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**CHILD CUSTODY:
PARENTAL COHABITATIONAL RELATIONSHIPS
AND THE BEST INTEREST OF THE CHILD
STANDARD—JARRETT V. JARRETT**

Among the most difficult decisions for a court in a divorce proceeding is which parent will be awarded custody of the children.¹ Traditionally, Illinois has followed the established rule that child custody decisions are resolved in accordance with the best interest of the child.² Case law indicates that Illinois courts have considered such factors as the stability of the familial environment,³ the physical and mental conditions of both parents⁴ and the preference of the child⁵ to determine which parent will provide the more suitable environment for the child.⁶ More recently, the legislature affirmed the importance of these considerations in determining the best interest of a child when it passed the new Illinois Marriage and Dissolution of Marriage Act (IMDMA).⁷ These factors are included in the Act's provisions for the initial determination of custody⁸ and the subsequent modification of the custody agreement.⁹

1. See Kirshner, *Child Custody Determination—A Better Way!*, 17 J. FAM. L. 275 (1978-79).

2. The best interest of the child standard was initially enunciated in *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952), where the court stated, "[t]he guiding star is and must be, at all times, the best interest of the child." *Id.* at 415, 105 N.E.2d at 304. See also *Sommer v. Borovic*, 69 Ill. 2d 220, 233, 370 N.E.2d 1028, 1032 (1978) ("[t]he court's primary concern obviously is not the wishes of the parents but rather the best interests of child"); *Marcus v. Marcus*, 24 Ill. App. 3d 401, 406-07, 320 N.E.2d 581, 585 (1st Dist. 1974) ("the sole objective of the court [is] to reach a decision designed to protect the child's best interest"); *Vysoky v. Vysoky*, 85 Ill. App. 2d 306, 310, 230 N.E.2d 3, 5 (1st Dist. 1967) ("the paramount concern must always be the welfare of the children").

3. See *Mason v. Mason*, 49 Ill. App. 3d 775, 777, 364 N.E.2d 705, 706 (4th Dist. 1977); *Holloway v. Holloway*, 10 Ill. App. 3d 662, 665, 294 N.E.2d 759, 761 (1st Dist. 1973); *Cave v. Cave*, 2 Ill. App. 3d 782, 784, 276 N.E.2d 793, 794 (5th Dist. 1971).

4. See *Burris v. Burris*, 70 Ill. App. 3d 503, 505, 388 N.E.2d 811, 813 (5th Dist. 1979); *Mason v. Mason*, 49 Ill. App. 3d at 777, 364 N.E.2d at 706; *Marcus v. Marcus*, 24 Ill. App. 3d at 406, 320 N.E.2d at 584.

5. See *Jines v. Jines*, 63 Ill. App. 3d 564, 570, 380 N.E.2d 440, 444 (5th Dist. 1978); *Strouse v. Strouse*, 75 Ill. App. 2d 362, 364, 220 N.E.2d 485, 486 (4th Dist. 1966); *Stickler v. Stickler*, 57 Ill. App. 2d 286, 287, 206 N.E.2d 720, 722 (1st Dist. 1965).

6. For a discussion of these factors, see Schiller, *Child Custody: Evolution of Current Criteria*, 26 DEPAUL L. REV. 241, 245-47 (1977).

7. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

8. *Id.* § 602. This section provides:

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

Despite this development of standards that were first established by case law and are now codified, the best interest principle they embody is difficult to apply to specific situations. In *Jarrett v. Jarrett*,¹⁰ the Illinois Supreme Court had the opportunity to review a situation in which a mother, who had been awarded custody of her children, entered into a cohabitational relationship with her boyfriend.¹¹ The court found that the best interest principle necessitated removing the Jarrett children from their mother's custody because the environment in which the children were being raised endangered their moral well-being.¹²

This Note first analyzes *Jarrett*, the standards the Illinois Supreme Court used in reaching its decision and the court's holding in relation to the best interest of the child principle. In addition, the impact that this decision will have on future child custody determinations is discussed. Finally, this Note proposes an alternative approach that not only better comports with the legislature's intent, but also preserves the right of parents to raise their children as they see fit.

FACTS OF *JARRETT*

On December 6, 1976, Jacqueline Jarrett was awarded a judgment for divorce from Walter Jarrett in the Circuit Court of Cook County.¹³ The court found Jacqueline to be a fit and proper mother and granted her the

- (4) the child's adjustment to his home, school and community; and
- (5) the mental and physical health of all individuals involved.

(b) the court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

9. *Id.* § 610. Section 610 provides:

(a) No motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

(b) The court shall not modify a prior custody judgment unless it finds, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior judgment unless:

(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 costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

10. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, _____ U.S. _____ (1980).

11. *Id.* at 341, 400 N.E.2d at 421-22.

12. *Id.* at 347-48, 400 N.E.2d at 425.

13. *Id.* at 340, 400 N.E.2d at 421. The divorce was granted on the grounds of extreme and repeated mental cruelty. *Id.* at 340-41, 400 N.E.2d at 421.

sole care, custody and control of the couple's three minor daughters.¹⁴ In April, 1977, Jacqueline informed Walter that her boyfriend, Wayne Hammon, would be living with her and the children. Although Walter objected to this arrangement, Hammon moved into the family home on May 1, 1977.¹⁵ The children did not expressly object to the arrangement although they were not "overly enthused" when he first moved into their home.¹⁶ Hammon played an active role in the children's lives. He verbally disciplined the children, attended school functions with them, played with them and paid their allowances from his own money.¹⁷ The arrangement did not have any apparent adverse effects on the children.¹⁸

Jacqueline and Hammon testified at the custody modification hearing that they had no plans to marry in the immediate future.¹⁹ Jacqueline had explained to her children that she did not feel that it was wrong for her and Hammon to live together unmarried, although other people had different moral beliefs.²⁰ She also testified that she believed it was important for her children to develop their own set of values.²¹ After Hammon moved in with Jacqueline and the Jarrett children, Walter filed a change of custody petition to remove the children from what he believed to be an immoral environment.²² The trial court found that it was in the best moral and spiritual interests of the children to amend the original divorce decree and award Walter the custody of his daughters.²³ The appellate court, in reversing the lower court's decision, found that the change in conditions did not warrant a modification of the custody agreement because the presence of Hammon did not adversely affect the children.²⁴

14. *Id.* at 341, 400 N.E.2d at 421. The divorce decree also awarded Jacqueline the use of the family home until six months after any remarriage, as well as child support. Walter Jarrett was allowed the right of visitation with the children at all reasonable times and hours. *Id.*

15. *Id.* at 341, 400 N.E.2d at 421-22.

