Judicial Treatment of Parental Cohabitation after *Jarrett v. Jarrett*  

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**INTRODUCTION**

Census Bureau statistics indicate that from 1960 to 1970, the incidence of nonmarital cohabitation in the United States increased 700%.\(^1\) Since 1970, the number of persons cohabiting has risen an additional 100%.\(^2\) As the parallel climb in the divorce rate continues, it is estimated that over 30% of all children will experience a parental divorce.\(^3\) These figures reflect a dramatic change in society's attitude toward traditional notions of marriage and child-rearing. This change of attitude, however, has not been accepted by all sectors of society. As competing societal values and attitudes toward cohabitation continue to surface, the legal system often serves as the battleground for determining the legal consequences which attach to nonmarital relationships.\(^4\)

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4. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 Wis. L. Rev. 275, 276. The California Supreme Court, in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), addressed the issue of the remedies that may be available to a nonmarital party after the nonmarital relationship has ended. Based upon a recognition of the prevalence of nonmarital relationships in society and the social acceptance of them, the court recognized that a change in judicial attitude toward cohabitation was warranted. Accordingly, the court concluded that a cause of action for damages can be predicated upon an express oral contract, implied contract, constructive trust, or quasi-contract.
In the area of child custody, the judiciary has had to consider whether cohabitation by a custodial parent so adversely affects the child as to justify a change in the original custody decree. The Illinois Supreme Court addressed this issue in Jarrett v. Jarrett. The court held that a transfer of custody from a cohabiting parent to a non-cohabiting parent was justified on the grounds that the cohabiting parent’s lifestyle threatened the children’s moral well-being.

Following Jarrett, the Illinois Appellate Court has developed a variety of distinctions and exceptions to avoid the force of the Jarrett decision. This has produced a number of approaches to the treatment of cohabitation in custody proceedings. As a result, there are no consistent guidelines for the Illinois courts to follow when presented with this issue.

This note will focus on cohabitation as a factor in custody determinations. First, it will set forth the current standards used in Illinois custody proceedings. Second, the Jarrett decision and the various responses to Jarrett by the Illinois Appellate Court will be discussed. Third, the conclusive presumption established by Jarrett will be analyzed and the reasons why it should be rejected set forth. In addition, the current posture of the Illinois courts concerning this issue will be discussed. Finally, recommendations will be proposed for use by the courts in custody proceedings involving a cohabiting parent.

The Illinois Supreme Court rejected the reasoning of Marvin in Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). The Hewitt court criticized the Marvin rationale that changes in societal values required a parallel change in the law relating to marriage. As a result, it refused to confer legal status on the cohabitational relationship. See generally Note, Beyond Marvin: A Proposal for Quasi-Spousal Support, 30 STAN. L. REV. 359 (1978).

6. Id. at 341, 400 N.E.2d at 423.
8. See infra text accompanying notes 106-37.
BACKGROUND

The Best Interests Standards

Judicial Treatment

The current standard for the resolution of custody disputes is the "best interest of the child." The goal of the best interest standard is to place the child in the environment which will pro-

9. At common law, the adjudication of custody disputes was governed by the simple rule that the father was "the person entitled by law to the custody of his child." King v. DeManneville, 102 Eng. Rep. 1054, 1055 (1804) (Lord Ellenborough speaking). This absolute right of the father arose from his legal obligation to support his child. In addition, it was an outgrowth of the prevailing view of children as chattel. See 1 W. BLACKSTONE, COMMENTARIES *447-454. Custody law in the first half of the twentieth century witnessed a complete reversal from the common law paternal preference to an equally rigid preference for the mother. The mother of a young child was automatically given custody unless she was found to be unfit. See Jones, Tender Years Doctrine: Survey and Analysis, 16 J. Fam. L. 695 (1978); Roth, Tender Years Presumption in Child Custody Disputes, 15 J. Fam. L. 423 (1977); Note, Maternal Preference and the Double Burden: Best Interest of Whom?, 38 L.A. L. Rev. 1096 (1978).


10. This standard was first enunciated by Justice Brewer in Chapsky v. Wood, 26 Kan. 650 (1881) and later by Justice Cardozo in Finaly v. Finaly, 240 N.Y. 429, 148 N.E. 624 (1926). "The Chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as parens patriae to do what is best for the interest of the child." Id. at 433, 148 N.E. at 626.


The states that employ the best interest standard by case law include Georgia, Kansas,
vide optimal physical, intellectual, mental, and spiritual growth.\textsuperscript{11} As the name implies, the best interest standard requires the court to keep the child's welfare as the "guiding star"\textsuperscript{12} in original custody hearings and any subsequent modifications of the custody decree.\textsuperscript{13}

To determine which environment will best serve the child's interests, courts carefully assess and balance a wide range of factors. The two factors which have received the most attention from courts and commentators are the child's age\textsuperscript{14} and the child's preference for the parent with whom he or she would prefer to live.\textsuperscript{15} Courts are also concerned with factors such as

13. Two years after the initial decree, the non-custodial parent may petition the court for a modification of the original decree, if there is sufficient cause and if modification is in the child's best interest. ILL REV. STAT. ch. 40, § 610(1) (1981) (court has jurisdiction to decide custody in original and modification proceedings). See infra note 39 for text of modification statute.

Although the child's preference as to which parent he or she would rather live with is an important factor in custody determinations, the preference is not controlling. See \textit{In re Marriage of Kush}, 106 Ill. App. 3d 233, 435 N.E.2d 921 (1982) (preference of child as to custody, though entitled to consideration, is not binding upon the courts); \textit{In re Marriage of Allen}, 81 Ill. App. 3d 517, 401 N.E.2d 608 (1980) (the trial court is not precluded from finding that the child's preference is not in the child's best interest).

State statutes and case law vary as to the admissibility of the child's preference and the weight such evidence should be given. Some statutes are patterned after the UNIFORM MARRIAGE AND DIVORCE ACT, § 402, 9A U.L.A. 197 (1974) [hereinafter cited as UMDA], which regards the child's preference as one of the factors courts are to consider in custody determinations. See infra note 35. Other states will consider the child's preference if that
the frequency with which the parent will be away from the home, the amount of discipline the child will receive, the physical and mental condition of the parents, parental conduct which will affect the child, the stability of the environment, abandonment and desertion of the spouse or child, nonmarital sexual conduct, and parental political philosophy. Courts will also consider differences between the parents’ religious beliefs and practices, in addition to their ability to provide financially for the child’s educational and
The determination of what is in the best interests of the child is the function of the trial court. The court enjoys wide discretion when deciding initial custody cases and subsequent modifications. This broad discretion exists because the trial court is in a more favorable position than the appellate court to observe the parties, hear testimony, and examine evidence. Such discretion will not be disturbed unless the decision is against the manifest weight of the evidence. Theoretically, this discretion is not unbridled. In practice, however, this broad discretion often allows the trial judge to decide cases based upon his own biases, morals, and interests, rather than upon well reasoned principles and articulable facts.


27. "Courts perform two very different functions in the resolution of custody disputes: private-dispute settlement and child-protection." Mnookin, Child Custody Adjudication: Judicial Functions in the Face Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 229 (1975). Both functions are performed simultaneously at the initial custody proceeding. At this stage, the court seeks to protect the child's welfare by evaluating all relevant factors and resolving the dispute over which parent will provide the optimal environment for the child. See, e.g., Frees v. Frees, 99 Ill. App. 2d 213, 240 N.E.2d 274 (1968). The private-dispute role ceases upon entry of the order awarding custody to one of the parents. The child-protection role, however, remains vital and is exercised through the court's continuing jurisdiction over the child.

28. See, e.g., Brooks v. Brooks, 97 Ill. App. 3d 921, 424 N.E.2d 81 (1981) (great discretion is vested in the trial court in custody cases); In re Marriage of Mitchell, 103 Ill. App. 3d 242, 430 N.E.2d 716 (1981) (trial court has broad discretion in awarding custody and there is a strong and compelling presumption in favor of its decision); In re Custody of Piccirilli, 88 Ill. App. 3d 621, 410 N.E.2d 1086 (1980) (trial court is vested with great discretion in custody cases).


