Chapter 4 FACTORS CONSIDERED IN DECIDING CUSTODY

1-4 Modern Child Custody Practice § 4.43A

§ 4.43A. --Internet Sex

The 1990s brought a new type of conduct for courts to consider in divorces and custody disputes: Internet sex. The facts are somewhat different than those involving traditional nonmarital sexual relationships, but the rules of law are about the same, and nonmarital Internet ''sexual'' relationships generally are not regarded as a significant factor in deciding custody unless harm to the child is shown.

In a case before the South Dakota Supreme Court, the mother and father disputed custody of their three-year-old son. [412.2] In 1999, when the child was two-years-old, the mother admitted that ''she engaged in 'highly erotic' discourse on Internet 'chatrooms' with two different adult men. These communications occurred in her estimate, perhaps 'once a week.' She explained that 'it was kind of enjoyable that someone was finding interest in me.' ''[412.3]

The trial court found that the mother's conduct was ''potentially harmful'' and ''appalling,'' but it also found there was no ''demonstrable effect'' on the child.[412.4] In the same year, the mother had engaged in sexual intercourse with another man, including on one occasion in the mother's and father's apartment while the child slept. This incident was described by the court as ''reprehensible'' but ''isolated.''[412.5] The trial court found both parents to be good, and that the mother had been the primary caregiver of the child. The trial court granted custody to the mother and the South Dakota Supreme Court affirmed, stating that ''we cannot hold that the court was clearly erroneous when it ruled that the misconduct had no harmful effect on (the child).''[412.6]

FOOTNOTES:

Footnote 412.2. Zepeda v. Zepeda, 2001 S.D. 101, 632 N.W.2d 48(2001).

Footnote 412.3. *Id.* at 51-52.

Footnote 412.4. *Id.* at 55.

Footnote 412.5. *Id.*

Footnote 412.6. *Id.* The South Dakota Supreme Court, made the following statement of law, which reflects the majority view: ''Generally marital misconduct alone is not a controlling consideration when making a custody determination. However, when misconduct results in some demonstrate harm to the child, parental fitness becomes an issue. Harm is self-evident when misconduct occurs in the presence of a child mature enough to perceive it.'' (citations omitted). *Id.* at 54.

Modern Child Custody Practice

Chapter 4 FACTORS CONSIDERED IN DECIDING CUSTODY

1-4 Modern Child Custody Practice § 4-44

§ 4-44. Homosexual relationships

The manner in which courts treat homosexual parents who seek custody is similar to the way in which courts treat heterosexual parents who have nonmarital relationships. Some courts will assume that the parent's sexual relationship is harmful to the child and will deny custody; others will not make such a presumption, and the parent may retain custody. The varied presumptions and approaches of the courts also apply to homosexual parents' requests for overnight visitation when the parent is living with his or her lover.

Most courts agree that homosexuality per se is not a ground for denial of custody or visitation. [413] Rather, the issue is how homosexuality is manifested, particularly in the presence of the child.[414] Courts have dealt with three primary concerns about a child in the custody or company of homosexual parents: (1) the degree to which a child observes homosexual behavior; (2) the issue of whether a parent's homosexuality will cause a child to become homosexual; and (3) the degree to which a child is harmed by societal reaction to the child's homosexual parent.

As with heterosexual relationships, courts often will deny custody to a homosexual parent who flaunts his or her sexual relationship when a child is present. A homosexual parent who kisses and fondles his or her partner while the child is watching, or who engages in noisy lovemaking when the child is in the home, is likely to lose custody.[415] On the other hand, a parent who engages in affectionate, but not sexual, behavior in front of the child and who is discreet with his or her partner is less likely to lose custody or the opportunity for overnight visitation.[416] Some courts will impose restrictions on parents who are gay activists and who wish to involve their children in organized gay activities. One court, for example, affirmed restrictions on a homosexual father's visitation with his twelve-year-old son, including prohibitions against overnight visitation and attendance with his son at gay activist meetings and gay churches.[417] In a Mississippi case, however, the state supreme court reversed restrictions on a homosexual father's visitation, stating that even if the parties' 15-year-old son ''is embarrassed, or does not like the living arrangement of his father, this is not the type of harm that rises to the level necessary to place such restrictions on (the father's) visitation with his son.''[418] The supreme court thus reversed a restriction that the father not exercise visitation in the company of the father's ''life partner.''

On the other hand, the Arkansas Supreme Court affirmed a restriction on custody to the mother that said the mother could retain primary custody only if the mother's same-sex partner with whom the mother had purchased a house

no longer remained in the same residence and was not an overnight guest when the children were present.[418.1] The state supreme court said, ''Arkansas case law simply has never condoned a parent's unmarried cohabitation, or a parent's promiscuous conduct or lifestyle, when such conduct is in the presence of the child.''[418.2]

With regard to the second issue of whether a child is likely to become homosexual, the attorney for the homosexual parent may will find it useful to hire a psychologist or psychiatrist to address the issue to the court. The causes of homosexuality are too uncertain to permit a court to take judicial notice of whether or not a child of a homosexual parent is more likely to become homosexual than a child of a heterosexual parent.[419] Even though judicial notice is inappropriate on this issue, some judges seem to apply a gut belief that homosexual parents will raise their children to be homosexuals.[420] The majority view of the mental health profession, as reflected in expert testimony in custody cases, is that children of homosexual parents are not more likely to experience sexual dysfunction or become homosexuals than are children of heterosexual parents.[421]

A court's views of the third issue--societal reaction to the child of a homosexual--will depend on the preconceptions of the judge and the nature of the evidence introduced. A Missouri Court of Appeals case, which changed custody of a ten-year-old girl from a homosexual mother to the father, illustrates a strong negative perception of the problems faced by a child in the custody of a homosexual parent: ''She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness... The court does not have to wait, though, till the damage is done.''[422]Other courts, without using language as strong as Missouri's, have expressed concern that the child will face a dilemma of having to defend the homosexual parent or having to reject the homosexual parent's values.[423]

In some cases in whic homosexual parents received custody, the courts made explicit findings that the children were not embarrassed by their parents' homosexuality.[424] In, *M.P. v. S.P.,*[425] for example, decided by the New Jersey Superior Court, a mother retained custody of her two daughters, ages seven and eleven. The court said it was speculative to assume harm to the children based on a parent's homosexuality, and the court noted that the mother did not display sexual behavior in the presence of the children and did not attempt to inculcate the girls with her sexual attitudes.[426] Drawing an analogy to a case that gave custody to a parent who had an interracial marriage, the court said that if the children were raised in a stable, loving home, as these girls had been, the girls could handle any prejudice they would encounter.[427]

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COMMENT: Although it likely that a child in the custody of a homosexual parent will face issues that a child in the custody of a heterosexual parent will not encounter, the issues are not inherently so problematic that a parent's homosexuality should be an automatic negative factor when deciding issues of custody or visitation. Like custody and visitation decisions involving other factors, courts need to focus on the facts of each case and examine the impact of the factor in question on the child.

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In a case involving a stable homosexual relationship, a homosexual parent probably would be wise to call his or her partner in the relationship as a witness in order to give the court some indication of the partner's character and demeanor. In a case before the Pennsylvania Superior Court, a lesbian mother lost her request for expanded visitation, in part, because she did not call her live-in friend as a witness.[428] The Court said, ''In any custody case in which a child is to spend substantial time in the company of an adult in the custodial setting, it is incumbent on the parties and the court to present for appellate review the testimony of that person.''[429]

An issue related to homosexuality is whether a parent can be required in a custody dispute to take a blood test to determine the existence of Acquired Immune Deficiency Syndrome. In a New York trial court case between a long-term custodial father and the maternal grandparents, the court held that an AIDS test could not be ordered absent a ''compelling need for involuntary testing,'' which was not found in this case.[430] The court noted that both the City of New York and the State of New York have strong policies against involuntary AIDS testing. The court also said that even if the father were found to have AIDS, there was no showing that the disease would be transmitted to his children. Medical evidence cited by the court ''found no risk of HIV infection through close personal contact or sharing of household functions.''[431] In addition, a psychiatrist who interviewed all parties testified ''that even if the father were suffering from AIDS and had a shortened life span, this fact would not justify removing the children from their long-term custodial parent with whom they have such strong bonds of love and affection.''[432]

In 1994, the New England Journal of Medicine published an article surveying many issues related to homosexuality. Regarding homosexuals as parents, the article stated:

> The literature on lesbian mothers indicates no adverse effect of a homosexual orientation, as evidenced by psychiatric symptoms, peer relationships, and overall functioning of the offspring. The frequency of a homosexual orientation has not been greater in such children than in children of heterosexual mothers. The data on gay fathers are more scant. No evidence has emerged, however, to indicate an adverse effect of sexual orientation on the quality of fathering. Enough information has accumulated to warrant the recommendation that sexual orientation should not, in itself, be the basis for psychiatric and legal decisions about parenting or planned parenting.[433]

For discussion of visitation issues involving children raised by homosexual couples, see § 9-20.