16. *Id.* at 341, 400 N.E.2d at 422. The appellate court noted that on one occasion Walter asked his oldest daughter what she thought of the situation. She said she did not object to Hammon except when he occasionally disciplined her and her sisters. *See Jarrett v. Jarrett*, 64 Ill. App. 3d 932, 934, 382 N.E.2d 12, 14 (1st Dist. 1978).

17. *Jarrett v. Jarrett*, 64 Ill. App. 3d at 934, 382 N.E.2d at 14.

18. While under Jacqueline's care, the children appeared to be clean, healthy, well dressed and well nourished. 78 Ill. 2d at 342, 400 N.E.2d at 422.

19. *Id.* Jacqueline believed that it was too soon after her divorce to remarry and that a marriage license does not create a relationship. Jacqueline also considered the divorce decree's stipulation that she sell the family house upon remarriage. The children did not want to move and, in any case, she would be financially unable to do so. *Id.* at 341, 400 N.E.2d at 422.

20. *Id.* at 341-42, 400 N.E.2d at 422.

21. *See Jarrett v. Jarrett*, 64 Ill. App. 3d at 934, 382 N.E.2d at 14.

22. 78 Ill. 2d at 341, 400 N.E.2d at 422.

23. *Id.* at 342, 400 N.E.2d at 422.

24. *Jarrett v. Jarrett*, 64 Ill. App. 3d at 937, 382 N.E.2d at 16-17. The appellate court noted that there was no showing that Jacqueline had neglected her children. The appearance, health and stability of the children were not adversely affected. The children attended religious training classes regularly and were taken to church every week. Absent a showing of any negative effects on the children, the court refused to speculate as to what effect the situation might have on the girls in the future. *Id.*

THE PRESUMPTION OF UNFITNESS AND
DIRECT IMPACT APPROACHES

Illinois courts have followed two different approaches when considering the relationship between a parent's nonmarital sexual conduct and the best interest of the child. The first approach presumes that parental misconduct adversely affects the child;²⁵ the second requires proof that the conduct is actually detrimental to the child's well-being.²⁶

The presumption that a cohabitating parent is unfit to retain custody of his or her child is founded on the proposition that such conduct is inconsistent with the child's best interest. This approach uses the rebuttable presumption that a parent who is engaged in a nonmarital relationship cannot provide proper moral training for the child.²⁷ Justification for removing the child from such an environment is based upon the speculation that the child will follow the parent's example and ultimately engage in similar conduct.²⁸

The appellate court also refused to judge Jacqueline's conduct without a determination of the effect such conduct would have on the children. In reversing the trial court's decision, the court stated:

We do find it to be an abuse of discretion for the trial court to impose its own standard in this regard and infer, without any evidence in the record, that Jacqueline's conduct in living with a man to whom she was not married was detrimental to the welfare of the children and in and of itself sufficient to disqualify her as the custodian of the children.

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

25. See *Strand v. Strand*, 41 Ill. App. 3d 651, 355 N.E.2d 47 (2d Dist. 1976); *Mulvihill v. Mulvihill*, 20 Ill. App. 3d 440, 314 N.E.2d 342 (1st Dist. 1974); *Hahn v. Hahn*, 69 Ill. App. 2d 302, 216 N.E.2d 229 (2d Dist. 1966).

26. See *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (4th Dist. 1979); *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (3d Dist. 1978); *Collings v. Collings*, 120 Ill. App. 2d 125, 256 N.E.2d 108 (2d Dist. 1970).

27. In *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952), the Illinois Supreme Court stated that this presumption could be rebutted by a showing that 1) the misconduct has terminated and will not be resumed in the future, 2) the child was unaware of the conduct and 3) the conduct did not have an adverse affect on the child.

The *Nye* court used this test to evaluate the fitness of a mother who had engaged in sexual conduct with her boyfriend after receiving custody of her daughter. The mother was able to retain custody of her child after showing that she had married her boyfriend, the child had not witnessed any indiscretions and the misconduct had had no effect on the care which the mother provided for her daughter. For a discussion of *Nye*, see Note, *The Changed Circumstance Rule in Child Custody Modification Proceedings*, 47 Nw. U.L. REV. 543 (1952).

Although the presumption is said to be rebuttable, it is often difficult to refute and therefore becomes conclusive in practice. See *Hahn v. Hahn*, 69 Ill. App. 2d 302, 216 N.E.2d 229 (2d Dist. 1966) (custody of children changed to father as mother had been living openly in adultery and there was no evidence that she would reform); *Wolfrum v. Wolfrum*, 5 Ill. App. 2d 471, 126 N.E.2d 34 (3d Dist. 1955) (father awarded custody of his children as mother was found guilty of adultery).