30. See, e.g., In re Marriage of Leopando, 106 Ill. App. 3d 444, 435 N.E.2d 1312 (1982) (In awarding custody of a child, the trial court has broad discretion, but such discretion is not unlimited. It is subject to review and when award is contrary to the manifest weight of the evidence, it is the duty of a reviewing court to reverse.); Lloyd v. Lloyd, 92 Ill. App. 3d 124, 415 N.E.2d 1105 (1980) (trial court's discretion in a custody proceeding will be reversed only if court has clearly abused its discretion or its decision was contrary to the manifest weight of the evidence).

31. See Note, Modification of Child Custody Awards in Indiana: The Need for Statutory Guidelines, 47 IND. L.J. 129, 136 (1971); Comment, Child Custody: Best Interests of
Statutory Treatment

In response to concerns about the potential for abuse of discretion at the trial court level, many jurisdictions have enacted statutory schemes which provide substantive guidelines for the courts to follow in custody cases.\(^3\) In 1977,\(^3\) the Illinois General Assembly responded to this concern with the enactment of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA").\(^3\) The IMDMA closely follows the Uniform Marriage and Divorce Act ("UMDA")\(^3\) in substance and purpose by delineating minimum factors which the court must consider in determining...
initial custody and in subsequent modification proceedings.

Section 602 of the IMDMA governs initial custody hearings. The factors set forth in this section represent a compilation of those criteria which courts have traditionally employed. These factors include the wishes of the parent and child, the interaction of the child with his siblings, the child’s adjustment to his current environment, and the mental and physical health of the proposed guardian. This list is not exhaustive. The court is further directed to consider any relevant factors that may affect the child’s welfare. The statute does not set forth the relative weight each factor must be given. Balancing and weighing these factors is within the discretion of the trial court.

Section 610 of the IMDMA governs any subsequent modifi-
cations of the initial custody decree. The primary aim of section 610 is the maintenance of finality of the original custody order. This goal is consistent with the current theories of human development which recognize that the child's best interests can only be served if stability and continuity are present in the child's environment. In furtherance of this goal, no modification may be brought within two years of the entry of the original decree. In addition, custody will be maintained in the present custodian unless: the custodian agrees to a change; the child has been integrated into the family of the petitioning parent; or the petitioning parent can prove that the child's present environment is dangerous to his physical, mental, moral, or emotional health and that the risks of harm from a change of environment

(1) the custodian agrees to the modification;
(2) the child has been integrated into the family of the petitioner with consent of the custodian; or
(3) the child's present environment endangers seriously his physical, mental, moral or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) Attorney fees and cost shall be assessed against the party seeking modification if the court finds that the modification action is vexious and constitutes harassment.

40. The standards set forth in ¶ 610 of the IMDMA are substantially those upon which Illinois courts have relied in custody modification proceedings. Generally, there must have been a change in circumstances since the original determination and this change must adversely affect the interests of the child. See Nye v. Nye, 411 Ill. 408, 416, 105 N.E.2d 300, 304 (1952).

41. ILL. ANN. STAT. ch. 40, ¶¶ 602-610 (Smith-Hurd 1979) (Historical and Practice Notes) (“This section emphasizes stability and continuity in the child's environment.”). See In re Custody of Potts, 83 Ill. App. 3d 518, 404 N.E.2d 446 (1980) (“Nothing is more injurious to the child than to be shuttled between parents.”); In re Custody of Russell, 80 Ill. App. 3d 41, 399 N.E.2d 212 (1979) (custody transferred to the father where the mother moved five times in four months and her marital status and child care plans were unsettled). See Modifying Child Custody Awards, supra note 31, at 450.


43. The two year waiting period is not an absolute rule. Within the two year period, a petitioner may be allowed a hearing on the issue of modification if he can show, by affidavit, that there is some great urgency for the change and that the child's best interests require it. The trial judge will deny the motion to modify, without a hearing, if the moving party has not carried the onerous burden of showing that the child's present environment may endanger his physical, mental, moral, or emotional health. UMDA Commissioners' Note § 409.
are outweighed by the advantage of a change of custody.\textsuperscript{44}

Practical application of the best interests standard is fraught with difficulties. This is due, in part, to the nature of custody law. Family law, and specifically the area of custody, has been described as vague and amorphous.\textsuperscript{45} As one jurist has explained: "[A] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders."\textsuperscript{46} The primary difficulty facing a court is the uncertainty that characterizes any attempt to determine what is or is not in the best interests of the child.

What is "best" for the child is indeterminate and speculative.\textsuperscript{47} It is impossible to predict with exactitude what future external events will occur in a child's life to mold and shape his future.\textsuperscript{48} Additionally, little unanimity exists in the mental health profession regarding the theories of human development and the rela-

\textsuperscript{44} Under ILL REV. STAT. ch. 40, § 610(b) (1981), the requirement that one of the three factors just discussed be present before a court will order modification is a stricter standard than under the previous statute, ILL REV. STAT. ch. 40, § 19 (1975) (repealed 1977). The previous statute merely required a showing that there were altered conditions or new facts since the decree or that there existed material facts which were unknown to the court at the time of decree and that the welfare of the child demanded modification. Various alterations in circumstances have been deemed insufficient to warrant change. See, e.g., Lock v. Lutz, 128 Ill. App. 2d 476, 262 N.E.2d 256 (1970) (the fact that the mother, to whom custody of a minor child had been granted, had been, subsequent to the decree, guilty of adultery did not of itself represent such a change of circumstances as to justify modification); Jayroe v. Jayroe, 58 Ill. App. 2d 79, 206 N.E.2d 266 (1965) (the fact that mother gave birth to an illegitimate child was not enough, of itself, for changing custody); Eggemeyer v. Eggemeyer, 86 Ill. App. 2d 224, 229 N.E.2d 144 (1967) (the fact that custodial parent had recently remarried did not itself constitute sufficient cause to justify modification).


\textsuperscript{46} B. BOTEIN, TRIAL JUDGE 273 (1952).

\textsuperscript{47} Mnookin, supra note 27, at 229. See also Mnookin, CHILD, FAMILY AND STATE (1978).

\textsuperscript{48} See Lauerman, Nonmarital Sexual Conduct and Child Custody, 46 U. CIN. L. REV. 647, 674 (1977). See also J. GOLDSTEIN, A. FREUD, & A. SOLNIT, supra note 42. The authors described their view of child placement by reference to a remark of Justice Wachenfeld: "The uncertainties of life . . . will always remain to be encountered as long as one lives. . . . Their devious forms and variations are too complicated and numerous to be susceptible of tabulation. Our inability to predict or solve them anchors us closely to nature's intendment." Id. at 50. See also Note, Custody and the Cohabiting Parent, 20 J. FAM. L. 697, 713 (1982).
tive importance of those factors which affect the child.\(^49\) Furthermore, no psychological theory can predict the long-term ramifications of placing a child in the custody of one parent versus the other.\(^50\) The problems that plague the general law of custody become more pronounced when cohabitation by the custodial parent becomes a factor in the custody proceeding.

**Cohabitation as a Factor in Custody Proceedings**

At one time cohabitation was considered "deviant" behavior.\(^51\) This attitude reflected the common law interest in preventing the debasement and corruption of society's morals.\(^52\) States sought to simultaneously discourage cohabitation and preserve the institution of marriage\(^53\) through the enactment of criminal statutes punishing cohabitation and fornication.\(^54\) As cohabitation has increasingly come to be recognized as an alternative to

\(^{49}\) See Mnookin, supra note 27, at 258 n.161 (wherein the author delineates the various competing theories of human development: physiological, behavioral, psychoanalytical, child learning, and interpersonal).

\(^{50}\) Id. at 251.

\(^{51}\) See Fineman, supra note 4, at 276. See also Skolnick, Coercion to Virtue: The Enforcement of Morals, 415 CALIF. L. REV. 588 (1968). The notion that cohabitation was deviant behavior was analogous to the common law treatment of lewdness as a misdemeanor.

\(^{52}\) See Fineman, supra note 4, at 313. See, e.g., Jarrett v. Jarrett, 78 Ill. 2d at 346, 400 N.E.2d at 424 ("Conduct of that nature, when it is open, not only violates the statutorily expressed moral standards of the State, but also encourages others to violate those standards, and debases public morality.").