FOOTNOTES:

Footnote 413. *See, e.g.,* Nadler v. Nadler, 255 Cal. App. 3d 253, 63 Cal. Rptr. 352

(1967) ; In re Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886, 888 (1983) ; Doe v. Doe, 284 S.E.2d 799 (W. Va. 1981) .

In Teegarden v. Teegarden, 642 N.E.2d 1007 (Ind. Ct. App. 1994) , the court held a mother's homosexuality did not render her unfit; thus, the court ordered custody for the mother, rather than the stepmother, following death of the custodial father. The appellate court also said: ''the trial court found that 'neither boy currently appears to be particularly traumatized by their mother's sexual orientation,' despite the fact they had seen Mother kissing and hugging her partner. Had the evidence revealed that Mother flagrantly engaged in untoward sexual behavior in the boy's presence, the trial court may have been justified in finding her to be unfit and, accordingly, awarded custody to Stepmother.'' *Id.* at 1010 (citation to trial record omitted).

In State *ex rel.* Human Services Dep't v. Jacinta, 107 N.M. 769, 764 P.2d 1327 (App. Ct. 1988) , the appellate court held it was improper for a trial court to refuse to allow placement of an abused and neglected girl with her homosexual brother--particularly when the home study on the brother was positive.

In Maradie v. Maradie, 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996) , the court held that a trial court may properly consider a parent's sexual conduct in judging the parent's moral fitness for purposes of granting custody, but should focus on whether the parent's behavior has a direct impact on the welfare of the child. A connection between the actions of the parent and harm to the child must be established by evidence and cannot be assumed. Further, the mere possibility of a negative impact is not enough to deny custody; there must be evidence of actual harm, either in the past or likely in the future. A trial court, thus, had erred in first making known in its final judgment rejecting a request for custody by a bisexual mother that it was taking judicial notice of the fact that a homosexual environment is not a traditional home environment and can adversely affect a child. The court's judgment was to be reversed and the case remanded to give the mother the opportunity to dispute the matter judicially noticed.

Compare White v. Thompson, 569 So. 2d 1181, 1184-85 (Miss. 1990) , in which the court said it did not have to reach the issue of whether the mother's homosexual activity was a *per se* ground for finding her unfit since there was other evidence in the record in support of giving custody to the paternal grandparents. The record showed the mother used marijuana in the presence of the children and often did not supervise them. (The father did not seek custody because he had drinking and financial problems.)

Compare also In re Marriage of Diehl, 221 Ill. App. 3d 410, 582 N.E.2d 281, 292 (1991) , in which the court affirmed custody of a five-year-old daughter to the father, instead of an allegedly lesbian mother who was living with a female friend. The appellate court held the trial court's decision did not constitute a violation of equal protection or freedom of association. The appellate court said, ''An intimate cohabitation relationship of a parent, be it heterosexual, homosexual or lesbian in nature, is a proper factor to be considered by the trial court in making a custody determination... . Contrary to the claimed discrimination, we believe that such an approach is sexual orientation neutral in that *any* such relationship is considered to be relevant regardless of the relationship's sexual orientation.'' *Id.* at 292. In this case, the trial and appellate courts seemed to regard the allegedly lesbian relationship as an inherently negative factor, although the reported opinion does not state a specific negative impact on the child.

Footnote 414. *See* Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980) .

Footnote 415. *See* Dailey v. Dailey, 635 S.W.2d 391, 393 (Tex. Civ. App. 1981) . *See also* L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (daughter testified she did not like being with her mother because ''of the stuff I saw up there ... she was kissing the other women and going to bed with them'').

In Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998) , the North Carolina Supreme Court modified custody from the father, who was a homosexual, to the mother based on the following facts: the father lived with his homosexual partner and engaged in oral sex with the door closed while the children occupied a bedroom across the hall; the children saw the father and his friend kiss each other on the cheeks and lips; the father kept pictures of ''drag queens'' in his bedroom; one of the boys cried when he learned that his father was a homosexual and the boy asked his mother to take him out of his father's home, although at the time of the hearing, the child said he did not have a preference regarding with which parent he lived. In modifying custody to the mother, the court said the change of circumstances requirement does not require a showing of adverse consequence fromthe current environment; rather it is sufficient that the trial judge thought that harm was likely and that a change of custody would beneficial to the child.

In Roe v. Roe, 228 Va. 722, 324 S.E.2d 691, 692 (1985) , the court modified custody to the mother when the nine-year-old daughter saw her father and his lovers ''hugging and kissing and sleeping in bed together.'' This upset the daughter and she wanted to live with her mother. *Cf.* Bark v. Bark, 479 So. 2d 42, 43 (Ala. Civ. App. 1985) (giving custody to father when lesbian mother spent increasing amounts of time with her lover, and father became more responsible for raising the child); M.J.P. v. J.G.P., 640 P.2d 966, 967 (Okla. 1982) (mother had an ''acknowledged, open homosexual relationship'' that included a ''Gay-la'' wedding in a church). *Compare* cases discussed *supra* § 4-41, which show situations in which parents engaging in heterosexual nonmarital relationships usually lose custody. Another similarity between cases involving homosexual relationships and cases involving nonmarital relationships exists when a parent is so preoccupied with his or her lover that the child suffers. *Compare* Hall v. Hall, 95 Mich. App. 614, 291 N.W.2d 143 (1980) (homosexual mother who is preoccupied with lover lost custody) *with* Murphy v. Murphy, 427 So. 2d 1278 (La. Ct. App. 1983) and Marlatt v. Marlatt, 427 So. 2d 1285 (La. Ct. App. 1983) .

Footnote 416. *See, e.g.,* Ashling v. Ashling, 42 Or. App. 47, 599 P.2d 475, 476 (1975) , and cases where children are asked to testify on their parents' homosexuality. *Cf.* In re Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886 (1983) , remanding denial of homosexual father's request for overnight visitation at his home.

In In re Marriage of Diehl, 221 Ill. App. 3d 410, 582 N.E.2d 281, 293-94 (1991) , the court reversed an order that prohibited an allegedly lesbian mother from exercising visitation with her five-year-old daughter in the presence of the mother's female friend. The court found the trial court's order to be a ''restriction'' that requires a showing that the child would be endangered, and the record in the case did not show endangerment.

In In re Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990) , the court reversed a

visitation restriction on a homosexual father that limited visitation to times when ''no unrelated adult'' was present. The court noted testimony that the father ''was a good, loving responsible father.'' The father, when questioned about his sex life, also testified, ''there is no way my children will be exposed to that.'' *Id.* at 493.

In Peyton v. Peyton, 457 So. 2d 321, 324 (La. Ct. App. 1984) , the court affirmed a split custody arrangement of alternating three-month periods to a mother and father when both parents had discreet nonmarital relationships; the mother's relationship was homosexual; the father's was heterosexual. The court observed, ''[T]he trial judge did not see fit to favor one form of adultery over another; we do not find his decision erroneous.''

In M.A.B. v. R.B., 134 Misc. 2d 317, 510 N.Y.S.2d 960, 963 (Sup. Ct. 1986) , the court modified custody of a twelve-year-old boy to a homosexual father who was ''discreet, not flamboyant,'' and had lived with the same partner for eight years. The boy's grades and school conduct improved markedly when he was with his father.

Cf. Hallon v. Hallon, 784 So.2d 943 (Miss. 2001) (reversing custody of three-year-old boy to father and granting custody to mother, who had been the primary caretaker, when trial judge placed undue emphasis on mother's alleged lesbian relationship, which mother denied having).

