parent, not one Master responded to the question that one of their reasons for such a decision was that the children would be stigmatized by society due to their parent’s lifestyle. See also, supra notes 17-21 and accompanying text.

141 See, e.g., Shapiro, supra note 10, at 148, where the author lists key support groups that may intervene at the trial level or on appeal, including the following:

Lambda Legal Defense and Education Fund
666 Broadway, 12th Floor
New York, NY 10012
(212) 995-8585

National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257

Lesbian Mothers National Defense Fund
P.O. Box 21567
Seattle, WA 98111
(206) 325-2643

Gay & Lesbian Advocates & Defenders
P.O. Box 218
Boston, MA 02112
(617) 426-1350

Gay & Lesbian Parents Coalition International
P.O. Box 50360
Washington, D.C. 20004
(202) 583-8029
IV. CONCLUSION

Courts across the nation have employed various standards of review to child custody or visitation disputes involving a gay or lesbian parent. A minority of courts employ the rigid *per se* analysis, which appears to be based upon nothing more than rank homophobic fears. These courts deny gay or lesbian litigants the opportunity to show their lifestyles do not adversely impact their children nor hinder their parenting abilities.

Fortunately, the vast majority of jurisdictions reject the narrow-minded *per se* approach and at a minimum allow a gay or lesbian parent to rebut with evidence any presumption that their lifestyle harms or may harm their children. Beyond those states which employ such a middle ground analysis (i.e., a rebuttable presumption approach) are the growing number of states which require a nexus between the homosexual parent’s lifestyle and the alleged harm to the child before such lifestyle becomes a relevant consideration in the dispute.

West Virginia is one of those enlightened jurisdictions, and its long-standing precedent requiring the nexus standard bodes well for the gay or lesbian parent faced with a claim that his or her lifestyle is somehow relevant as to their parenting abilities. The requirement of demonstrable proof of harm to the child as a result of the homosexual parent’s lifestyle, and not mere speculation or unfounded fears of harm, will defeat frivolous claims. The nexus standard serves the best interests of the child, and heterosexual parents concerned with their child’s development will be protected where they can show their children are harmed by the nontraditional lifestyle of the gay or lesbian parent.
APPENDIX

CLASSIFICATION OF STATES’ DECISION-MAKING FRAMEWORK
IN CHILD CUSTODY AND VISITATION
DISPUTES INVOLVING A GAY OR LESBIAN PARENT

I. STATES FOLLOWING PER SE ANALYSIS (Seven States)

B. MISSISSIPPI: White v. Thompson, 569 So. 2d 1181 (Miss. 1990).
D. NEVADA: Daly v. Daly, 715 P.2d 56 (Nev. 1986).

II. STATES REJECTING PER SE, BUT NOT SPECIFICALLY ADOPTING NEXUS APPROACH (Eight States)

Schlotman, 502 N.W.2d 831 (N.D. 1993) (nexus approach implicitly used but Jacobson not overruled or distinguished).


III. STATES FOLLOWING NEXUS APPROACH (25 States)


IV. STATES WHICH HAVE NOT ADDRESSED THE ISSUE (10 States)


D. KANSAS: Hardenburger v. Hardenburger, 532 P.2d 1106 (Kan. 1975) (finding that a mother’s allegations that father was a homosexual not supported in the record).

E. MONTANA: See Deirdre Larkin Runnette, Comment, Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should be Considering a Parent’s Sexual Orientation in Contested Custody Cases, 57 MONT. L. REV. 177 (1996) (noting that no reported decision beyond that of their trial court level addresses the issue and which reviews Montana decisions indicating that a nexus approach should be employed). See also In re Marriage of D.F.D. and D.G.D., 862 P.2d 368 (Mont. 1993) (holding that allegations that a father cross-dressed in past not a valid basis to deny him joint custody).
F. NEBRASKA: Smith-Helstrom v. Yonker, 544 N.W.2d 93 (Neb. 1996) (holding that a mother’s violation of a decree prohibiting her from cohabiting with men to whom she was not married did not outweigh the child’s best interests as there was no showing the cohabitation adversely affected her child). See also Christen v. Christen, 422 N.W.2d 92, 95 (Neb. 1988) (citing NEB. REV. STAT. § 42-364(1)(1996)) (holding that in determining a child’s best interests in a custody case, a court can consider the moral fitness of the child’s parents, including the parent’s sexual conduct, as well as the parent’s proposed living environment).


H. RHODE ISLAND: (no relevant cases found).