\(^{53}\) Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (emphasized the refusal of the General Assembly in enacting the IMDMA to sanction any nonmarital relationships and its declaration of the purpose to strengthen and preserve the integrity of marriage and safeguard family relationships). This right of the state to regulate the institution of marriage was recognized by the U.S. Supreme Court in Pennoyer v. Neff, 95 U.S. 714 (1877), in which it stated that "[t]he state...has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." Id. at 734-35. See generally Note, Fornication, Cohabitation and the Constitution, 77 MICH. L. REV. 252 (1978).

\(^{54}\) In Illinois, ¶11-8 of the Criminal Code of 1961 provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." ILL. REV. STAT. ch.38, ¶ 11-8 (1977). In Jarrett v. Jarrett, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), cert. denied, 449 U.S. 927, reh'g denied, 449 U.S. 1067 (1980), the court found the mother's conduct to be "open and notorious." The evidence supporting this finding included the fact that the mother discussed her behavior with her children, her ex-husband, and her neighbors. Id. at 346.

Twenty other states and the District of Columbia have statutes which proscribe cohabitation or fornication. See ALA. CODE § 8-1 (1975); ARIZ. REV. STAT. ANN. § 13-1409 (1983); D.C. CODE ANN. § 22-1002 (1981); FLA. STAT. ANN. § 789.01 (West 1976); GA. CODE § 26-2010 (1977); IDAHO CODE § 18-6604 (1979); MASS. GEN. LAWS ANN. ch. 272, § 16 (West
marriage or as a premarital step, however, most states have begun to either repeal their cohabitation statutes or not enforce them.

The issue of cohabitation is usually raised upon petition for modification, although the nonmarital sexual conduct of a parent is relevant in initial custody proceedings as well as in subsequent modifications. The party seeking modification of the initial custody order usually alleges that the cohabitation by the custodial parent seriously endangers the child’s emotional, mental, moral, or physical health. Judicial response to the allegation that cohabitation by the custodial parent is incongruous


55. See Fineman, supra note 4, at 318-28. In that article, the author takes an in-depth look at the historical alternatives to formal marriage. The two main alternatives discussed are compassionate marriage and common law marriage. Compassionate marriages were formal legal marriages with state controlled consequences. “The parties entered into the relationship with the expectation that it would be permanent, however, there existed a safety valve of divorce by mutual consent if the parties remained childless and, after separation, reconciliation efforts were unsuccessful.” Id. at 319. Common law marriages carried greater legal consequences yet were not strapped with the formalities of legal marriage. The elements of common law marriage include present agreement, cohabitation, acknowledgement, and repute. Id. at 321 n.187. See also Lindsey & Evans, The Compassionate Marriage 132 (1927); Note, Common Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem, 39 U. Pitt. L. Rev. 579 (1978).

56. See Fineman, supra note 4, at 287-308. The article examines how legislators, prosecutors, and judges have responded to the increasing incidence of cohabitation in Wisconsin. The author conducted a study concerning the enforcement of the criminal statute against cohabitation. Response to a survey of 50 district attorneys revealed that 23 of the district attorneys never received a request from anyone to prosecute cohabitation and 25 of the attorneys who responded, had received requests, but had chosen not to prosecute. Id. at 288 n.57.


57. Although the issue of cohabitation does not usually arise at the initial custody proceeding, the courts do consider the parents’ sexual conduct in determining which parent will best serve the child’s interests. See, e.g., Patterson v. Patterson, 47 Ill. App. 2d 133, 197 N.E.2d 724 (1964) (evidence of mother’s course of adulterous conduct with married men sustained court’s award of custody to father).

with the child's best interest has been mixed.\textsuperscript{59}

The conflicting attitudes regarding whether cohabitation is detrimental to the child's welfare are reflected in the legal system's inconsistent treatment of the issue. Illinois courts have treated the issue in four ways:\textsuperscript{60} cohabitation giving rise to a conclusive presumption of unfitness; cohabitation as merely one factor to be considered in the totality of evidence; cohabitation as "tipping the balance" when all other factors are equal; and cohabitation giving rise to a rebuttable presumption. The most controversial approach, the conclusive presumption approach, is represented by the seminal Illinois case of \textit{Jarrett v. Jarrett}.\textsuperscript{61}

**DISCUSSION**

\textit{Jarrett v. Jarrett}

**The Facts of the Case**

In December 1976, Jacqueline Jarrett received a divorce from her husband Walter\textsuperscript{62} and was awarded custody of the three Jarrett children, ages twelve, ten, and seven.\textsuperscript{63} In May 1977, Jacqueline informed Walter that her boyfriend would be moving into the home with her and the children.\textsuperscript{64} Walter objected and filed a petition to modify custody on the grounds that Jacqueline's living arrangements were not providing a proper environment in which to raise their children.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{59} See infra text accompanying notes 106-38.
  \item \textsuperscript{60} Lauerman, \textit{supra} note 48. The author of this article discusses four approaches that the courts have adopted in dealing with nonmarital sexual conduct, which may or may not include cohabitation: conclusive disqualification, presumptive unfitness, direct adverse impact, and presumptive adverse impact. See Note, \textit{Child Custody: Parental Cohabitational Relationships and the Best Interests of the Child Standard—Jarrett v. Jarrett}, 29 De Paul L. Rev. 1141, 1144 (1980). See generally Bregman, \textit{Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism}, 2 Fam. L.Q. 384 (1968); Foster & Freed, \textit{Child Custody}, 39 N.Y.U. L. Rev. 423 (1964).
  \item \textsuperscript{61} 78 Ill. 2d 37, 400 N.E.2d 421 (1979), cert. denied, 449 U.S. 927, reh'g denied, 449 U.S. 1067 (1980).
  \item \textsuperscript{62} Id. at 340, 400 N.E.2d at 421. Jacqueline received a divorce from Walter in the Circuit Court of Cook County on grounds of extreme and repeated mental cruelty.
  \item \textsuperscript{63} Id. at 341, 400 N.E.2d at 422. In addition to custody of the children, the divorce decree awarded Jacqueline the use of the family home and child support. Walter received reasonable visitation rights.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Walter based his petition on Ill. Rev. Stat. ch 40, ¶ 610(b)(3) (1981). See supra
\end{itemize}
Following a hearing at which Jacqueline and Walter testified, the circuit court modified the original decree and transferred custody to Walter. The court held that modification was "necessary for the moral and spiritual well-being and development" of the children. The Illinois Appellate Court reversed, reasoning that the circuit court record did not reveal any negative effects on the children caused by Jacqueline’s cohabitation and that the circuit court had not found Jacqueline unfit.

The Illinois Supreme Court formulated the issue as "whether a change of custody predicated upon the open and continuous cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children." A divided Illinois Supreme Court held that Jacqueline’s cohabitation warranted a change in custody. Accordingly, the court reversed the appellate court’s decision and reinstated the circuit court’s modified custody decree.

The Majority Opinion

The Jarrett court relied upon the state’s fornication statute and the IMDMA as indicia of the relevant standards of conduct. These statutes, the court noted, were enacted not to sanction nonmarital relationships but to "strengthen and preserve the integrity of marriage and safeguard the family relationship."

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66. 78 Ill. 2d at 341, 400 N.E.2d at 423.
67. Id.
68. 64 Ill. App. 3d 932, 937, 382 N.E.2d 12, 16-17 (1978). The appellate court declined to consider potential future effects of the cohabitation on the children.
69. 78 Ill. 2d at 345, 400 N.E.2d at 423.
70. Id. at 350, 400 N.E.2d at 426.
71. Id.
74. 78 Ill. 2d at 345, 400 N.E.2d at 424. See supra note 53.
Despite Census Bureau statistics which revealed changes in family living arrangements, the court found that Jacqueline's open and notorious sexual conduct was an affront to the moral standards of the state, as expressed by the legislature. The court observed that such flagrant violation of moral standards would encourage others to engage in similar behavior. Moreover, Jacqueline's lifestyle would instruct and encourage her children to engage in similar conduct in the future.

Jacqueline argued that the modification provision of the IMDMA, section 610(b), precluded the trial court from modifying a prior custody award unless it found that the children had suffered actual tangible harm. The court rejected this argument. In the court's view, cohabitation had the potential to affect the mental, moral, and emotional health of the children. Although the court agreed that the children presently appeared unaffected by the cohabitation, it declined to wait until the children began emulating their mother's conduct before transferring custody to the father.