Footnote 417. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982). *See also* Anonymous v. Anonymous, 428 So. 2d 109, 113 (Ala. Civ. App. 1983) , affirming denial of overnight visitation. In Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1996) , the court affirmed restrictions on a lesbian mother's visitation that prohibited contact between the mother's partner and the children. The court noted with approval, however, that the restrictions had been eased while the case was on appeal. The trial court found harm to the children from ''eroticization'' and participation in gay and lesbian rights parades. The court noted that much of the harm to the children seemed to come from the conflict between the parents more than the sexual preferences of the mother. ''Already suffering the ill-effects of the divorce, the children were proselytized by [the mother] on one side and [the father] on the other as if their souls were a grand prize in a strange and destructive parental contest... . In their efforts to wound each other, [the father and mother] continually placed the children at sword's point.'' *Id.* at 951.

Footnote 418. Weigand v. Houghton, 730 So. 2 d581, 577 (Miss. 1999). The court denied the father's petition to modify custody even though the custodial mother lived with an abusive husband.

Footnote 418.1. Taylor v. Taylor, 345 Ark. 300, 47 S.W.3d 222 (2001).

Footnote 418.2. 345 Ark. 300, 47 S.W.2d at 225.

Footnote 419. *See* Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207, 1216 (1980) , holding that a trial judge cannot take judicial notice of possible harm to the child of a homosexual parent. *Cf.* Carney v. Carney, 24 Cal. 3d 725, 598 P.2d 36, 39, 157 Cal. Rptr. 383 (1979) , holding that a court may not take judicial notice of the cause or current treatment of childhood enuresis. *Compare* In re Marriage of Diehl, 221 Ill. App. 3d 410, 582 N.E.2d 281, 292 (1991) , in which the appellate court found it ''need not place great weight'' on a variety of sociological studies cited in and attached to the appellate briefs of an allegedly lesbian mother and her *amici*.

The studies were not presented to the trial court. The appellate court said, ''We believe, however, that, in general, issues should be fully litigated and argued at trial and this court should primarily engage in error correction.'' *Id.* (citations omitted).

Footnote 420. *See, e.g.,* In re Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886, 888 (1983) (comments of trial judge). For a later appeal involving *In re Marriage of Cabalquinto* and the issue of visitation, *see* 169 N.J. Super. 425, 404 A.2d 1256 (Ch. Div. 1979) and In re Marriage of Birdsall, 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (1988) .

For an extraordinarily harsh view of the effect of a lesbian mother on her children, see the opinion of Justice Frank Henderson of the South Dakota Supreme Court, concurring in part and dissenting in part in Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992) , in which he said: ''Lesbian mother has harmed these children [ages four and five] 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 lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation.'' *Id.* In *Chicoine,* the majority reversed an unsupervised visitation order and remanded the case for a home study to assess the safety and stability of the mother's home environment. The mother had a history of eating disorders, depression, and suicidal threats. She also had multiple homosexual relationships that seemed to upset the older child.

Footnote 421. *See, e.g.,* Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207, 1215 (1980) ; Doe v. Doe, 16 Mass. App. 499, 452 N.E.2d 293, 296 (1983) . *See also* In re Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886, 890 (1983) , in which a psychologist specializing in gender identification testified that a child's sexual preference is formed early in life, and an eight-year-old boy would not be influenced by his father's homosexuality if the father did not flaunt his sexuality. In Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) , the North Dakota Supreme Court agreed with the trial court that court could not determine if the child was likely to become homosexual or bisexual because there was insufficient expert testimony on the issue.

Footnote 422. M.K.M. v. L.E.M., 606 S.W.2d 179, 180 (Mo. Ct. App. 1980) . More recent Missouri cases continue to treat homosexuality as a strong negative factor in deciding custody. *Compare* In G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987) , *motion to transfer denied* (Mo. 1988), the appellate court affirmed granting custody to the father, primarily because of the mother's live-in lesbian relationship. The court said it ''cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development'' and ''the environment into which [the boy] would be thrust ... would not be a healthy one.'' *Id.* at 728. *See also* S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987) (denying custody to the mother when she and her lover showed affection to one another in front of the children and slept in the same bed).

In Roe v. Roe, 228 Va. 722, 324 S.E.2d 691, 692 (1985) , the court removed custody of a nine-year-old girl from a homosexual father who had a live-in lover and stated 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 societal condemnation attached to them, which will inevitably afflict her relationships with

her peers and with the community at large.''

The Alabama Supreme Court has expressed a preference for heterosexual relationships over homosexual relations and used that as a basis for modifying custody of a girl from the mother to the father. In Ex parte J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) , the court said: ''[T]he inestimable developmental benefit of a loving home that is anchored by a successful marriage is undisputed. [footnote omitted] The father's circumstances have changed, and he is now able to provide this benefit to the child. The mother's circumstances have also changed, in that she is unable, while choosing to conduct an open cohabitation with her lesbian partner, to provide this benefit.''

In Ex parte H.H., 830 So. 2d 21 (Ala. 2002) , the Alabama Supreme Court found that the record supported the trial court's decision not to modify custody from the father to the mother. The mother was a homosexual and living with a domestic partner. The supreme court reversed the Court of Civil Appeals, finding that the Court of Civil Appeals had impermissibly reweighed the evidence when the Court of Civil Appeals ruled in favor of the mother. The trial court's decision did not appear to focus on the mother's homosexuality, but Chief Justice Moore of the Alabama Supreme Court in a specially concurring 23-page opinion took note of the issue and stated: ''I write specially to state that homosexual conduct of a parent--conduct involving a sexual relationship between two persons of the same gender--creates a strong presumption of unfitness that alone is sufficient for denying that parent custody of his or her own children or prohibiting the adoption of children by of others... . Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated.'' *Id.* at 26. Justice Moore noted that homosexual conduct is a Class A misdemeanor in Alabama, *id.* at 29, citing Ala Code 1975, § 13A-6-65, and that a state statute directs that sex education programs in public schools shall include ''An emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.'' 830 So. 2d at 29, *citing* Ala. Code 1975, 16-40A-2(c)(8).

Footnote 423. *See, e.g.,* Jacobson v. Jacobson, 314 N.W.2d 78, 80-81 (N.D. 1981) ; M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982) . In Constant A. v. Paul C.A., 344 Pa. Super. 49, 496 A.2d 1 (1985) , the court affirmed a decision denying expanded visitation to a lesbian mother. The court noted the parties' ten and thirteen-year-old children were not yet aware of their mother's sexual preference. The court said that after learning of their mother's homosexuality and the mother's live-in lover, ''it is inconceivable that [the children] would go into that environment, be exposed to the relationship, and not suffer some emotional disturbance, perhaps severe.'' *Id.* at 8. The court held ''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.'' *Id.* at 5 (court's emphasis) (footnote omitted). The Pennsylvania Superior Court's approach in this case contrasts with its approach in cases involving nonmarital heterosexual relationships. In cases involving nonmarital heterosexual relationships, the Pennsylvania Superior Court explicitly declined to apply any presumptions that such relationships will have an adverse impact on children. Instead, the focus must be on the facts of each case, rather than on automatic presumptions. *See supra* § 4-43.

In Thigpen v. Carpenter, 21 Ark. App. 194, 730 S.W.2d 510, 512 (1987) , the court affirmed modification of joint custody to sole custody with father when the mother was a homosexual and had attempted suicide. The trial judge had expressed concern about the children being exposed to ridicule. The appellate court said that ''it has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is.'' *Id.* at 513.

In In re Marriage of Williams, 205 Ill. App. 3d 613, 563 N.E.2d 1195 (1990) , the court considered the mother's homosexuality and gave custody of the party's three-year-old girl to the father, noting in particular that the mother had a lesbian relationship with a woman who was a minor (the woman was about sixteen years old when the relationship began). Although the facts of the case may have supported custody to the father, the appellate court's tone suggests that homosexuality *per se* is a negative factor. ''Here, the evidence reveals that the mother exhibited gross character defects. The mother, while a nurse at Lifeway [a drug treatment center], actively recruited a patient who was a minor, to engage in an elicit and criminal sexual relationship... In doing so, the mother showed her propensity to feed her sexual appetite without regard to morals, ethics or law.'' *Id.* at 1199.

Footnote 424. Doe v. Doe, 16 Mass. App. 499, 452 N.E.2d 293, 296 (1983) ; M.P. v. S.P., 169 N.J. Super. 425, 436, 404 A.2d 1256, 1261-62 (Ch. Div. 1979) .

Footnote 425. 169 N.J. Super. 425, 404 A.2d 1256 (Ch. Div. 1979).