28. See *Hahn v. Hahn*, 69 Ill. App. 2d at 305, 216 N.E.2d at 230; *Kline v. Kline*, 57 Ill. App. 2d 244, 251, 205 N.E.2d 775, 777 (3d Dist. 1965). *Accord*, *Stark v. Stark*, 13 Ill. App. 3d 35, 38, 299 N.E.2d 605, 608 (3d Dist. 1973). See generally Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 663-66 (1977) (author asserts that courts use the speculative impact justification to change the custody of a child whose parent is engaged in

Since the supposed harm to the child's morals will not become evident until a future time, courts using the presumption of unfitness approach do not require an actual showing of present detriment to the child's moral development. For example, in *Gehn v. Gehn*²⁹ the appellate court observed that it may be impossible to present evidence illustrating the effect of a mother's adulterous affair on the children. Yet, the court transferred custody of the children to the father as it found that the mother was not providing the children with proper moral training.³⁰ Further, in *DeFranco v. DeFranco*,³¹ an Illinois appellate court found that the need for proof of imminent harm was precluded by section 610 of IMDMA.³² Section 610 allows the modification of a custody agreement if the child's present environment endangers his or her moral health.³³ The *DeFranco* court recognized the difficulty of proving a correlation between a parent's cohabitational relationship and the adverse effect it may have on a child.³⁴ Nevertheless, the court removed the children from their cohabitating mother's custody, holding that the possibility of the children following their mother's example was sufficient justification under section 610 to modify the custody agreement.³⁵

In contrast, courts following the direct impact approach do not modify the custody agreement unless it can be shown that the parent's nonmarital sexual conduct has a direct, adverse impact on the child. These courts admit that a parent's misconduct should be considered; however, there is no presumption of the parent's unfitness to retain custody.³⁶ Unlike courts using

a nonmarital sexual relationship where there is no evidence that the parent's conduct has a present effect on the child; author suggests that such decisions are influenced by judicial attitudes toward certain moral values and the desire to establish a single set of moral values).

29. 51 Ill. App. 3d 946, 367 N.E.2d 508 (3d Dist. 1977).

30. *Id.* at 949, 367 N.E.2d at 511. This same reasoning convinced the court in *Hahn v. Hahn*, 69 Ill. App. 2d 302, 216 N.E.2d 229 (2d Dist. 1966), to remove the children from their mother's custody after she began living with a married man. Although there was no evidence that the mother neglected her children, her conduct was not deemed "conducive to the proper moral training that children of tender years need." *Id.* at 305, 216 N.E.2d at 230.

31. 67 Ill. App. 3d 760, 384 N.E.2d 997 (1st Dist. 1979).

32. ILL. REV. STAT. ch. 40, § 610 (1977).

33. See note 9 *supra*.

34. 67 Ill. App. 3d at 767, 384 N.E.2d at 1003.

35. *Id.* at 770, 384 N.E.2d at 1004. The court asserted that the children should not be raised in an environment which demonstrates to them that nothing is wrong with their mother sleeping with her boyfriend. *Id.*

36. See *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (3d Dist. 1978) (mother's moral indiscretions alone are not grounds for a change in custody where the children are not affected); *Christensen v. Christensen*, 31 Ill. App. 3d 1041, 335 N.E.2d 581 (2d Dist. 1975) (mother awarded custody of her children even though her relationship with her boyfriend was technically adulterous because the conduct did not adversely affect the children). Other jurisdictions have also used this approach. See *In re Marriage of Moore*, 35 Colo. App. 280, 531 P.2d 995 (1975); *Torrance v. Torrance*, 1 FAM. L. REP. (BNA) 2456 (Minn. Dist. Ct. 1975); *In re Burrell*, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979). See generally Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 658-60 (1977).

the presumption of unfitness approach, courts adopting the direct impact approach do not speculate as to how the conduct may affect the child in the future. For example, in *Hendrickson v. Hendrickson*,³⁷ the court refused to consider the possibility of future impact as it was not "substantial and immediate enough to deprive the respondent of the custody of her children."³⁸ Another court,³⁹ in determining that adulterous conduct on the part of the mother did not warrant a change in custody, found authority for its decision in IMDMA, which specifically states that parental conduct on the does not affect the child should not be considered by courts in custody decisions.⁴⁰ Courts that follow this approach also express a reluctance to impose their personal views into custody cases of this nature. For example, one trial court judge stated, "[w]hile there is no doubt that my personal code of morality might well be different from [the parent's], I don't think I can let that enter into my decision."⁴¹ Therefore, under the direct impact approach, while courts may not condone the parent's activity, it is not a deciding factor.

ANALYSIS OF THE MAJORITY'S OPINION

The recent trend in couples choosing cohabitation as an alternative to marriage presented the *Jarrett* court with the contemporary issue of whether a parent engaged in such a relationship can be deprived of the custody of his or her child without proof of adverse effects on the child.⁴² The court utilized both Illinois statutory law and prior case law to formulate its decision.

The majority first reviewed applicable Illinois statutory and case law concerning modification of custody agreements. The court noted that IMDMA reflects prior case law in that it gives primary consideration both to the child's best interest⁴³ and to continuity in the child's environment.⁴⁴

37. 49 Ill. App. 3d 160, 364 N.E.2d 566 (2d Dist. 1977).

38. *Id.* at 163-64, 364 N.E.2d at 569.

39. *Holt v. Holt*, 71 Ill. App. 3d 87, 388 N.E.2d 1353 (4th Dist. 1979).

40. ILL. REV. STAT. ch. 40, § 602(b) (1977) (reproduced at note 8 *supra*). See *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (5th Dist. 1979) (mother was allowed to retain custody of her children although she was living with her boyfriend).

41. *Burris v. Burris*, 70 Ill. App. 3d at 505, 388 N.E.2d at 813 (quoting the trial court's opinion). This reluctance to interject personal attitudes in custody decisions was also prevalent in *Hendrickson v. Hendrickson*, 49 Ill. App. 3d at 163, 364 N.E.2d at 569 ("[o]ur censorship of the respondent's conduct, however, can properly relate only to its effect on the children").

42. 78 Ill. 2d at 345, 400 N.E.2d at 423.