75. See supra notes 1-3.
76. 78 Ill. 2d at 346, 400 N.E.2d at 425. But see Burris v. Burris, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979) (the court recognized the increasing frequency of unmarried couples living together as motivated by economic factors as well as personal reasons and commented that courts should deal realistically and fairly with the problems of daily life). See supra note 54.
77. 78 Ill. 2d at 347, 400 N.E.2d at 425. See also Hahn v. Hahn, 69 Ill. App. 2d 302, 216 N.E.2d 229 (1966) (court transferred custody to father because mother was living in open adultery with married man and such action shows disdain for the generally accepted standards of morality).
78. 78 Ill. 2d at 348, 400 N.E.2d at 425. See supra note 52. Other Illinois courts have refused to modify or to award custody based on the conduct of the present or proposed custodial parent that was not shown to have detrimentally affected the child. See, e.g., Soldner v. Soldner, 69 Ill. App. 3d 97, 386 N.E.2d 1153 (1979) (mother's sexual activity not determinative of her right to custody in the absence of proof that it had detrimental effect on the children). See also Eaton v. Eaton, 50 Ill. App. 3d 306, 365 N.E.2d 647 (1977); Fears v. Fears, 5 Ill. App. 3d 306, 283 N.E.2d 709 (1972).
79. 78 Ill. 2d at 348, 400 N.E.2d at 425.
80. Id. at 349, 400 N.E.2d at 425. The majority was also concerned that if the Jarrett children remained in their present environment that they might be compelled to try to explain their mother's paramour's presence to their friends and perhaps to endure taunts and jibes.
81. Id. See also In re Marriage of Padiak, 101 Ill. App. 3d 306, 427 N.E. 2d 1372 (1981). The IMDMA does not require that there be actual harm to the physical, mental, moral or emotional health of the child before change of custody can be awarded; rather, the Act contemplates potential harm as well as present harm. But see Ehr v. Ehr, 77 Ill. App. 3d 540, 396 N.E.2d 87 (1979) (sexual activity and marijuana use alone are not determinative of a mother's right to continued custody absent proof that such conduct had detrimental effect on the child).
The Dissenting Opinions

Chief Justice Goldenhursh and Justice Moran dissented. Justice Goldenhursh viewed the decision as establishing a per se rule that cohabitation by the custodial parent mandates transfer of custody. He questioned whether the increase in cohabitation was attributable to parental example. In addition, he cautioned the court not to address the issue of cohabitation with reference to its own biases and preferences for traditional lifestyles.

Justice Moran read the opinion as "countenancing a change of custody based solely on a conclusive presumption." He did not find one scintilla of actual or statistical evidence of harm or danger to the children. Therefore, he felt that the majority had used the child custody issue to punish Jacqueline for her violation of the fornication statute rather than focusing on the best interests of the children.

The United States Supreme Court's Denial of Certiorari

Jacqueline Jarrett's petition for writ of certiorari was denied, with Justices Brennan, Marshall, and Blackmun dissenting. Justice Brennan, with whom Justice Marshall joined, expressed concern that the decision raised the significant question of "[w]hether the State may deprive a divorced mother of the custody of her children through the operation of a conclusive presumption that her cohabitation with an unmarried adult male

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82. 78 Ill. 2d at 350, 400 N.E.2d at 426 (1979) (Goldenhursh, C.J., dissenting); Id. at 352, 400 N.E.2d at 427 (Moran, J., dissenting).
83. Id. at 351, 400 N.E.2d at 426. (Goldenhursh, C.J., dissenting).
84. Id. at 351, 400 N.E.2d at 427 (Goldenhursh, C.J., dissenting). See Jingling v. Trtanj, 99 Ill. App. 2d 64, 241 N.E.2d 39 (1968) (court warned that consideration of the parent's misconduct in custody suits, in effect, punishes the parent and contravenes the best interests standard).
85. 78 Ill. 2d at 352, 400 N.E.2d at 427 (Moran, J., dissenting). Justice Moran recently reiterated his belief that Jarrett established a per se rule in In re Thompson, 96 Ill. 2d 80, 449 N.E.2d 93 (1983) (Moran, J., concurring). For purposes of this note, the terms "per se rule" and "conclusive presumption" have been used interchangeably. For a discussion of presumptions, see G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 40-60 (1978).
86. 78 Ill. 2d at 352, 400 N.E.2d at 427 (Moran, J., dissenting).
87. Id. (Moran, J., dissenting). See also Jayroe v. Jayroe, 58 Ill. App. 2d 79, 206 N.E.2d 266 (1965) (court refused to modify custody because to do so would only have been a punishment for the mother's past misconduct).
89. Justice Blackmun dissented from the denial of certiorari and would have set the case for argument; however, he did not write a separate dissenting opinion. Id. at 931 (Blackmun, J., dissenting).
constitutes custody not in the best interest of the child, however strong the contrary evidence.\textsuperscript{90}

Justice Brennan explained that the \textit{Jarrett} decision, in effect, held that a violation of the Illinois fornication statute presumptively harmed the children.\textsuperscript{91} The application of a conclusive presumption, he noted, contravenes the recent Supreme Court case of \textit{Stanley v. Illinois},\textsuperscript{92} which held unconstitutional the conclusive presumption that an unwed father is unfit to exercise custody over his children.\textsuperscript{93} Brennan argued that based on \textit{Stanley}, the use of a conclusive presumption in \textit{Jarrett} may have violated Jacqueline Jarrett's fourteenth amendment right to a full and fair hearing on the issue of parental fitness.\textsuperscript{94}

\textbf{Jarrett's Conclusive Presumption}

Application of a presumption of unfitness is predicated on the view that cohabitation is inconsistent with the child's best interests.\textsuperscript{95} It is further based upon the speculation that cohabitation by the custodial parent is detrimental to the child.\textsuperscript{96} Proponents of this approach contend that it is impossible for the cohabiting parent to provide a healthy moral environment.\textsuperscript{97} Based on sim-
ilar concerns, the Jarrett court held that Jacqueline's cohabitation would adversely affect her children's mental and emotional health and therefore warranted a change of custody.

The scope and import of the Jarrett decision has been vigorously debated. Most commentators are in accord with the view of Justices Brennan and Marshall that the Jarrett decision implicitly establishes a conclusive presumption. Subsequent Illinois appellate decisions that have addressed the issue of whether Jarrett establishes a per se rule have reached conflicting conclusions. Furthermore, the justices of the Illinois Supreme Court continue to debate the scope and effect of the Jarrett decision.

Although the case has generated discordant interpretations, the clear weight of authority supports the conclusion that Jarrett implicitly establishes a conclusive presumption that cohabitation by the custodial parent warrants modification. This conclusion is based on the majority's failure to adequately

205 N.E.2d 775 (1965) (although the mother had married her paramour the court transferred custody to the father because it was improbable that the mother could provide a climate for the wholesome physical, mental, emotional, and moral growth of the children).


99. See supra note 98.

100. Compare Brandt v. Brandt, 99 Ill. App. 3d 1089, 425 N.E. 2d 1251 (1981) (open cohabitation with member of opposite sex does not mandate a change of custody) with In re Marriage of Burgham, 86 Ill. App. 3d 341, 408 N.E. 2d 37 (1980) (case remanded to trial court to determine whether the cohabitation has terminated and to enter judgment according to Jarrett).

101. In re Marriage of Thompson, 96 Ill. 2d 67, 449 N.E. 2d 88 (1983), cert. denied, 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (No. 83-281). In Thompson, an original custody decision awarded the custody of the Thompson child to a father who was cohabiting. The mother argued that Jarrett required custody to be awarded to the non-cohabiting parent. In an opinion that is in direct conflict with the reasoning expounded by the court in Jarrett, the Illinois Supreme Court held that "Jarrett does not establish a conclusive presumption...[that] because a custodial parent cohabits with a member of the opposite sex, the child is harmed." Id. at 78, 449 N.E.2d at 93. Justice Moran concurred with the judgment yet did not concur with the majority’s statement of the Jarrett holding. In his opinion, Jarrett did establish a conclusive presumption. See Jarrett v. Jarrett, 78 Ill. 2d at 352-53, 400 N.E. 2d at 427 (1979) (Moran, J., dissenting).