Footnote 426. *Id.* at 430, 439, 404 A.2d at 1259, 1263. In In re Marriage of Birdsall, 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (1988) , the court vacated a trial court order that prohibited a homosexual father from exercising overnight visitation with his son. The court held that ''an affirmative showing of harm or likely harm to the child is necessary in order to restrict parental custody or visitation.'' *Id.* at 1030, 243 Cal. Rptr. at 290. The court found there was no evidence of harm to the child and added, ''The unconventional lifestyle of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other parent's religion [in this case, the mother was a Jehovah's Witness] do not provide an adequate choice for restricting visitation rights.'' *Id.* at 1031, 243 Cal. Rptr. at 291.

In In re Marriage of Walsh, 451 N.W.2d 492, 493 (Iowa 1990) , the court removed a restriction on a homosexual father's visitation that limited his visitation to times when ''no unrelated adult'' was present. The court noted that several witnesses and even the children's mother testified that the father was ''a good, loving and responsible father to his children.'' *Id.* In addition, when the father was asked about his private sex life, he testified, ''There is no way my children will be exposed to that. There is no way.'' *Id.*

In another Iowa case, the court reversed an order of primary physical custody to the father and gave primary physical custody to the mother, who had a homosexual relationship with another woman. Facts supporting primary custody for the mother included: the father's record of assaults, the mother's greater cooperation on visitation, and the mother's greater responsibility in financial support for the child. Regarding the mother's homosexual relationship, the court said, ''Although Shawn's homosexual relationship with Lori appears to be of great concern to David and a fair amount of concern to the trial court we are more concerned about other aspects of

the parties' situations... While we do not find a discreet homosexual relationship to be a *per se* bar against a mother's custody, we do find the behavior of those sharing a custodial parent's home an important factor to continuing that custody and if that behavior can be found to harm the child, the child's interests would require either curtailment of the harmful situation or a change of custody.'' Hodson v. Moore, 464 N.W.2d 699, 700-02 (Iowa Ct. App. 1990) .

In Peyton v. Peyton, 457 So.2d 321, 325 (La. Ct. App. 1984) , the court affirmed a joint physical custody arrangement involving equal time-sharing between a homosexual mother and a heterosexual father. The court observed, ''While the child may suffer from the opprobrium of society when living in the same house with her mother and the mother's homosexual lover, such is not the case unless the relationship is notorious. Such does not appear to be the case, at least presently, in the situation at hand.''

In Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994) , the court affirmed primary custody of an eight-year-old girl and a five-year-old boy to their lesbian mother who was living in a monogamous relationship with her partner. The court said, ''As judicial officers, ruling on a legal controversy, we must be guided by principles of law. Personal conceptions of morality held by members of this Court have no place in the resolution of this controversy... . The record indicates that both [the mother] and her partner are affectionate and attentive toward the children, while being discreet about the sexual aspects of their own relationship.'' *Id.* at 39. The court also noted that, contrary to the father's fears, there was no evidence that the children were being ridiculed or embarrassed by their mother's living arrangement. In addition, the children indicated they preferred to live with their mother, and a psychologist retained by both parents recommended physical custody for the mother.

In In re Marriage of Cabalquinto, 43 Wash. App. 518, 718 P.2d 7 (1986) , the appellate court struck a trial court restriction on visitation that prohibited visitation in the father's home if the father's male friend was living with the father. The Court of Appeals noted that the father was found ''to be a kind, loving person, exemplary in every way except that he lived with another male in a homosexual relationship.'' *Id.* at 7. The court went on to say: ''Parents come in all shapes and sizes. It is a wonder of the human race that, as a general proposition, children love their parents and are better off with them than without them. There are some restraints society places upon parents, of course, but they are few in number and sexual preference is not one of them.'' *Id.* at 8 (citations omitted).

Footnote 427. 169 N.J. Super. at 436-37, 404 A.2d at 1262, citing Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243, 246 (1973) . *See also* M.A.B. v. R.B., 134 Misc. 2d 317, 510 N.Y.S.2d 960, 963-64 (Sup. Ct. 1986) (when modifying custody of twelve-year-old boy to a homosexual father, the court noted the possibility of teasing and ostracism, but said there was no showing that the father could not help the boy handle the adverse effect).

Compare In re Adoption of Evan, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sup. Ct. 1992) , in which the court approved adoption of a six-year-old boy by the lesbian life-partner of the biological mother. The biological mother and her partner decided to have a child together and obtained sperm from a friend who relinquished any claims to the child. The adoption was recommended by a guardian ad litem and two licensed social workers. The court stated, ''Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving

partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic, or social philosophy to obstruct such a favorable situation.'' *Id.* at 1002. The court also cited several trial court opinions from other states approving adoptions by lesbian partners. *Id.*

Footnote 428. Constant A. v. Paul C.A., 344 Pa. Super. 49, 496 A.2d 1 (1985) . For further discussion of *Constant A.,* see In re Marriage of Williams, 205 Ill. App. 3d 613, 563 N.E.2d 1195 (1990) .

Footnote 429. *Id.* at 8.

Footnote 430. Doe v. Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (Sup. Ct. 1988) (Justice Kristin Booth Glen).

Footnote 431. Doe v. Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 at 725 (Sup. Ct. 1988) (Justice Kristin Booth Glen).

Footnote 432. Doe v. Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 at 726 (Sup. Ct. 1988) (Justice Kristin Booth Glen). For discussion of cases in which a parent's infection with AIDS was found not to be a valid basis for denying visitation, *see infra* § 5-28.

Footnote 433. Richard Friedman, M.D. & Jennifer Downey, M.D., *Homosexuality,* 331 (No. 14) New Eng. J. Med. 923, 927 (Oct. 6, 1994) (footnotes omitted). Dr. Friedman is from the Department of Psychiatry, Columbia University College of Physicians and Surgeons, New York, N.Y. Dr. Downey is from the Department of Psychology, Adelphi University, N.Y.

Chapter 5 VISITATION BY NONCUSTODIAL PARENT

5-5 Modern Child Custody Practice § 5-17

§ 5-17. Restrictions due to parents' friends of the opposite sex

Some courts will prohibit a parent from having overnight visitation with his or her child if an unrelated adult of the opposite sex is present. The manner in which courts approach this issue is similar to the way in which courts approach consideration of nonmarital sexual relationships when deciding which parent shall have custody (*see* §§ 4-39-4-43). Some courts will assume that nonmarital sexual relationships are harmful to the child, while courts others will not. Since the mid-1980s, most courts seem unwilling to impose restrictions based on the presence of a person of the opposite unless there is a specific showing of harm to the child.

Affirming a prohibition on overnight visitation when a member of the opposite sex was present, the Louisiana Court of Appeal said that such visitation will undermine the child's respect for the family institution. [104] The South Dakota Supreme Court affirmed cessation of a father's overnight visitation with his three- and eight-year-old daughters because the court felt the older child, who had been raised with religious training, would be confused by the fact that her father was living with a woman to whom he was not married.[105]

On the other hand, many courts will not allow restrictions on overnight visitation unless there is a specific showing of harm to the child resulting from the presence of the parent's friend of the opposite sex. In the same year it affirmed restrictions on overnight visitation in order to prevent undermining of the family institution, the Louisiana Court of Appeal reversed the same type of restriction in another case. It held that absent a showing of detrimental effect, such restrictions could not stand.[106] The Illinois Appellate Court also has reversed a prohibition on a father's overnight visitation that had been imposed because the father was living with a woman to whom he was not married.[107] In that case, the court said a child of young age (four years old) was not likely to be influenced by his father's living arrangement and any impact would be lessened because the father intended to marry the woman.

An analogous issue is raised when custodial parents are prohibited from having friends of the opposite sex live with them or spend the night when the children are present. When these restrictions are imposed, some courts reason that such action is necessary for the child's welfare,[108] while other courts do not make this assumption.[109] In a case reversing and remanding a sleep-over and live-in prohibition made against a custodial father, the Florida District Court of Appeal said:

Because restrictions of this nature impact upon the private life of the custodial parent, they will be sustained only if the record contains competent substantial

evidence to demonstrate that they are required to safeguard the best interest of the child. Here, the record is devoid of any supporting evidence.[110]

Aside from the issue of whether overnight visitation restrictions serve the interest of the child,[111] some restrictions present problems of overbreadth. An inartfully drawn prohibition that a custodial mother could have custody, provided ''(n)o member of the opposite sex (may) stay in the home overnight,'' was stricken because the restriction could even apply to the mother's relatives.[112] Barring a father from visiting the children ''at any time or any place when the woman he is living with is present'' was called a clear abuse of the trial court's discretion because it applied to places outside the home such as schools, churches, and the homes of relatives.[113] Another ban against overnight visitation when a woman was present was modified so that it applied only to the particular woman the father was living with at the time of the hearing.[114] For discussion of restrictions on visitation based on a parent's homosexuality, *see supra* § 4.44.