43. ILL. REV. STAT. ch. 40, § 610(b) (1977) provides that "[t]he court shall not modify a prior custody judgment unless it finds . . . that the modification is necessary to serve the best interest of the child." See *Sommer v. Borovic*, 69 Ill. 2d 220, 233, 370 N.E.2d 1028, 1032 (1977) (the court's primary concern is the best interest of the child, not the wishes of the parents); *Marcus v. Marcus*, 24 Ill. App. 3d 401, 406-07, 320 N.E.2d 581, 585 (1st Dist. 1974) (the sole objective of the court in reaching a decision is to protect the best interest of the child).

44. ILL. REV. STAT. ch. 40, § 610(b) (1977) stipulates that no modification in the custody agreement will be made if a change of environment would be more detrimental to the child

Further, IMDMA precludes a change in custody unless new conditions have arisen since the entry of the original agreement.⁴⁵ In addition, this change in conditions must adversely affect the child's physical, mental, moral or emotional health.⁴⁶ Any conduct of the parent that does not affect his or her relationship with the child will not justify a change in custody.⁴⁷ Thus, IMDMA mandates that courts focus on the child and the effects of parental conduct on the child.

The court next examined the legality of cohabitation under Illinois law. Relying on the Illinois fornication statute⁴⁸ and IMDMA,⁴⁹ the *Jarrett* court found that open cohabitation violates the moral standards of the state.⁵⁰ The court noted that the Illinois fornication statute explicitly prohibits open and notorious nonmarital sexual activity.⁵¹ Moreover, the court found that IMDMA similarly proscribes cohabitation by persons of opposite sexes. In this context, the court relied upon its recent decision in *Hewitt v. Hewitt*⁵² in interpreting the Act's purpose—"to strengthen and preserve the

than if the child remained in his or her present environment. See *Bergan v. Bergan*, 42 Ill. App. 3d 740, 743, 356 N.E.2d 673, 676 (5th Dist. 1976) (finality of custody judgments is important for the child to establish a stable environment); *King v. Vancil*, 34 Ill. App. 3d 831, 834-35, 341 N.E.2d 65, 68 (5th Dist. 1975) (children and parents are entitled to a certain degree of finality in orders of custody).

45. ILL. REV. STAT. ch. 40, § 610(b) (1977) provides that "[t]he court shall not modify a prior custody judgment unless it finds . . . that a change has occurred in the circumstances of the child or his custodian." See *Nye v. Nye*, 411 Ill. 408, 416, 105 N.E.2d 300, 304 (1952) (only new facts which have occurred after the order has been issued will be considered); *Vysoky v. Vysoky*, 85 Ill. App. 2d 306, 309-10, 230 N.E.2d 3, 5 (1st Dist. 1967) (to justify a modification of the decree there must be a showing that the parent is unfit to retain custody or that there has been a change in circumstances).

46. ILL. REV. STAT. ch. 40, § 610(b) (1977) specifies that "[t]he court shall retain the custodian appointed pursuant to the prior judgment unless . . . the child's present environment endangers seriously his physical, mental, moral or emotional health."

47. ILL. REV. STAT. ch. 40, § 602(b) (1977) provides that "[t]he court shall not consider conduct of a parent or proposed custodian that does not affect his relationship to the child." See *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (3d Dist. 1978) (there was no need for a modification of the custody agreement where the children were not affected by their mother's nonmarital sexual conduct).

48. ILL. REV. STAT. ch. 38, § 11-8 (1977) provides in part: "(a) Any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious."

49. ILL. REV. STAT. ch. 40, § 102 (1977) provides in part: "This Act shall be liberally construed and applied to promote its underlying purposes, which are to: . . . (2) strengthen and preserve the integrity of marriage and safeguard family relationships."

50. 78 Ill. 2d at 346, 400 N.E.2d at 424. The *Jarrett* court noted that only open fornication is subject to criminal sanctions because that type of conduct encourages others to violate the statutorily expressed moral standards. *Id.*

51. See note 48 *supra*.

52. 77 Ill. 2d 49, 66, 394 N.E.2d 1204, 1211 (1979). The plaintiff in *Hewitt* had lived with the defendant in an unmarried, family-like relationship for fifteen years. During that period, the plaintiff gave birth to three children, assisted the defendant in his career and performed the duties of a wife and mother. Upon the termination of the relationship, the plaintiff claimed that the conduct of both parties established an implied contract entitling her to one-half of the property accumulated over the fifteen-year period. *Id.* at 53, 394 N.E.2d at 1205. She also

integrity of marriage"⁵³—as indicative of the Illinois legislature's unwillingness to recognize cohabitation as an alternative to marriage.⁵⁴ By applying these statutory standards, the *Jarrett* court found that Jacqueline's cohabitational relationship with Wayne Hammon violated the moral standards of the state.⁵⁵ This adherence to statutory standards weakened Jacqueline's argument that her conduct did not violate contemporary social standards as indicated by the large number of people who live together outside the realm of marriage.⁵⁶ The court noted that using such statistics to depict the standards of the state would nullify the Illinois fornication statute as this statutory prohibition would then apply only to those persons who agree with the statute and not to those who believe that fornication is not immoral.⁵⁷

The Illinois Supreme Court then focused on the relationship between Jacqueline's improper living arrangement and the question of custody, disposing of three arguments presented by Jacqueline. First, Jacqueline argued that previous court decisions have allowed parents who violated the community's moral standards to retain custody of their children.⁵⁸ The majority conceded that courts have not denied custody to every parent who has infringed these standards and recognized that *past* extramarital conduct by the parent does not justify a denial of custody if no evidence is present to indicate that the parent will engage in future indiscretions.⁵⁹ In the court's view, however, Jacqueline's circumstances differed from such situations; she admitted that she was living with Wayne Hammon at the time of the litigation and gave no indication that she would alter the arrangement.⁶⁰ The

claimed restitutionary relief under various theories, such as constructive trust. The *Hewitt* court refused to acknowledge that an implied contract existed. Nor did the court employ equitable remedies to prevent the defendant's unjust enrichment. Instead, the court held that recognition of the agreement would contravene the public policy established in *IMDMA*. *Id.* at 66, 394 N.E.2d at 1211. For a discussion of the practical implication of the *Hewitt* decision, see Grant & Hyink, *Caveat Amator: The State of Affairs in Illinois*, 29 DEPAUL L. REV. 493 (1980).