102. See supra notes 7 & 98.
consider the trial court record and its blanket application of the Illinois fornication statute.\textsuperscript{103}

The formulation of the issue by the \textit{Jarrett} court implies that evidence of Jacqueline's fitness or unfitness was not considered. As the court noted, the issue was whether or not the trial court abused its discretion by modifying custody absent any tangible evidence of contemporaneous adverse effect on the children.\textsuperscript{104}

The trial record clearly revealed that the children were well-cared for and well-adjusted. Yet the court ignored this evidence and instead considered only the existence of a cohabitational relationship.

The court also evaluated the existence of cohabitation in view of the Illinois fornication statute. Whether the children were affected by the conduct was apparently irrelevant. The court assumed that because Jacqueline violated the fornication statute her actions would adversely affect the children's well-being. As a result, even though Jacqueline was provided a hearing on the issue of parental fitness,\textsuperscript{105} the court's failure to consider the trial record and its blanket application of the fornication statute established a conclusive presumption and effectively denied Jacqueline Jarrett a full and meaningful hearing. At a minimum, the decision fashions a very rigid standard, a standard which the Illinois Appellate Court has declined to support.

\textit{Post-Jarrett Judicial Treatment of Parental Cohabitation}

The Illinois Appellate Court has apparently been reluctant to apply \textit{Jarrett} as broadly as it was written.\textsuperscript{106} This reticence is

\textsuperscript{103} See Minton, supra note 98, at 431.

\textsuperscript{104} See supra text accompanying notes 69-81.

\textsuperscript{105} Although the \textit{Jarrett} majority sought to distinguish its decision from \textit{Stanley v. Illinois}, Justice Moran, in his dissent, recognized that the majority's disposition of the case was the equivalent of no hearing at all. 78 Ill. 2d at 353, 400 N.E.2d at 426 (Moran, J., dissenting).

\textsuperscript{106} See Minton, supra note 98, at 430. See, e.g., \textit{In re Blonsky}, 84 Ill. App. 3d 810, 405 N.E.2d 1112 (1980). In \textit{Blonsky}, the parents were awarded joint custody of their minor child. Mr. Blonsky, who lived in California, began cohabiting with an unmarried woman. Mrs. Blonsky petitioned the court for modification of the custody decree based on the father's relationship. The \textit{Blonsky} court, in an attempt to avoid the holding of \textit{Jarrett}, distinguished its facts in two ways. First, unlike Mr. Jarrett's testimony, Mrs. Blonsky did not specifically testify that she objected to the cohabitational relationship. Second, the \textit{Blonsky} court noted that, unlike the Illinois statute relied upon in \textit{Jarrett}, there was no similar statute against cohabitation in California. \textit{Id.} at 819, 405 N.E.2d at 1118.
not a rejection of the Jarrett view that cohabitation may be detrimental to the child’s welfare,\textsuperscript{107} but rather a rejection of the rationale employed by the Jarrett court. In subsequent decisions, the appellate court has disagreed with Jarrett’s refusal to consider all the circumstances present in the child’s environment, the refusal to recognize documented shifts in the family structure, the implicit use of a conclusive presumption, and the disregard of the well-established best interests standard.\textsuperscript{108}

Only one Illinois appellate decision thus far has mechanically followed the Jarrett holding. In In re Custody of Iverson,\textsuperscript{109} temporary custody of the Iverson child was transferred from the mother to the father. The sole basis for the modification was a verified allegation by the father that the child was being exposed to Mrs. Iverson’s “live-in boyfriend.”\textsuperscript{110} Citing Jarrett and referring to the petitioner’s verified allegation, the appellate court acknowledged that “[t]he existence of such an environment would be sufficient grounds to justify a change in custody under section 610.”\textsuperscript{111}

Iverson clearly represents the minority position. In the majority of cases, the appellate court has developed various methods for resolving the issue of custody and cohabitation. Generally the cases can be classified under one of three approaches: cohabitation giving rise to a rebuttable presumption, cohabitation tipping the balance, or considering cohabitation within the totality of the evidence.

Cohabitation Gives Rise to a Rebuttable Presumption of Unfitness

Under the rebuttable presumption approach, the cohabiting parent may rebut the presumption of unfitness by presenting evidence showing that there has been a reform in the nonmarital sexual conduct at issue. This approach is based upon precedent which allows the cohabiting parent to maintain custody “if the parent’s present conduct establishes the improbability of such

\textsuperscript{107} See Note, supra note 60, at 1144.
\textsuperscript{109} 83 Ill. App. 3d 493, 404 N.E.2d 411 (1980).
\textsuperscript{110} Id. at 496, 404 N.E.2d at 414.
\textsuperscript{111} Id. at 497, 404 N.E.2d at 415.
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lapses [in moral conduct] in the future." To demonstrate that future lapses in moral conduct are improbable, the cohabiting parent must have married, terminated the relationship, or established future plans to marry. The Illinois Appellate Court, in fact, has often used eleventh hour marriages or terminations of relationships to avoid the Jarrett holding and allow the cohabiting parent to maintain custody.

In the case of In re Custody of Nodot, the custodial mother petitioned the trial court for permission to remove her two year old daughter from the country. This proposed move was necessary in order to allow the mother to go with her new husband to his job in Indonesia. The father, who was cohabiting with an unmarried woman at the time, counter-petitioned for custody. The trial court disregarded the father's present cohabitation and awarded him custody because the father had represented to the court his intention to marry his paramour. In addition, the

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112. Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952). In Nye, the Illinois Supreme Court noted that the presumption of unfitness based upon the cohabitation of a custodial parent could be overcome by showing that the misconduct had terminated and would not resume in the future.

113. See, e.g., In re Custody of Saloga, 96 Ill. App. 3d 661, 421 N.E. 2d 991 (1981) (court refused to modify custody even though the mother had been cohabiting because she had terminated that relationship before the modification proceedings were brought and she had since married).

It should be noted that either marriage or termination of the relationship will rebut the presumption, even if these measures are taken at the eleventh hour. See, e.g., In re Custody of Boyer, 83 Ill. App. 3d 52, 403 N.E.2d 796 (1980) (court denied father's petition to modify custody based upon mother's cohabitation because immediately upon the filing of the petition, the mother ended the relationship so as to not do anything that would endanger the child's welfare and child was too young to be aware of her mother's moral indiscretions).

114. See, e.g., In re Marriage of Hanson, 112 Ill. App. 3d 564, 445 N.E.2d 912 (1983) (custody maintained in father who was cohabiting because he testified he had plans to marry his girlfriend); In re Marriage of Burgham, 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980) (case remanded for determination of whether the improper cohabitation had continued, and, if it had, then past cohabitation would not disqualify cohabiting parent from custody). See Minton, supra note 98, at 430.

115. 81 Ill. App. 3d 883, 401 N.E.2d 1189 (1980). See also Rippon v. Rippon, 64 Ill. App. 3d 465, 381 N.E.2d 70 (1978). In Rippon, the mother testified that she and her live-in boyfriend were going to be married as soon as her second divorce was final. Id. at 466, 381 N.E.2d at 73. In maintaining custody in the cohabiting mother, the court noted that past moral indiscretions alone are not grounds for a change in custody when the children appear to be leading normal lives. Id. at 468, 381 N.E.2d at 73. The court emphasized that even open adulterous acts are not grounds for custody once the mother has married the paramour. Id.