FOOTNOTES:

Footnote 104. Billiot v. Billiot, 422 So. 2d 238, 239 (La. Ct. App. 1982) . *Accord*, Duplantis v. Monteaux, 412 So. 2d 215, 218 (La. Ct. App. 1982) . *See also* Bull v. Bull, 634 S.W.2d 228, 229 (Mo. Ct. App. 1982) . *Cf.* J.B.F v. J.M.F., 730 So. 2d 1197 (Ala. Civ. App. 1998) , affirming a restriction on a lesbian mother that she could not exercise visitation in the presence of her female companion; LeBlanc v. LeBlanc, 490 So. 2d 763 (La. Ct. App.) , *writ denied*, 494 So. 2d 332 (La. 1986), finding that the following order was proper and was in the best interest of the child: ''[the father] shall not have a female companion sleep over day or night at his dwelling or any other private or public dwelling when the child is in his care''; Gray v. Gray, 654 S.W.2d 309 (Mo. Ct. App. 1983) , affirming prohibition of overnight visitation to a father who was living with a married woman (not his wife) whom he had gotten pregnant while his own wife was pregnant.

Footnote 105. Rivers v. Rivers, 322 N.W.2d 864, 865 (S.D. 1982) . In Carrico v. Blevins, 402 S.E.2d 235, 237 (Va. Ct. App. 1991) , the court held it was within the trial court's discretion to prohibit the noncustodial mother from allowing an adult male to whom she was not married to spend the night while she exercised visitation with her seven-year-old son. The court also said, ''The moral climate in which the children are to be raised is an important consideration for the court. Although we do not hold that the moral values of the custodial parent are necessarily the deciding factor, we do hold that they may be considered in imposing visitation restraints.'' *Id.*

Footnote 106. Moreau v. Moreau, 422 So. 2d 734, 736 (La. Ct. App. 1982) . Louisiana courts also have been inconsistent in their application of the Tender Years Doctrine (*see supra* § 4-6) and in their custody decisions involving women who live with men to whom they are not married (*see supra* § 4-39). *See also* Nichols v. Nichols, 491 So. 2d 617, 618 (Fla. Dist. Ct. App. 1986) , where the appellate court removed a restriction that the mother could not have an adult male spend the night when the children were present (the court held such restrictions were not proper unless there was ''competent and substantial evidence proving the allegations that the mother's conduct has adversely affected the child''); Harrington v. Harrington, 648 So. 2d 543 (Miss. 1994) , reversing a prohibition on overnight visits with the father when he was living with a woman he was not married to and reversing a prohibition that the father not discuss with the children his relationship with his live-in friend.

Footnote 107. *In re* Marriage of Hanson, 112 Ill. App. 3d 564, 445 N.E.2d 912 (1983) . In Kelly v. Kelly, 217 N.J. Super. 147, 524 A.2d 1330 (Ch. Div. 1986) , the court allowed the father to have overnight visitation with his children, even though he was living with a woman to whom he was not married. The court noted that the father had a ''long-term and apparently stable'' relationship with his friend. The court also noted that experts had testified that the children would benefit from overnight visits with their father and from being able to compare different value systems held by the mother and father. Kelly v. Kelly, 217 N.J. Super. 147, 524 A.2d 1330 (Ch. Div. 1986) , at 1334-35. The court rejected the mother's argument that she had a First Amendment right of religious freedom to withhold overnight visitation if she found the visitation morally objectionable. For additional discussion of religion and the First Amendment, *see supra* § 4-36.

Footnote 108. *See, e.g.*, Primm v. Primm, 409 So. 2d 1299 (La. Ct. App. 1982) ; Parillo v. Parillo, 554 A.2d 1043 (R.I. 1989) (affirming an order prohibiting the custodial mother from having ''unrelated males'' stay overnight at her residence when the children were present, even though all the children said they got along with the mother's live-in friend).

Footnote 109. *See, e.g.*, Miller v. Miller, 423 So. 2d 638 (Fla. Dist. Ct. App. 1982) .

Footnote 110. Miller v. Miller, 423 So. 2d 638 (Fla. Dist. Ct. App. 1982) , at 639-40.

Footnote 111. For the author's view on restrictions based on nonmarital sexual relationships, *see supra* § 4-43 in the Comment contained in the last paragraph.

Footnote 112. Bolton v. Bolton, 412 So. 2d 72, 73 (Fla. Dist. Ct. App. 1982) . *See also* Jackson v. Jackson, 279 S.C. 618, 310 S.E.2d 827, 829 (Ct. App. 1983) .

Footnote 113. Lasseigne v. Lasseigne, 434 So. 2d 1240, 1241-42 (La. Ct. App. 1983) .

Footnote 114. Gallo v. Gallo, 184 Conn. 36, 440 A.2d 782, 787 (1981) .

Chapter 5 VISITATION BY NONCUSTODIAL PARENT

5-5 Modern Child Custody Practice § 5-18

§ 5-18. Restrictions pertaining to religious practices.

Some custodial parents try to prohibit the noncustodial parent from involving the child in the noncustodial parent's religious practices. Such attempts nearly always fail. Court restrictions on a parent's religious activities with a child are generally found to violate the parent's first amendment rights [115] and rights to family privacy.[116] Before a court will prohibit a parent's religious activities with a child, the parent objecting to the practices must make ''a clear affirmative showing that these religious activities will be harmful to the child.''[117] The harm must be demonstrated in detail; it may not be surmised by a parent's general testimony that the child was confused or upset.[118] When dealing with matters of religion in custody and visitation cases, courts have observed that ''intervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark.''[119]

In *In re Marriage of Mentry*,[120] a California mother obtained a restraining order prohibiting the father from engaging in any religious activity or discussions with the children during the father's visitation with them. The father was a member of the Church of Jesus Christ of Latterday Saints (the Mormons). The mother testified that the children, who were six and seven years old, were confused about the doctrinal differences between the father's religion and the mother's religion.[121] She said that when her six-year-old son was angry at her, he would say: ''I am a Mormon. I want to be a Mormon. I want to be like my Daddy.''[122] A court conciliator who had talked to the parents, but not to the children, also testified that the children would be confused by their parents' religious differences.

The California Court of Appeal reversed the restraining order, stating that the evidence of harm to the children was ''manifestly insufficient''[123] and ''essentially conjectural.''[124] The court said ''the order represents an unwarranted intrusion into family privacy.''[125] The court also held that restrictions on a parent's religious practices would undermine the state's policy of giving both parents a meaningful role in the raising of their children.[126] The Massachusetts Supreme Judicial Court also removed a restraining order that prohibited the noncustodial parent from engaging in religious activities with his children. In *Felton v. Felton*,[127] the father, a Jehovah's Witness, instructed his seven- and four-year-old daughters in religion and took them to Jehovah's Witness gatherings. The trial court restrained such activity, again on generalized testimony from the mother that the children were confused and upset. The court reversed, holding that the harm must be shown in detail. The court added: ''The law ... tolerates and even encourages up to a point the child's exposure to religious influences of both parents although they are

divided in their faiths ... . (I)t is suggested, sometimes, that a diversity of religious experiences is itself a sound stimulant for a child.''[128]

In a case before the North Dakota Supreme Court, the court similarly upheld a noncustodial parent's right to expose his children to new religious beliefs. In *Hansen v. Hansen*,[129] a mother sought to prohibit the father from taking the parties' eleven- and seventeen-year-old sons to any church other than a Catholic church. The children had been raised as Catholics, and the father also had attended the Catholic church until his recent conversion to the Pentecostal Apostolic Church. The mother testified that the father told the children that ''they are not religious,'' ''that the Catholic church believes in cannibalism,'' and that ''the Catholic church and the Lutheran church taught false doctrines.''[130] The mother said that, as a result, the boys were disturbed by the father's religious beliefs and did not like visiting with him. The North Dakota Supreme Court reversed a trial court order that prohibited the father from taking the children to his church or church services. The court held that harm from conflicting religious instructions may not be presumed, and that ''the evidence in this case falls short of the clear and affirmative showing of physical or emotional harm to the children required to justify the religious restrictions.''[131]