53. See note 49 *supra*.

54. *Hewitt v. Hewitt*, 77 Ill. 2d at 61, 394 N.E.2d at 1209.

55. 78 Ill. 2d at 346, 400 N.E.2d at 424. The court stated that Jacqueline's behavior clearly violated society's norms because her relationship with Hammon was neither private nor discrete. *Id.*

56. Jacqueline cited a 1978 Census Bureau statistic which showed that 1.1 million households in the United States were composed of an unmarried man and woman. *Id.* at 345, 400 N.E.2d at 424.

57. *Id.* at 346, 400 N.E.2d at 424.

58. *Id.* at 347, 400 N.E.2d at 424.

59. *Id.* The court noted that, in custody determinations, courts examine both the moral example that each parent is currently setting and is expected to set in the future. Thus, as the court stated in *Nye v. Nye*, 411 Ill. at 415, 105 N.E.2d at 303, past moral indiscretions are irrelevant as long as there is no indication of future lapses.

60. The continuity of Jacqueline's relationship was therefore the factor distinguishing the situation in *Jarrett* from cases in which the *Nye* principle was utilized to leave custody with a parent who had engaged in moral indiscretions. See *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381

majority therefore found that the modification of the custody agreement was justified on the grounds that the moral values continuously demonstrated by Jacqueline to her children violated established standards of conduct and endangered the healthy moral development of her children.⁶¹

Jacqueline further argued that the trial court judge based his decision to modify the custody agreement upon his own personal moral beliefs. Such a predisposition, Jacqueline claimed, should instead be established by the legislature.⁶² The court rejected this contention, stating that the trial court, in holding that Jacqueline's cohabitational relationship justified the removal of her children from her custody, was adhering to principles established by the legislature.⁶³

Finally, Jacqueline questioned the lower court's interpretation of section 610 of IMDMA, alleging that the provision requires a showing of actual tangible harm to children before a court can modify a custody agreement.⁶⁴ The

N.E.2d 70 (3d Dist. 1978); *Strand v. Strand*, 41 Ill. App. 3d 651, 355 N.E.2d 47 (2d Dist. 1976); *Christensen v. Christensen*, 31 Ill. App. 3d 1041, 335 N.E.2d 581 (2d Dist. 1975).

61. 78 Ill. 2d at 347-48, 400 N.E.2d at 425. By holding that a parent's moral indiscretion justifies a denial of child custody, the Illinois Supreme Court discredited three Illinois appellate court decisions that held modifications of the custody agreement unsupported by parental indiscretions not affecting the children involved. The *Jarrett* court noted that the decisions in *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (5th Dist. 1979), and *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (3d Dist. 1978), had relied upon the appellate court's decision in *Jarrett* and, therefore, were overturned by the supreme court's more recent decision in that case. The third case discussed in this regard was *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (4th Dist. 1979), in which the appellate court modified a custody agreement after it was shown that the children's father was better able to provide for them than their mother. Although the modification was granted, the court reiterated the appellate court's holding in *Jarrett*: absent a showing of detrimental effect on children, a parent's extramarital sexual relationship does not per se warrant a change in custody.

62. 78 Ill. 2d at 348, 400 N.E.2d at 425.

63. *Id.* The majority cited three cases, each of which held that open and notorious extramarital sexual conduct violated moral standards established by the legislature. In *People v. Searls*, 13 Ill. 597 (1852), the Illinois Supreme Court stated that open and notorious fornication was prohibited as such a living arrangement was a public scandal that offended public decency. *Id.* at 598. In *People v. Potter*, 319 Ill. App. 409, 49 N.E.2d 307 (4th Dist. 1943), a white, married man was convicted of adultery after he had lived with a black woman to whom he was not married. The court stated that such brazen adultery and fornication were prohibited by statute in order to conserve public morals. *Id.* at 413-14, 49 N.E.2d at 309. Finally, the *Jarrett* court cited *Lyman v. People*, 198 Ill. 544, 64 N.E. 974 (1902), in which a married man who had lived with a single woman was found guilty of adultery. The couple had been seen entering the same bedroom together, embracing in public and visiting the county fair together. This evidence convinced the court that the couple was living together in a state of adultery. *Id.* at 549, 64 N.E. at 976.

Justice Goldenhersh was not convinced that cohabitation was contrary to the present public policy. He found the majority's argument unconvincing because the three cases cited to define the existing public policy were outdated. Further, Justice Goldenhersh observed that these cases more clearly represent the prevailing prejudice against interracial sexual relations at the time they were decided rather than current Illinois public policy. 78 Ill. 2d at 351, 400 N.E.2d at 426-27 (Goldenhersh, J., dissenting).

64. 78 Ill. 2d at 348, 400 N.E.2d at 425.

majority countered that Jacqueline's conduct might encourage her children to enter into a similar relationship in the future.⁶⁵ The environment, therefore, endangered the children's moral health and justified a modification of the original custody agreement.⁶⁶ Recognizing, however, that no actual harm to the children had been shown, the court reasoned that the effect on Jacqueline's children of her cohabitation with Wayne Hammon may not become apparent until the children matured. For this reason, the court found it necessary to take preventative measures to safeguard the moral well-being of the children.⁶⁷

Finally, the court distinguished the custody question raised in *Jarrett* from *Stanley v. Illinois*.⁶⁸ In *Stanley*, the United States Supreme Court held that the State of Illinois could not create a statutory presumption that unmarried fathers were unfit parents. Rather, such fathers had a due process right to be granted hearings to determine their fitness as parents before being deprived of custody of their children.⁶⁹ In contrast, Jacqueline was neither presumed to be an unfit parent nor found unable to give her children affection and care. Instead, custody was transferred to Walter Jarrett because the environment in which Jacqueline was raising the children would be detrimental to their "moral well-being" and because Walter was equally able to provide for the children. In addition, the trial court had found him to be conducting himself in a manner that did not contravene Illinois public policy.⁷⁰

CRITICISM OF *JARRETT*

The *Jarrett* decision is susceptible of criticism for three reasons. First, it reduces the importance of the best interest standard in child custody determinations. Second, it relies solely on a speculation that Jacqueline's living arrangement will harm her children. Third, the decision infringes upon Jacqueline's constitutional right to raise her children as she sees fit.