117. Id. at 889, 401 N.E.2d at 1193.
court held that the two year old daughter was too young to be aware of the father’s relationship and its consequences.\textsuperscript{118}

On appeal, the \textit{Nodot} court referred to \textit{Jarrett}, stating that the transfer of custody in \textit{Jarrett} was the result of the existence of a sexual relationship between unmarried persons.\textsuperscript{119} Although the court recognized that \textit{Jarrett} mandated a change of custody, the appellate court affirmed the trial court decision to award custody to the cohabiting parent. \textit{Jarrett} was held inapplicable because, unlike Jacqueline Jarrett, “the father had represented in his brief and oral argument that he and his girlfriend have married, pursuant to his intention as expressed to the trial court.”\textsuperscript{120}

Cohabitation Tips the Balance When All Other Factors Are Equal

Many commentators view \textit{Jarrett} as establishing a per se rule that cohabitation by the custodial parent warrants a modification of custody.\textsuperscript{121} In addition, the \textit{Jarrett} holding has also been described as “extremely narrow and only becom[ing] operative as a ‘tie-breaker’ when all other custody factors are equal.”\textsuperscript{122} This interpretation of \textit{Jarrett} is based on the language in the opinion that custody should be transferred “to Walter Jarrett, an equally caring and affectionate parent whose conduct did not contravene the standards established by General Assembly and earlier decisions.”\textsuperscript{123}

This “tie-breaker” rationale was applied by the Illinois Appellate Court in \textit{In re Custody of Boyer}.\textsuperscript{124} In this case, original custody had been awarded to Mrs. Boyer, who later began residing with a man to whom she was not married. The father petitioned the court for modification on the grounds that the mother’s cohabitation endangered the mental, emotional, and moral health of the child.\textsuperscript{125}

\begin{itemize}
  \item \textsuperscript{118} See \textit{supra} note 14.
  \item \textsuperscript{119} 81 Ill. App. 3d at 893, 401 N.E.2d at 1197.
  \item \textsuperscript{120} \textit{Id}. at 893, 400 N.E.2d at 1197. In distinguishing \textit{Jarrett}, the \textit{Nodot} court explained how, unlike Mr. Nodot, Jacqueline Jarrett maintained at oral argument that she was still cohabiting and had no intention of marrying her paramour.
  \item \textsuperscript{121} See \textit{supra} note 98.
  \item \textsuperscript{122} See Minton & Golden, \textit{supra} note 98, at 19 (Harvey L. Golden, chairman of the ABA Family Law Section’s Committee on Paternity, referred to the \textit{Jarrett} decision as a “tie-breaker.”).
  \item \textsuperscript{123} 78 Ill. 2d at 350, 400 N.E.2d at 438 (emphasis added).
  \item \textsuperscript{124} 83 Ill. App. 3d 52, 403 N.E.2d 796 (1980).
  \item \textsuperscript{125} \textit{Id}. at 53, 403 N.E.2d at 797. Mr. Boyer also alleged that the mother’s paramour
\end{itemize}
The Boyer court agreed with the Jarrett view of cohabitation as creating a potentially dangerous emotional and moral climate in which to raise children. Nonetheless, the Boyer court did not treat cohabitation as giving rise to a conclusive presumption of unfitness. Instead, it held that "if all other factors are equal, then cohabitation could tip the balance in favor of the petitioning parent." After reviewing the facts before it, the Boyer court concluded that all factors were not equal in this case and therefore the scale need not tip in favor of the non-cohabiting parent. Consequently, custody was maintained in Mrs. Boyer.

Cohabitation As One Factor in the Totality of the Evidence

In some cases, the Illinois Appellate Court has treated cohabitation as merely one factor to be examined in relation to all other existing factors that may affect the child's welfare. Utilization of this approach eliminates the narrow focus on the morality of the parental conduct and instead considers the emotional and physical environment of the child as well. Usually, a court following this approach will require the petitioning party to bring forth evidence that cohabitation by the custodial parent has been detrimental to the child.

physically abused the child. Since the evidence was in dispute concerning this allegation, the appellate court deferred to the trial court's judgment that the physical health of the child was not endangered by the mother's cohabitation. Evidence of physical punishment was the basis of the decision in Applegate v. Applegate, 80 Ill. App. 3d 81, 399 N.E.2d 330 (1980). In Applegate, the mother's boyfriend frequently stayed overnight at the home of the custodial mother. The father petitioned the court for modification of custody based upon Jarrett. The Applegate court noted that it need not look to Jarrett and consider the question of the children's moral health because there was enough evidence of tangible harm to the children. Accordingly, the appellate court reversed the trial court and placed custody of the children with the father.

126. 83 Ill. App. 3d at 55, 403 N.E.2d at 798.
127. Id.
128. Id. at 53, 403 N.E.2d at 798.
129. Accord Hagen v. Hagen, 226 N.W.2d 13 (Iowa 1975) (court refused to modify custody from the parent who had been cohabiting because the children were healthy, doing well in school and otherwise normal); Feldman v. Feldman, 55 Mich. App. 147, 222 N.W.2d 2 (1974) (court emphasized that the custodial adulterous mother was a good mother and the children were well-adjusted).
130. See, e.g., In re Marriage of Hubbard, 315 N.W.2d 75 (Iowa 1982) (evidence showed that mother had neglected children's education and medical treatment and engaged in sexual intercourse with numerous men in the presence of children); In re Marriage of McCreary, 276 N.W.2d 399 (Iowa 1979) (court modified custody upon finding that the custodial mother's conduct was upsetting the children, that one of the mother's par-
The totality approach was adopted by the Illinois Appellate Court in Brandt v. Brandt. In this case, the mother had custody of her two youngest daughters, ages fourteen and fifteen. After the mother began living with a married man, the father petitioned the court for modification of the original decree and argued that Jarrett mandated a custody transfer.

Rather than applying Jarrett in an absolute manner, the Brandt court interpreted Jarrett as requiring an individualized evaluation and assessment of all the evidence. The Brandt court's evaluation of the evidence revealed that the children were in excellent physical and mental health and were doing well in school. Although the older daughter preferred to remain with the mother, the younger daughter preferred to live with her father. As in Jarrett, no evidence of mental, moral, or physical harm was present. Contrary to the holding of Jarrett, however, the Brandt court affirmed the trial court decision to maintain custody of the older child in the cohabiting mother. Based on the younger child's strong paternal preference, her custody was transferred to the father.
Rejection of the Conclusive Presumption Approach

Although in the majority of cases, the Illinois Appellate Court has sought to avoid Jarrett's conclusive presumption approach, no definitive rationale supporting the evasion of Jarrett has been enunciated. There are, however, three reasons why the Jarrett approach should be rejected: first, the custodial parent's constitutional rights may be violated; second, the application of a conclusive presumption contravenes the IMDMA; and, third, there is great potential for the misapplication of such a rigid standard as the conclusive presumption approach.

Constitutional Reasons for Rejecting Jarrett

The Jarrett rationale is weakened by at least three constitutional infirmities. First, the implicit use of a conclusive presumption stands in opposition to Stanley v. Illinois. Stanley is one case in a line of many recent United States Supreme Court decisions striking down the use of conclusive presumptions. In Stanley, the Court declared unconstitutional the conclusive presumption that an unwed father is unfit to exercise custody over his children. As for the issue of custody and cohabitation, any approach that modifies custody solely on one factor and disregards all others clearly trangresses the Stanley prohibition against the use of conclusive presumptions.

A second constitutional reason for the rejection of Jarrett's
conclusive presumption approach is based upon the recognition that there is a constitutional right to engage in consensual adult heterosexual activity.⁴⁴ Although the United States Supreme Court has not explicitly recognized such a right, many commentators argue that such a right may exist under the "penumbra of privacy."⁴⁵ Based upon a line of cases beginning with *Lochner v. New York*,¹⁴⁶ and *Griswold v. Connecticut*,¹⁴⁷ and culminating with *Roe v. Wade*¹⁴⁸ and *Carey v. Population Services International*,¹⁴⁹ the Supreme Court has consistently maintained that the right to privacy includes "the freedom of personal choice in matters of marriage and family life."¹⁵⁰ As the Jarrett

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¹⁴⁶. 198 U.S. 45 (1905). Although *Lochner* is not a sexual privacy case, the case is significant because of its extension of judicial power in the area of substantive due process. In *Lochner*, the Supreme Court declared unconstitutional a law limiting the working hours of bakery employees because it interfered with right to contract. The court held that their right to contract was part of the "liberty of the individual protected by the Fourteenth Amendment. . . ." *Id.* at 53. *Lochner* was highly criticized because of its potentially limitless reach and its "natural justice" notions. *See Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978).

¹⁴⁷. 381 U.S. 479 (1965). In *Griswold*, the court held unconstitutional a law that prohibited married couples from using contraceptives because the law "swept unnecessarily broadly." In declaring this law unconstitutional, the Court held that the right of privacy protects the marriage relationship. The opinion, written by Justice Douglas, spoke of "zones of privacy" within the penumbra of the first, third, fourth, fifth, and ninth amendments. *Id.* at 484. Although *Griswold* dealt with the narrow issue of contraception, the opinion has been a basis for cases more generally concerned with the issues of sexual conduct. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (a ban on distribution of contraceptives to unmarried persons is equally as impermissible as a ban on distribution to married persons). *See generally Note, Expanding the Right of Sexual Privacy*, 27 Loy. L. Rev. 1279 (1981).