In a New Hampshire case, the trial judge, in awarding joint custody, structured each parent's time with the child so that the father could have his religious holidays with the child (Christmas Eve, Christmas Day, and Easter), but the mother, who was a member of the World Wide Church of God, could not spend her religious holidays or weekly Sabbath services with the child.[132] The apparent reason for the time allocation was the trial court's preference for the father's more traditional religion over the mother's less traditional religion. The New Hampshire Supreme Court held that the visitation provisions violated the establishment clause of the first amendment and remanded the case for setting a visitation schedule that did not favor one parent's religion over the other's.[133]

In cases in which courts have approved restrictions on a child's religious training, specific harm to the child usually has been found. In one case, a father sought to enroll his nine-year-old child in Jewish Sunday School, even though the custodial mother was raising him as a Lutheran.[134] The mother was also training to become a lay minister in the Lutheran Church. At trial, a psychologist testified that the child was experiencing anxiety problems because of the religious conflict and that the child was soiling his pants (encopresis) because of his anxiety. The anxiety and encopresis ceased during a pretrial period when the parties agreed that the child would not have to attend Jewish Sunday School. Based on this record, the Court of Appeals affirmed the trial court's decision that the child not be indoctrinated in the Jewish faith. In this case, the father's opportunity to expose his child to Judaism was not completely blocked. The mother did not object to the child attending Jewish services, attending Jewish summer camp, and celebrating Jewish holidays, but she did object to the child being enrolled in a Jewish school.

In another case, a Lutheran mother was given exclusive control over the religious upbringing of the parties' two children, ages eight and ten; the father was prohibited from taking the children to his church, the Assemblies of God.[135] The children testified that they were ''a little afraid'' of the five-hour faith-

healing service they attended and that they would rather not go to such services or to an Assemblies of God Bible camp.[136] In addition, the mother testified that the children would return from visits to their father's church in an ''extremely upset and emotional state indicating that I was going to hell because I did not go to the correct church.''[137]

Similarly, a father who was a Jehovah's Witness was not allowed to take his children to religious services after the children were found to be '' 'emotionally strained and torn' as a result of the parties' conflicting religious beliefs.''[138] In another case involving a Jehovah's Witness, a mother was able to modify a joint parenting agreement to sole physical rights and responsibilities and obtain a provision that the father not bring the children to Jehovah's Witness gatherings.[138.1] In this case, the mother presented ''extensive evidence'' that the parties' daughters were experiencing ''extreme confusion and anxiety'' including nightmares, stomach aches and thumb-sucking.[138.2] The children's pediatrician and counselor said the children were suffering from anxiety. Conflicts included participation of the children in birthday and holiday celebrations at school. The state supreme court, in affirming the trial court's restrictions said, ''(T)he court was not in the position of picking a religion for the children, but was only giving effect to the mother's decision on that issue (regarding the religious upbringing of the children.''[138.3]

In cases involving expert testimony on religious disputes, an issue may arise regarding the competency of a mental health professional to testify on matters concerning religion. One appellate court that faced the issue rejected a father's contention that a psychologist needed special expertise in religion.[139] The appellate court said the psychologist ''*was qualified* as an expert *to testify on the effect of the* parents' *dispute on* the emotional health of *the children* and the court properly admitted his testimony for that purpose.'' (Emphasis by the court.)[140]

Another visitation issue concerns the propriety of a court ordering the noncustodial parent to take the child to religious services or to return the child to the custodial parent so that the custodial parent may do so. A Virginia court held such an order violated a state constitutional provision that ''[n]o man shall be compelled to frequent or support any religious worship.''[141]

FOOTNOTES:

Footnote 115. *See* Sanborn v. Sanborn, 123 N.H. 740, 465 A.2d 888, 893-94 (1983) . For further discussion of constitutional issues, *see supra* §§ 4-36-4-38 on the use of religion as a factor to determine child custody.

Footnote 116. *See* *In re* Marriage of Mentry, 142 Cal. App. 3d 260, 262 & 266-68, 190 Cal. Rptr. 843, 844 & 847-49 (1983) . *But cf.* J.L.P.(H.) v. D.J.H., 643 S.W.2d 865 (Mo. Ct. App. 1982), affirming a restriction that prohibited a homosexual father from taking his twelve-year-old son to gay churches). In *J.L.P.(H.)*, the court's primary reason for the restriction seemed to be its perception of harm to the child from being in the company of homosexuals rather than harm from religious training per se. For further discussion of consideration of homosexuality in custody decisions, *see supra* § 4-44.

Footnote 117. *In re* Marriage of Murga, 103 Cal. App. 3d 498, 505-06, 163 Cal. Rptr. 79, 82 (1980) . *See also* *Sanborn*, 123 N.H. at 748-49, 465 A.2d at

894. In Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715, 721 (Ct. App. 1988) , the court remanded a case in which a father wished to continue to expose his children to the Sikh religion and held, ''Courts should adhere to a policy of impartiality between religions, and should intervene into this sensitive and constitutionally protected area *only* if there is a clear and affirmative showing of harm to the children'' (court's emphasis).

Footnote 118. Felton v. Felton, 383 Mass. 232, 418 N.E.2d 606, 607 (1981) . *See also* *In re* Marriage of Mentry, 142 Cal. App. 3d 260 at 265, 190 Cal. Rptr. 843 at 846 (1983) (quoting and adopting *Felton*).

Footnote 119. Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715, 720 (Ct. App. 1988) , quoting Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (1958) .

Footnote 120. 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983).

Footnote 121. The mother was a member of the Los Gatos Christian Church, which the mother admitted was hostile to the Mormon Church. 142 Cal. App. 3d 260 at 262-64 & 271, 190 Cal. Rptr. 843 (1983), 190 Cal. Rptr. at 844-46 & 851.

Footnote 122. 142 Cal. App. 3d 260 (1983), at 264.

Footnote 123. 142 Cal. App. 3d 260 (1983), at 266, 190 Cal. Rptr. at 847.

Footnote 124. 142 Cal. App. 3d 260 (1983), at 263, 190 Cal. Rptr. at 845.

Footnote 125. 142 Cal. App. 3d 260 (1983), at 262, 190 Cal. Rptr. at 844.

Footnote 126. 142 Cal. App. 3d 260 (1983), at 268, 190 Cal. Rptr. at 849.

Footnote 127. 383 Mass. 232, 418 N.E.2d 606 (1981).

Footnote 128. 142 Cal. App. 3d 260 (1983), at 235, 418 N.E.2d at 607. Indiana has a statute that provides ''the custodial parent may determine the child's upbringing, including his education, health care, and religious training.'' Ind. Code § 31-1-11.5-21(b) (1986). The statute has been construed to allow a custodial parent's control over whether the child may be enrolled in a religious school or camp, while preserving the right of a noncustodial parent to discuss religious beliefs with the child. Swartzel v. Swartzel, 492 N.E.2d 71, 73 (Ind. Ct. App. 1986) .

Footnote 129. Hansen v. Hansen, 404 N.W.2d 460 (N.D. 1987) .

Footnote 130. 404 N.W.2d 460 (N.D. 1987), at 464.

Footnote 131. 404 N.W.2d 460 (N.D. 1987), at 465.

Footnote 132. *Sanborn*, 123 N.H. at 748-49, 465 A.2d at 894.

Footnote 133. *Sanborn*, 123 N.H. at 748-49, 465 A.2d at 894.