65. *Id.* at 346-47, 400 N.E.2d at 425.

66. See ILL. REV. STAT. ch. 40, § 610(b)(3) (reproduced in part at note 9 *supra*). The court noted that section 610 requires the trial court to consider whether the present environment "endangers" the child's physical, mental, moral or emotional health. The majority did not interpret this provision of the statute to require a showing of actual harm to prove detriment to the child's morals.

67. 78 Ill. 2d at 349, 400 N.E.2d at 425.

68. 405 U.S. 645 (1972). In *Stanley*, the unwed father of three children was denied custody of his children after the death of the natural mother, with whom he had lived for eighteen years. Under Illinois law, children of unwed fathers became wards of the state upon the death of their mother.

69. *Id.* at 658. In *Jarrett*, Justice Moran, dissenting, found no distinction between the statutory presumption that a father is unfit to have custody of his illegitimate children and the judicially created presumption that Jacqueline is unfit to have custody of her children because of her living arrangement. Thus, he asserted that the majority's decision was inconsistent with the holding in *Stanley* because a hearing at which the determination of custody is based upon a conclusive presumption is the same as having no hearing at all. 78 Ill. 2d at 353, 400 N.E.2d at 427 (Moran, J., dissenting).

70. 78 Ill. 2d at 350, 400 N.E.2d at 426.

Subordination of the Best Interest Standard

The *Jarrett* decision distorts child custody laws in order to further the Illinois Supreme Court's effort to limit the rights of couples living together without the benefit of a marriage license and thereby discourage cohabitation. The court's decision in *Jarrett* compliments its earlier decision in *Hewitt v. Hewitt*⁷¹ in that the supreme court, in both cases, focused on the legislature's intent to "strengthen and preserve the integrity of marriage."⁷² The cases differ, however, as a third interest is involved in child custody disputes, namely, the interest of the children of the dissolved marriage.

Basing its decision on the so-called immoral conduct of Jacqueline, the court disregarded the best interest standard of child custody decisions.⁷³ In so doing, the court ignored relevant considerations such as the preference of the child, the relationship that the child has with each parent, and the stability the child has in his or her present environment.⁷⁴ Justice Moran pointed out in his dissent that the court, in effect, punished Jacqueline for violating the state's "relevant standards of conduct."⁷⁵ Such harsh punishment not only exceeds the statutory sentence for violation of the fornication statute,⁷⁶ but it also degrades the child custody laws by subordinating the welfare of the child to the court's implicit interest in punishing the parent.⁷⁷ It is the innocent third party, the child, who is unduly injured.

71. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). See note 52 and accompanying text *supra*.

72. See note 52 and accompanying text *supra*.

73. See notes 2-9 and accompanying text *supra*.

74. These considerations are specified in IMDMA. ILL. REV. STAT. ch. 40, § 602 (1977) (reproduced at note 8 *supra*). See *Jines v. Jines*, 63 Ill. App. 3d 564, 380 N.E.2d 440 (5th Dist. 1978) (mature child's preference is a proper factor to be considered by the court in child custody proceedings); *Holloway v. Holloway*, 10 Ill. App. 3d 662, 294 N.E.2d 759 (1st Dist. 1973) (stability of the environment was found to be an important factor in determining the best interest of the child); *Filipello v. Filipello*, 130 Ill. App. 2d 1089, 268 N.E.2d 478 (1st Dist. 1971) (psychiatrist's testimony showing that children got along with mother but not with father was allowed as evidence in custody hearing).

75. 78 Ill. 2d at 353, 400 N.E.2d at 427 (Moran, J., dissenting).

76. Fornication in Illinois is classified as a Class B misdemeanor. ILL. REV. STAT. ch. 38, § 11-8 (1977). Offenses that violate § 11-8 are punishable by imprisonment for not more than six months or imposition of a fine not to exceed \$500, or both. ILL. REV. STAT. ch. 38, §§ 1005-8-3(a)(2), -9-1(a)(3) (1977).

77. Justice Goldenhersh, in his dissent, stated that the majority did not find Jacqueline an unfit parent, but instead, removed the children from her custody because the court found her guilty of fornication. He observed that the court's decision contradicts the established rule that a custody agreement cannot be modified without a showing that the parent to whom custody was originally awarded has become unfit to retain custody, or that a change of conditions has made a change of custody in the child's best interest. 78 Ill. 2d at 351-52, 400 N.E.2d at 427 (Goldenhersh, J., dissenting).

Punishment of the parent has never been condoned as a consideration in custody disputes. In *Jingling v. Trtanj*, 99 Ill. App. 2d 64, 241 N.E.2d 39 (5th Dist. 1968), the Illinois Appellate Court for the Fifth District stated:

[T]he paramount question as to custody of children in divorce proceedings is not what the parents wish, not who was wrong or who was right when the decree was

Reliance on a Speculative Harm

The majority's contention that an unmarried live-in environment will seriously injure the children's moral health is far too speculative to justify a modification of the custody agreement. As Justice Moran suggested in his dissent, the majority's reliance on IMDMA to determine that the environment in which the children were being raised harmed their moral well-being was misplaced.⁷⁸ IMDMA expressly provides that courts are not to consider conduct of the custodian which does not affect his or her relationship with the child.⁷⁹ It must be noted that there was no evidence in *Jarrett* that the children were adversely affected by their mother's relationship. To the contrary, the evidence showed that the children were well provided for. The *Jarrett* majority, therefore, based its decision on a presumption that Jacqueline's living situation *would* harm her children.⁸⁰

This presumption is unfounded. The effect of present experiences upon a child's future development cannot be predicted.⁸¹ Nevertheless, the *Jarrett* court baldly proclaimed that, by living with their mother, the children will have a tendency to engage in similar conduct in the future. Even if this speculation were warranted,⁸² the court's solution of changing custody of the children to the other parent does not totally alleviate the problem. As was

entered dissolving the marriage, *not the punishment of the father or the mother*, but what is best for the child at the time custody is fixed.