¹⁴⁸. 410 U.S. 113 (1973) (the fundamental right to privacy protects a woman's decision to terminate her pregnancy unless regulation of the abortion would further a compelling state interest).

¹⁴⁹. 431 U.S. 678 (1977) (the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults, and since the state cannot impose a blanket prohibition on the minor's choice to terminate her pregnancy, then a blanket prohibition on the distribution of contraceptives is also foreclosed).

¹⁵⁰. In Hollembough v. Carnegie Free Library, 439 U.S. 1052 (1978) (denying certiorari), Justice Marshall wrote: "Although we have never demarcated the precise boundaries of this right [to privacy], we have held that it broadly encompasses 'freedom of per-
court noted, states have an interest in preserving the family and promoting the morality of its citizens. Even the most ardent modern advocate of "the enforcement of morals," however, views the state interest in certain matters of individual choice as limited.

In conjunction with the "privacy" argument is the constitutional claim that modification of custody based on cohabitation alone infringes an individual's freedom of association. If a case is decided on the basis of the custodial parent's cohabitation with members of the opposite sex, then, in effect, the judiciary is exercising control over those persons with whom a divorced person can associate. A parent's decision to adopt a lifestyle not accepted by all of society or to choose to associate with persons with varying views of morality and philosophy should not be infringed upon without some compelling state interest.

Application of a Conclusive Presumption Contravenes the IMDMA

Application of a conclusive presumption also contravenes the language and purpose of section 602 of the IMDMA. Section 602 expressly provides that the court consider all relevant factors which may affect the child. The employment of a conclusive presumption automatically precludes any investigation into whether or not the parental conduct has had an effect on the personal choice in matters of marriage and family life." "Id. at 736 (Marshall, J., dissenting) (quoting Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632, 639-40 (1974)).


152. In Poe v. Ullman, 367 U.S. 497 (1961), Justice Harlan described the state's interest in promoting the morality in its citizens as a subject with which every society in civilized times has found it necessary to deal. Id. at 545-46 (Harlan, J., dissenting).


155. See Comment, supra note 145, at 733.

156. ILL. REV. STAT. ch. 40, § 602(b) (1981) provides that "the court shall not consider conduct of the present or proposed custodian that does not affect his relationship to the child." This subsection derives from § 402 of the UMDA. The Commissioners' Note to § 402 states the twofold purpose of this subsection: to eliminate the need for the parties "to spy on each other" and to remove "irrelevant" evidence from judicial consideration. Uniform Marriage and Divorce Act § 402, 9A U.L.A. 197 (1974) (Commissioners' Note). See also ILL. REV. STAT. ch. 40, ¶¶ 503(c), 504(b), 505 (1981), which prohibit reliance on past marital misconduct in determining maintenance, child support, and property rights.

157. Id. See supra text accompanying notes 131-37.
child, For example, the Jarrett court refused to consider the trial court record, which revealed that the children were well-cared for and unaffected by the mother’s living arrangement. This inordinate emphasis on the custodial parent’s cohabitation, rather than application of the best interests standard, violates the “all relevant factors” requirement of the IMDMA.158

The use of a conclusive presumption in the case of a cohabiting custodial parent also contravenes the purpose of the IMDMA. With the enactment of the IMDMA, the General Assembly sought to limit the broad discretion of the trial judge in custody cases.159 Section 602 was to accomplish this by prohibiting the consideration of conduct that had not affected the child.160 A conclusive presumption approach has as its starting point, however, the speculation that cohabitation may be detrimental to the child’s well-being. This reliance on speculation is incongruous with the statutory mandate that only parental conduct which actually affects the child is to be regarded as a factor in the custody proceeding.161

The Potential for Misapplication of a Conclusive Presumption

The conclusive presumption approach poses several hazards because of the rigidity that characterizes it. Such rigidity can be dangerous for custodial parents and their children, because any trend in the law which places exclusive reliance on one factor invites error. Jacqueline Jarrett lost custody of her children because she violated the state’s fornication statute.162 Fornication is a Class B misdemeanor in Illinois.163 If the Jarrett decision were taken to its extreme, any custodial parent guilty of a Class B misdemeanor could face losing custody of the child.164 Although this may be an unlikely occurrence, the potential for the misapplication and unwarranted extension of Jarrett is

158. ILL. REV. STAT. ch. 40, ¶ 602(a) (1981) (“The court shall consider all relevant factors . . . .”).
159. See supra text accompanying notes 32-44.
160. See supra note 35.
161. See Note, supra note 60, at 1146, 1152.
162. 78 Ill. 2d at 345, 400 N.E.2d at 421.
163. A Class B misdemeanor in Illinois is an offense punishable by imprisonment for not more than six months. ILL. REV. STAT. ch. 38, ¶ 1005-8-3(a)(2) (1981), or a fine not to exceed $500. Id. ¶ 1005-9-1(a)(3) (1981).
164. See Child Custody Provisions, supra note 34, at 681. In his dissent, Justice Moran expressed concern for a decision that was based upon “selective enforcement” of a
clearly illustrated by the case of *Krabel v. Krabel*. 165

In this case, Mrs. Krabel was originally awarded custody of her two children. Soon thereafter, she became involved in what the *Krabel* court labeled "an illicit liaison." 166 Unlike the custodial parent in *Jarrett*, Mrs. Krabel's boyfriend did not live in her home. 167 Relying on *Jarrett*, the trial judge allowed Mrs. Krabel to maintain custody provided that she either marry her boyfriend or terminate the relationship. 168 At the time of the appeal, however, Mrs. Krabel had done neither. Consequently, the appellate court remanded the case and held that if no reformation of Mrs. Krabel's conduct had occurred, custody should be transferred to Mr. Krabel. 169

To require a custodial parent to "reform" her conduct, when that conduct merely consists of having a non-cohabiting boyfriend, illustrates the potentially dangerous extensions of the conclusive presumption approach. This potential is an especially grave matter in an area of law where the courts are essentially deciding how a child will be raised. 170

In addition to the potential for misapplication, the rigidity of the conclusive presumption approach makes it difficult to apply in those gray areas not susceptible to exactitude. For example, what is the result when both parents are cohabiting or one parent is cohabiting and the non-cohabiting parent is a child-beater or chronic alcoholic? 171 Would it be safe to presume that the

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166. *Id.* at 251, 429 N.E.2d at 1105.
167. *Id.* at 252, 429 N.E.2d at 1106 (emphasis added).
168. *Id.* at 253, 429 N.E.2d at 1106.
169. *Id.* at 253-54, 429 N.E.2d at 1106. *Accord Yount v. Yount, 366 S.W.2d 744 (Mo. Ct. App. 1963)* (mother's misconduct consisted only of hugging and kissing a boyfriend, but the court held that the children were not receiving proper care and were being exposed to substantial immoral influences through this misconduct).
170. Another example of possible extensions of *Jarrett* is represented by the lower court opinion in the case of *In re Marriage of Sawyer*, 82 Ill. App. 3d 198, 402 N.E.2d 430 (1980) (appellate court reversed lower court's decision to limit the father's visitation right to only two days per month because the father was cohabiting).
171. *See, e.g., Burris v. Burris, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979).* In *Burris*, the custodial mother was living with her boyfriend and had no future plans of marriage. Mr. Burris, however, had contracted a blinding eye disease which caused him to become disabled and dependent on social security benefits for financial support. The appellate court maintained custody of the children in the cohabiting mother. It concluded that, although Mrs. Burris's conduct was alleged to be immoral, a custody transfer to Mr. Burris under
cohabiting parent is less fit for custody? Application of the conclusive presumption approach under such circumstances may place the child in an environment detrimental to his or her well-being. It is only through an evaluation of all relevant factors that a court can achieve the proper result.

Cohabitation and Custody under Current Illinois Law

As a result of the varied response to Jarrett, it is difficult to predict with any degree of certainty the probable outcome of a custody case in Illinois involving a cohabiting parent. The appellate response to Jarrett represents the entire spectrum of methods to resolve the issue of cohabitation and illustrates a broad range of societal and judicial attitudes. The Illinois appellate decisions also represent an attempt to realign the Illinois approach to cohabitation to a position that more closely corresponds to the current societal trend. Nevertheless, because of the conflicting interpretations of Jarrett, lack of predictability in the law of custody modification plagues the Illinois courts.