Footnote 134. Funk v. Ossman, 150 Ariz. 578, 724 P.2d 1247 (Ct. App. 1986) . In McCown v. McCown, 277 N.J. Super. 213, 649 A.2d 418 (App. Div. 1994) , the court affirmed a decision to deny the mother permission to enroll the children in a Jewish day school (a yeshiva). The mother and father had been Protestants and raised the children in that faith. After the parties divorced, the mother converted to Orthodox Judaism and married a man of that faith. The mother then sought to enroll the children in a Jewish day school. The father, who had joint legal custody, apparently did not contest the children being exposed to Jewish customs in their mother's and stepfather's home, but the father did oppose enrolling the children in the Jewish day school. The trial judge ruled in favor of the father and accepted testimony from a mental health expert that ''attendance at the yeshiva would only serve to isolate the children from their father.'' McCown v. McCown, 277 N.J. Super. 213, 649 A.2d 418 (App. Div. 1994) , at 422. The appellate court affirmed.In LeDoux v. LeDoux, 234 Neb. 479, 452 N.W.2d 1 (1990) , the court restricted a father's visitation with his children because of ''very substantial stress'' to the child. *Id.* at 4. In this case, the six-year-old son wet himself, had nightmares, and feared his father because of confrontations between the father and the child regarding Catholicism. The father was a Jehovah's Witness. The Nebraska Supreme Court affirmed an order that prohibited the father from exposing his child to religious practices that were inconsistent with the Catholic religion. The order also required the father to permit the children to engage in activities normally associated with the Catholic religion.In Kendall v. Kendall, 426 Mass. 238, 687 N.E.2d 1228 (1997) , the court upheld restrictions on visitation upon a showing of harm to the children. The mother was Jewish; the father was a member of the Boston Church of Christ. In this case, the children were found to have a firm Jewish identity and were distressed when their father took them to services where they were taught ''that those who do not accept the Boston Church of Christ faith are damned to go to hell where there will be 'weeping and gnashing of teeth.' '' *Id.* at 1233. In addition, the father cut off the son's religiously meaningful sideburns (payes) and threatened to cut off the son's clothing fringes (tzitzitz). The Massachusetts Supreme Court approved the trial court's restrictions, which provided in part: ''Each parent shall be entitled to share his/her religious beliefs with the children with restrictions as follows: neither may indoctrinate the children in a manner which substantially promotes their alienation from either parent or their rejection of either parent. The [father] shall not take the children to his church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or bible study if it promotes rejection rather than acceptance of their mother or their own Jewish self-identity. [The father] may have pictures of Jesus hanging on the walls of his residence [but the father] may not take the children to religious services where they receive the message that adults or children who do not accept Jesus Christ as their lord and savior are destined to burn in hell. By way of further example, [the father] may not shave off [the son's] payes. This provision shall not be construed so as to prevent [the father] from having the children with him at events involving family traditions at Christmas and Easter.'' *Id.* at 1231.

Footnote 135. *In re* Marriage of Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986) .

Footnote 136. *In re* Marriage of Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986) , at 921.

Footnote 137. *In re* Marriage of Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986) , at 919 (quoting the mother).

Footnote 138. *In re* Bentley, 86 A.D.2d 926, 448 N.Y.S.2d 559 (1982) .

Footnote 138.1. Meyer v. Meyer, 789 A.2d 921 (Vt. 2001) .

Footnote 138.2. *Id.* at 924.

Footnote 138.3. *Id.* at 925.

Footnote 139. *In re* Marriage of Andros, 396 N.W.2d 917, 923 (Minn. Ct. App. 1986) .

Footnote 140. *In re* Marriage of Andros, 396 N.W.2d 917, 923 (Minn. Ct. App. 1986) . For further discussion of use of mental health experts, see Chapter 13.

Footnote 141. Carrico v. Blevins, 402 S.E.2d 235, 237-38 (Va. Ct. App. 1991) , quoting Va. Const. art. I, § 6.

Chapter 5 VISITATION BY NONCUSTODIAL PARENT

5-5 Modern Child Custody Practice § 5-19

§ 5-19. Agreements between the parties regarding religious training of the child

The enforceability of an agreement between parents regarding a child's religious training varies from state to state. New York and North Carolina, for example, will enforce such agreements; [142] Pennsylvania and Ohio will not.[143] The issue may arise in the context of a written agreement between the parties that a child will attend a religious school. New York has enforced such agreements as long as they are in child's best interest. The courts in New York seem to presume that such agreements are in the best interest of the child, and the burden of proof is on the party who seeks to depart from the agreement ''to show that the observance of the religious guidelines specified in the separation agreement was detrimental to the child.''[144] In one case, the parties had agreed ''that the CHILDREN shall attend a yeshivah or school providing Jewish religious training until the completion of the 12th grade.''[145] When the custodial parent withdrew the children from a yeshivah and enrolled them in a public school, the court ordered that the children be re-enrolled in a full-time yeshivah or Jewish day school. In that case, the evidence did not show any harm to the children from their religious education, and, in fact, there was testimony they had benefited from it.[146]

In another New York case, a mother received custody by agreement, and the mother promised to raise and educate the child (who was almost two) as an Orthodox Jew.[147] Within a few years, the mother was no longer keeping a Kosher kitchen and she had withdrawn the child from a Jewish school. The father sought to gain custody because the mother violated their agreement. The trial court continued custody with the mother, stating that the father had not shown a material change in circumstances. The appellate court reversed and remanded, holding that the burden of proof should not have been on the father, but rather on the mother to show that the agreement was detrimental to the child. In remanding the case, the appellate court stated that, although an agreement on the child's religious training is enforceable, the ultimate issue is still the best interest of the child: ''We recognize, of course, that, at his present age, seven years, and considering the mother's exclusive custody for the past five years, it may well be too late to enforce religious orthodoxy on the child and that a change in custody from the mother to the father would be more harmful than helpful.''[148]

An agreement regarding the religious upbringing of a child has also been upheld in North Carolina.[149] The court found that the father of a child born out of wedlock was properly given responsibility for his daughter's religious upbringing in accordance with a previous agreement between the parties sharing joint custody of the child. In addition to the parties' agreement, there was evidence that the child had had a positive sense of her identity as a Jew since she was three years old and had been quite involved in her father's synagogue. It further appeared that the child had

suffered stress and anxiety after her mother attempted to involve her in activities at a Methodist church.

Although New York and North Carolina will enforce agreements regarding a child's religious training, a majority of states (that have ruled on the issue) will not. The majority view is that such agreements violate a parent's religious freedom; and contracts that attempt to deprive a parent of that First Amendment right are not enforceable.In Pennsylvania, for example, a mother sought to enforce a premarital agreement by which any children of the marriage would be raised in the Jewish faith.[150] The mother was Jewish; the father was raised Roman Catholic. The trial court prohibited the father from taking his children to religious services ''contrary to the Jewish faith'' during periods of custody or visitation.[151] The father, who wanted to take his children to occasional Roman Catholic services, appealed. The Pennsylvania Superior Court reversed. Writing for the majority, Judge John T.J. Kelly, Jr., wrote:

Enforcement plainly encroaches upon the fundamental right of individuals to question, to doubt, and to change their religious convictions, and to expose their children to their changed beliefs.

... .

Consequently, a hopeful and perhaps naive prenuptial assurance of a future commitment to an agreed (usually vague) course of religious instruction for the then as yet unborn children must remain as legally unenforceable in civil courts as the wedding vows the parties even more solemnly exchanged.[152]

Similarly, an Ohio court refused to enforce both a premarital agreement and a separation agreement regarding a child's religious training.[153] The court stated, ''Nor can the free choice of religious practices be circumscribed or controlled by contract.''[154]

FOOTNOTES:

Footnote 142. *See infra* notes 144-49 and accompanying text.

Footnote 143. *See infra* notes 150-54. And accompanying text.

Footnote 144. Perlstein v. Perlstein, 76 A.D.2d 49, 429 N.Y.S.2d 896, 901 (1980) . *See also* Sina v. Sina, 402 N.W.2d 573, 574-75 (Minn. Ct. App. 1987) , in which the court held it was within the trial court's discretion to prohibit the father from exposing the child to a third religion when the parties had already agreed that ''[t]he children of the parties shall continue to be raised in the Lutheran faith but will be exposed to the Catholic faith with [the father].'' The trial court found that exposing the children to a third religion would be ''confusing and detrimental.'' *Id.* at 576.

Footnote 145. Gruber v. Gruber, 87 A.D.2d 246, 451 N.Y.S.2d 117, 118 (1982) (capitalization in quoted agreement).

Footnote 146. Gruber v. Gruber, 87 A.D.2d 246, 451 N.Y.S.2d 117 (1982) (capitalization in quoted agreement), at 119-21.

Footnote 147. Perlstein v. Perlstein, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1980) .

Footnote 148. Perlstein v. Perlstein, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1980) , at 901. *See also* Wheeler v. Wheeler, 147 A.D.2d 939, 537 N.Y.S.2d 387 (1989) (reversing an order that the father comply with an agreement regarding the children's attendance at church services when the order was entered without an evidentiary hearing).

Footnote 149. MacLagan v. Klein, 123 N.C. App. 557, 473 S.E.2d 778 (1996) .

Footnote 150. Zummo v. Zummo, 394 Pa. Super. 30, 574 A.2d 1130, 1141 (1990) .

Footnote 151. Zummo v. Zummo, 394 Pa. Super. 30, 574 A.2d 1130 (1990) , at 1132.

Footnote 152. Zummo v. Zummo, 394 Pa. Super. 30, 574 A.2d 1130 (1990) , at 1146 & 1147.