Id. at 65-66, 241 N.E.2d at 41 (emphasis added) (quoting *Schmidt v. Schmidt*, 346 Ill. App. 436, 105 N.E.2d 117 (1952)). See *People ex rel. Irby v. Dubois*, 41 Ill. App. 3d 609, 354 N.E.2d 562 (5th Dist. 1976) (father awarded custody of children despite the fact that he had initially obtained custody through deceptive means); *Fears v. Fears*, 5 Ill. App. 3d 610, 283 N.E.2d 709 (5th Dist. 1972) (mother's use of marijuana may be an indiscretion; however, she should not be punished by having her children taken away from her).

78. 78 Ill. 2d at 352, 400 N.E.2d at 427 (Moran, J., dissenting).

79. See ILL. REV. STAT. ch. 40, § 602(b) (1977) (reproduced at note 8 *supra*).

80. 78 Ill. 2d at 352, 400 N.E.2d at 427 (Moran, J., dissenting). This same argument was presented by Justice Goldenhersh in his dissenting opinion. Justice Goldenhersh, noting the absence of any evidence indicating that the environment had an adverse effect upon the children, observed that the majority based its decision upon a "nebulous concept of injury to the children's 'moral well-being and development.'" *Id.* at 351, 400 N.E.2d at 426 (Goldenhersh, J., dissenting).

81. In his dissent, Justice Goldenhersh questioned whether any sociologist could attribute the increase in cohabitation to parental example. *Id.* (Goldenhersh, J., dissenting). See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, 49-52 (1973) (the authors state that no one, including psychoanalysts, can forecast the experiences, events, and changes a child will encounter, and that it is equally impossible to predict how the familial environment will reflect on the child's personality and character formation); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226, 258 (1975) (the author maintains that even a judge who is fully aware of a child's present environment and alternatives cannot make a prediction as to which alternative is best for the child because, of the numerous competing theories of human behavior, none are capable of making accurate predictions about the effect a given environment will have on the child).

82. This would require a showing that all children exposed to a parent who engages in nonmarital sexual activity suffer a particular adverse effect.

noted in the concurring opinion of the appellate court's decision,⁸³ when the custody agreement was modified, the children spent weekdays with their father and weekends with their mother. The children, therefore, were still aware of and exposed to their mother's relationship with Wayne Hammon. Thus, the *Jarrett* court's solution to the problem is no solution at all; nothing short of a complete termination of Jacqueline's visitation privileges would eliminate the possibility of future harm to the children's morals.⁸⁴

Infringement on Jacqueline's Parental Rights

Finally, the decision is open to criticism on the ground that, in its effort to protect the Jarrett children's moral development, the Illinois Supreme Court has infringed upon Jacqueline's right to raise her children as she sees fit. While the court has a valid interest in the protection of the welfare of the children, that interest may not exceed a parent's right to teach his or her children moral values.⁸⁵ The United States Supreme Court has held that the state cannot interfere with certain aspects of family life.⁸⁶ Accordingly, one line of cases recognizes the right of parents to control their children's education;⁸⁷ another protects the parental interest in guiding the religious

83. *Jarrett v. Jarrett*, 64 Ill. App. 3d 932, 937-38, 382 N.E.2d 12, 17 (1st Dist. 1978) (Simon, J., specially concurring).

84. Judge Simon observed that this approach was too "drastic and cruel" to even be considered. *Id.* at 938, 382 N.E.2d at 17 (Simon, J., specially concurring).

85. See *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 708 (1977) (Powell, J., concurring in part and concurring in judgment); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).

86. See *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). The state does have power to intervene in certain parental decisions to protect the welfare of the child. As the Court stated in *Prince v. Massachusetts*, 321 U.S. 158 (1944), "the family itself is not beyond regulation in the public interest. . . . Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.* at 166. See generally Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1399-402 (1974).

87. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court invalidated a state statute that prohibited the teaching of modern languages in elementary school. Although the issue concerned the rights guaranteed to teachers by the fourteenth amendment, the majority's decision was heavily influenced by the rights of parents. The Supreme Court stated that "[t]o marry, establish a home and bring up children" is a form of liberty protected by the due process clause of the fourteenth amendment. *Id.* at 399. This position was reiterated two years later in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where the Supreme Court explicitly limited state intervention in child-rearing decisions. In *Pierce*, the Court voided a statute which required parents to send children between the ages of eight and sixteen to public schools. The Court described the statute as an unreasonable interference with the rights of parents to "direct the upbringing and education of children under their control." *Id.* at 534-35. The *Pierce* Court further noted that "[t]he child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. 510, 535 (1925). For a further discussion of *Meyer* and *Pierce*, see Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 805-06 (1978).

upbringing of children.⁸⁸ Similarly, the Supreme Court has indicated that parents have some control over the moral development of their children. Relevant in this regard is *Ginsberg v. New York*.⁸⁹ There the Court upheld the state's right to regulate the sale of obscene material to minors⁹⁰ because it recognized that the state has an interest in the moral development of its youth.⁹¹ The Court noted, however, that the statute did not bar parents from purchasing the materials for their children.⁹² Thus, the state's concern in safeguarding its youths' morals could not extend beyond parental guidance in this area.⁹³

Nonetheless, the Illinois Supreme Court relieved Jacqueline Jarrett of her parental authority after concluding that the example she was setting for her children contravened the state's "relevant standards of conduct."⁹⁴ The majority thereby elevated the state's concern for its youth over Jacqueline's right as a parent. In so doing, the court gave the state a potentially unlimited power to interfere with parental decisions involving the child's moral instruction. Clearly, this imposition is contrary to the United States Supreme Court's holding in *Ginsberg* that parents have the right to teach their children sexual mores.⁹⁵

88. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court struck down a compulsory school attendance law because it conflicted with Amish religious beliefs. The state argued that its interest in compulsory education outweighed Amish religious practices. The Court, however, held that the state's interest

is not totally free from a balancing process when it impinges on fundamental rights and interests such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations." 268 U.S. at 535.