Factors which have emerged from cases considering Jarrett include whether: there is evidence showing physical or emotional harm to the child; the child has expressed a preference for a particular parent; the custodial parent has plans to marry or has terminated the relationship; and the child is too young to be aware of the relationship. If the child is being neglected or if the child has a strong parental preference then the custodial parent’s cohabitation is not an issue. Under these circumstances, the issue of cohabitation operates only as a means for the non-custodial parent to claim that custody should be modified. If the child is being treated well and either has no parental preference or is too young to express one, then the courts emphasize

whether the custodial parent has plans to marry or has terminated the relationship. If marriage is likely to occur or has occurred, or the paramour has moved out, the cohabitational relationship will not be an overriding consideration.

In a given custody case, the result under any particular approach depends upon the court’s focus on either the parent’s conduct or the child’s welfare and the degree of importance placed on cohabitation. Under the conclusive presumption approach, the court’s focus is on parental conduct, and the determinative factor is whether the custodial parent is cohabiting. Similarly, the “rebuttable presumption” and “tip the balance” approaches consider the conduct of the parent, even though cohabitation may not be the sole factor examined.

It is questionable how different the “tip the balance” approach is from the application of a conclusive presumption. All other factors being equal in a particular case, when a court declares that cohabitation will tip the balance in favor of the non-cohabiting party, it, in effect, places exclusive reliance upon the presence or absence of cohabitation. As a result, this exclusive reliance establishes the presumption that cohabitation adversely affects the well-being of the child.

Emphasis upon the cohabitation of the custodial parent also characterizes the rebuttable presumption approach. Under this approach, the cohabiting custodial parent maintains custody if the parent marries or terminates the relationship. Such a standard is, in effect, marriage by edict, and may itself be unconstitutional. To require a parent to marry in order to retain custody of a child forces the parent into a marriage which the parties may not have chosen as an alternative absent judicial intervention. Such a “forced marriage” could defeat the goal of “stability and continuity” in the child’s environment. If the parent marries only to satisfy the values of the court, there may be an increased chance that the marriage will fail and a divorce

178. See, e.g., In re Custody of Boyer, 83 Ill. App. 3d 52, 403 N.E.2d 796 (1980) (custody maintained in mother because the three and one-half year old daughter was too young to formulate a preference and mother’s boyfriend had moved out).

179. See, e.g., In re Custody of Nodot, 81 Ill. App. 3d 883, 401 N.E.2d 1189 (1980) (the cohabitants had plans to marry which they later carried out).

180. See supra text accompanying notes 95-97.

181. Loving v. Virginia, 388 U.S. 12 (1967) (“Marriage is one of the ‘basic civil rights of man’ fundamental to our very existence and survival.”). See Minton, supra note 98, at 431.

182. See supra notes 42-45.
occur. As a result, the child for whom the court was seeking to provide stability is the victim of still another disruption of the family structure.

In contrast to the conclusive presumption, rebuttable presumption, and "tip the balance" approaches, a totality approach prohibits the placement of exclusive reliance upon any one factor. This approach takes the position that although cohabitation is an appropriate consideration in custody disputes, it should not automatically give rise to a conclusive presumption of unfitness.\textsuperscript{183} Instead, a totality approach focuses on the child and those relevant factors that pertain to the child's well-being and best interests.

**RECOMMENDATIONS**

Determination of what is in the best interests of a child is a formidable task.\textsuperscript{184} An absolute rule that would eliminate the multitude of considerations that pervade a custody dispute may at first look appealing in terms of judicial economy. Where a child's future is at stake, however, this interest deserves a careful and complete assessment of all the relevant circumstances.\textsuperscript{185} The totality approach is best suited for custody determinations involving cohabitation because it is a flexible standard which recognizes that the effect of cohabitation on children cannot be ascertained.

Two reasons account for the difficulty in determining the effect of parental cohabitation on children. First, there are currently no psychological studies to ascertain what future effects cohabitation may have on children.\textsuperscript{186} Although many experts

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\textsuperscript{183} Accord In re Marriage of Kramer, 297 N.W.2d 359 (Iowa 1980) (mother's cohabitation is a proper factor to consider in deciding whether custody modification is appropriate); Ahlman v. Ahlman, 201 Neb. 273, 267 N.W.2d 521 (1978) (sexual misconduct is a factor that may be considered in determining what is in the best interests of the child).

\textsuperscript{184} See supra text accompanying notes 45-50.

\textsuperscript{185} See supra text accompanying notes 14-26.

\textsuperscript{186} Gehn v. Gehn, 51 Ill. App. 3d 946, 367 N.E.2d 508 (1977) (it is difficult to predict what psychological effects or problems may later develop from a child's efforts to overcome the disparity between his concepts of propriety and his parent's conduct). See also J. Goldstein, A. Freud & A. Solnit, supra note 42, at 49 (Predictions may be erroneous because "[n]o one—and psychoanalysis creates no exception—can forecast just what experiences, what events, what changes a child or for that matter his adult custodian, will actually encounter." Id. (footnote omitted)). See Note, supra note 48, at 713.

Studies of the future effects of cohabitation on children may also pose constitutional questions as to the right of privacy of the child and parent. Litwack, Gerber & Fenster,
agree that children do learn from their parents, it is impossible to define with any certitude what factors cause children to adopt certain moral and spiritual values.

The second problem with determining the effect of cohabitation is based upon the nature of the problem. Cohabitation is, for many, a moral issue. As with any discussion of morals, there are divergent viewpoints. Some courts see their duty as insuring that a child is raised in a "good moral environment" and view cohabitation as detrimental to a child's well-being. Others argue that the issue is beyond the scope of the legal system and should be left to theologians. The totality approach recognizes the moral nature of the issue and the difficulty in determining the effect of cohabitation, thus prohibiting exclusive reliance on any single factor. Instead, the totality approach allows for a flexible and in-depth evaluation of all the factors that exist in the present and proposed environments. Moral atmosphere is an important consideration in custody cases, however, any approach which ignores the physical, mental, emotional, and intellectual environment may not achieve what is best for the child. A decision based on all these factors will more accurately reflect the environment best suited for the child. The flexibility of the totality approach allows the court to make individualized decisions based upon the facts of each case, rather than upon rigid absolutes.
In applying the totality approach the court must remember that the decision whether to cohabit is an individual moral determination. The function of the trial judge is to analyze the evidence presented and to decide which parent will provide the most suitable custodial home. The judge's function is not to pass judgment on the parent's sexual conduct. If the court relies on its own moral values in deciding whether the cohabiting or non-cohabiting parent should have custody, the decisions may reflect the values of the judiciary rather than those of society.

Within the contours of the totality approach, cohabitation should be given the same weight and consideration as any other factor. It should not be the mere "fact" that cohabitation is present which is considered, but only the "effect" that this conduct has on the child. Speculative impact should not be considered. It would be unfair to both the parent and the child to allow courts to make predictions about cohabitation which even the experts cannot agree upon. Courts should critically scrutinize the environment provided by the cohabiting parent and when the evidence shows a clear direct impact or harm to the child as a result of the cohabitation, the custodial parent's cohabitation should be evaluated with all other relevant factors.

CONCLUSION

The Illinois Supreme Court in Jarrett v. Jarrett established a rigid standard that cohabitation by the custodial parent mandates a transfer of custody. The Illinois Appellate Courts has recognized the potential hardship and unfairness this approach may have on the parent and child. As a result, most appellate decisions since Jarrett have focused upon the welfare of the child rather than the conduct of the parent. These cases, however, have not utilized a consistent standard for determining the significance that should attach to cohabitation in custody proceed-

192. See supra text accompanying notes 27-31.
193. See Note, supra note 48. See Burris v. Burris, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979) ("[W]e recognize that it would be...erroneous for us to rely on our standards of morality in making this review." Id. at 509).
194. See supra text accompanying notes 157-59.
195. See Lauerman, supra note 48, at 673.
196. See supra text accompanying notes 186-88.
ings. An appropriate standard for the courts to employ when faced with this issue is an approach that reviews all factors present in the child's environment. A broad totality approach would provide flexibility in an area of law that is characterized by vagueness. The complexity of the family structure requires that in child custody disputes the court be allowed to decide each case upon its own facts. Although an assessment of the totality of circumstances is more difficult than the application of a conclusive presumption, it is only by weighing and balancing all factors that the child's best interests will be served.

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