Footnote 153. Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App.) *appeal dismissed*, 168 Ohio St. 373, 154 N.E.2d 820 (1958) (*per curiam* opinion stating ''the appeal as of right is dismissed for the reason that no debatable constitutional question is involved'').

Footnote 154. Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App.) , at 433. In Sotnick v. Sotnick, 650 So. 2d 157, 159-60 (Fla. Dist. Ct. App. 1995) , the court held that the parties' declaration to a Rabbinical Assembly stating their intention to ''enter their minor son in God's covenant with Israel (and) bring their son up in the Jewish faith'' was not enforceable and the mother could expose the children to her Christian beliefs.In *In re* Marriage of Wolfert, 598 P.2d 524, 526 (Colo. Ct. App. 1979) , the court held the custodial parent has the right to determine the child's religious training and ''that premarital agreements concerning the religious training of unborn children are unenforceable in the courts.'' For a collection of cases on the subject, *see* 22 A.L.R.4th 1028 (1982).

Modern Child Custody Practice
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Chapter 9 THIRD PARTY CUSTODY AND VISITATION

1-9 Modern Child Custody Practice § 9-20

§ 9-20. Visitation for children raised by homosexual couples

An issue arising with increasing frequency is the right of visitation (or custody) regarding children raised by homosexual couples. In these cases, the children have been in the company of two persons of the same sex, both of whom may have been acting in the role of parent. If the couple separates and there is a dispute over custody or visitation, courts must decide the rights of each member of the couple.

The first cases to deal with the issue generally denied visitation to same-sex partners. More recent cases have granted visitation. Examples of the first group of cases include cases from New York, California and Wisconsin, involving lesbian couples. In the New York and California cases, the couples conceived a child by artificial insemination. [185] In the Wisconsin case, one member of the couple adopted a child.[186]

When the couples separated, the members of the couples who were not the biological parent (or the adoptive parent in the Wisconsin case) sought custody or visitation of the child. The nonbiological or nonadoptive ''parents'' made many arguments in support of their positions, including that the ''parents'' had served as a ''*de facto* parent'' or a parent ''by estoppel.'' In each case, however, the courts denied the request, holding that state statutes gave rights only to biological or adoptive parents. In three cases, the courts indicated that the legislature could expand ''parental'' rights to cover situations, but the courts would not do so.

In the California case, the court said that expanding the definition of ''parent'' to cover this case could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of step-parents or other close friends of the family... . By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of a particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intended only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.[187]

In a Vermont case, a woman who had lived with a child's adoptive mother as ''life partners'' had been largely responsible for caring for the child during the first three and one-half years of the child's life and until the couple had separated. The woman sought to invoke the state's *parens patriae* authority to protect children as the basis for an award of visitation rights. The court found that there was no common law, statutory, or constitutional right and no judicially acknowledged public policy that would provide a legal basis for the plaintiff's claimed right to parent-child contact as an equitable or *de facto*

parent. The court emphasized the extremely limited circumstances under which the Vermont courts have historically been willing to intervene in custody matters and that the plaintiff might well have been able to protect the interests she sought to assert by adopting her partner's child.[188]

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COMMENT: Just as a child can have a very significant relationship with a stepparent that could justify visitation and even custody,[189] so too can a child have such a relationship with a person who has lived with the parent and child and has served as a parent to the child. The fact that both ''parents'' are of the same sex does not diminish the child's potential attachment to both parties, as well as both parties' attachments to the child. Granting custody or visitation to a party who is not related by blood or adoption to a child is an extraordinary circumstance that should be done with caution; nonetheless, it should be done if it will serve the best interest of the child.

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In 2000, the New Jersey Supreme Court in the case of *V.C. v. M.J.B.*, granted visitation to a same-sex partner who helped raise twins during the first two years of the twins' lives before the lesbian couple broke up and the two women and two children no longer lived together as a unit.[189.1] The twins were conceived by artificial insemination during the relationship. The court said, ''Although the case arises in the context of a lesbian couple, the standard we enunciate is applicable to all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption.''[189.2] The criteria the court used to determine if a third party is entitled to seek visitation is de facto parenthood.

> [T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. We are satisfied that that test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child.
>
> Prong one is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. Without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status. To avoid that result, in order for a third party to be deemed a psychological parent, the legal parent must have fostered the formation of the parental relationship between the third party and the child ... . Ordinarily, a relationship based on payment by the legal parent to the third party will not qualify ... .
>
> [T]he ending of the relationship between the legal parent and

the third party does not end the bond that the legal parent fostered and that actually developed between the child and the psychological parent ... .

[P]articipation in the decision to have a child is not a prerequisite to a finding that one has become a psychological parent to the child ... .

[A] finding that a third party assumed the obligations of parenthood, is not contingent on financial contributions made by the third party. Financial contribution may be considered but should not be given inordinate weight when determining whether a third party has assumed the obligations of parenthood. Obviously, as we have indicated, the assumption of a parental role is much more complex than mere financial support. It is determined by the nature, quality and extent of the functions undertaken by the third party and the response of the child to that nurturance. Indeed, we can conceive of a case in which the third party is the stay-at-home mother or father who undertakes all of the daily domestic and child care activities in a household with preschool children while the legal parent is the breadwinner engaged in her occupation or profession.[189.3]

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COMMENT: *V.C.* was decided two months before the decision of the U.S. Supreme Court in *Troxel v. Granville* (described in *supra* § 9-13). It could be argued that the U.S. Supreme Court's decision gives greater rights to biological parents over third parties and that the results in *V.C*. would be precluded. The better view, however, is that de facto parenthood, particularly for a period of years, is the type of special or exceptional circumstance referred to by the U.S. Supreme Court that justifies a state granting rights of visitation to third parties.

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In a case that came after *Troxel,* the Pennsylvania Supreme Court held that a same-sex partner who stood *in loco parentis* to a three-year-old child who was born during the relationship had standing to seek visitation.[189.4] The court said, ''(A) a biological parent's rights 'do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so.''[189.5]

FOOTNOTES:

Footnote 185. Alison D. v. Virginia M., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) ; Nancy S. v. Michele G., 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991) .

But compare *In re* Adoption of Evan, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sur. Ct. 1992) , in which the court approved adoption of a six-year-old boy by the lesbian life-partner of the biological mother. The biological mother and her partner decided to have a child together and obtained sperm from a friend, who relinquished any claims to the child. The adoption was recommended by a guardian ad litem and two licensed social workers. The court stated, ''Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic, or social philosophy to obstruct such a favorable situation.'' *Id.* at 1002 (court's emphasis). The court also cited several trial court opinions from other states approving adoptions by lesbian partners. *Id.* The court also noted that in the event the couple separated, the lesbian partner would be entitled to seek visitation.

Footnote 186. *In re* Interest of Z.J.H., 157 Wis. 2d 431, 459 N.W.2d 602 (Wis. App. 1990) .

Footnote 187. *Nancy S. v. Michele G.*, 279 Cal. Rptr. at 219 .

Footnote 188. Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) .

Footnote 189. For discussion of visitation and custody for stepparents and other third parties, *see supra* §§ 9-6, § 9-7 and § 9-19.

Footnote 189.1. V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000) .

Footnote 189.2. *Id.* at 205-06, 748 A.2d 542.

Footnote 189.3. *Id.* at 223-26, 748 A.2d 551-53. *See also* Custody of H.S.H.-K, 193 Wis. 2d 649, 533 N.W.2d 419, 421 (1995). In S.F. v. M.D.. 132 Md. App. 99, 751 A.2d 9 (2000) , the court firmly implied it could be appropriate to grant visitation to a same-sex partner, but the court affirmed denial of visitation to the same-sex partner in this case because repeated periods of visitation resulted in extreme stress on the child and the substantial dysfunctional behavior by the child.

Footnote 189.4. T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001). The court said, ''The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties ... ..The third party in this type of relationship, however, cannot place himself *in loco parentis* in defiance of the parent's wishes and the parent/child relationship '' *Id.* at 916-17.

In Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000), the state supreme court held the family court was vested with jurisdiction to entertain a petition to seek visitation with a child who was born during the petitioner's relationship with her same-sex partner. The court held that the same-sex partner seeking visitation was an ''interested party'' under the Uniform Law on Paternity and that she had a de facto mother-child relationship.

Footnote 189.5. T.B. v. L.R.M., 786 A.2d at 919, *quoting* J.A.L. v. E.P.H., 453 Pa. Super. 78, 682 A.2d 1314, 1322 (1996).