Id. at 214. For a discussion of *Yoder*, see Note, *An Expansion of The Free Exercise Clause: Wisconsin v. Yoder*, 37 ALB. L. REV. 329, 334-40 (1973).

89. 390 U.S. 629 (1968).

90. The defendant was found guilty of violating a New York statute which prohibited the sale to minors of materials defined to be obscene on the basis of its appeal to minors. *Id.* at 631-32.

91. *Id.* at 639-40. The Court gave two justifications for this interest. First, parents are entitled to the support of laws designed to protect their children's well-being. Second, the statute was reasonably related to the state's objective of safeguarding their youth. *Id.* at 639, 643. See also Note, *Constitutional Law—Obscenity—Materials May Be Obscene for Minors without Being Obscene for Adults*, 21 VAND. L. REV. 844, 848-49 (1968).

92. 390 U.S. at 639.

93. The right of parents to instruct their children in matters concerning nonmarital sexual conduct may be protected by the Constitution. In *Carey v. Population Serv. Int'l.*, 431 U.S. 678 (1977), the Court struck down a state statute which, in part, prohibited the sale of contraceptives to minors. Several members of the Court acknowledged that the statute was unconstitutional as it interfered with parental child-rearing rights. Justice Powell noted that "this provision prohibits parents from distributing contraceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children." *Id.* at 708 (Powell, J., concurring in part and concurring in the judgment). Justice Stevens also agreed that "the statute may not be applied . . . to distribution by parents." *Id.* at 713 (Stevens, J., concurring in part and concurring in judgment).

94. See notes 48-57 and accompanying text *supra*.

95. See notes 87-91 and accompanying text *supra*.

IMPACT

The Illinois Supreme Court's decision in *Jarrett* has shifted the burden of proof needed to warrant a modification of the custody agreement from the non-custodial parent to the custodial, cohabitating parent. Modification hearings not involving parental nonmarital sexual activity require that the party seeking a change in custody prove changed circumstances that necessitate removing the children from their present environment.⁹⁶ By imposing a presumption of unfitness on a parent who is engaged in a cohabitational relationship, the *Jarrett* court has carved out an exception to this rule.

Absent the presumption that a cohabitating parent is unfit to retain custody of his or her child, the non-custodial parent has the burden of proving that the child's home environment is detrimental to his or her moral well-being. The *Jarrett* decision shifts this burden of proof by assuming that a child who is reared by a cohabitating parent will emulate the parent's conduct.⁹⁷ In essence, to retain custody of the child, a cohabitating parent is required to show that the environment does not affect the child's development. The significance of this exception to the modification rule lies in the difficulty, if not impossibility of establishing such proof.⁹⁸ Thus, in the future the cohabitating parent will be left without any judicial relief once the non-custodial parent asserts that his or her child's moral development is being injured by exposure to an environment where people are living together while unmarried.

Moreover, aside from ensuring that a cohabitating, unmarried parent will lose custody should the non-custodial parent object to the living arrangement, the decision will be difficult for lower courts to implement. The supreme court did not provide a feasible alternative in situations where both parents are living with members of the opposite sex or where one parent is engaged in a cohabitational relationship and the other is unfit to be a custodial parent.⁹⁹ In these situations, the court's presumption of unfitness approach would render both parents incapable of assuming custody of the child. Unless the child was removed to the care of a non-parent or social agency of the state,¹⁰⁰ a new approach would have to be implemented.

96. See *McWilliams v. McWilliams*, 43 Ill. App. 3d 65, 356 N.E.2d 1124 (2d Dist. 1976); *Brady v. Brady*, 26 Ill. App. 3d 131, 324 N.E.2d 645 (5th Dist. 1975); *Jacobs v. Jacobs*, 25 Ill. App. 3d 175, 323 N.E.2d 21 (1st Dist. 1974).

97. See notes 65-67 and accompanying text *supra*.

98. See note 81 *supra*.

99. For example, in *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (5th Dist. 1979), the appellate court was confronted with making a choice between a mother who was living with her boyfriend and a father who, due to physical disability, was supporting a new wife and four children with social security benefits. The court held that because there was no showing that the mother's cohabitational relationship with her boyfriend was detrimental to the children, she should retain custody. *Id.* at 508, 388 N.E.2d at 815. It should be noted that the *Jarrett* court explicitly invalidated the *Burris* decision because *Burris* relied upon the overruled appellate decision in *Jarrett*. 78 Ill. 2d at 348, 400 N.E.2d at 425.

100. These alternatives may have harmful effects on the child's development. See Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law*

Thus, the court's failure to establish a policy which would be applicable in circumstances different than *Jarrett* may create confusion in future litigation.

SUGGESTED ALTERNATIVE

The primary aim in child custody decisions is to place the child in an environment that best promotes his or her welfare. Although the fact that a parent is living with a person of the opposite sex may be a relevant consideration in reaching this goal, it should not create a presumption that the cohabitating parent is unfit to retain custody of his or her child. Indeed, the Illinois legislature mandated in IMDMA that courts consider all pertinent factors in selecting the environment that will be most conducive to the best interest of the child.¹⁰¹ This legislative intent precludes determinations of custody based upon a single factor.

In light of IMDMA mandates, the Illinois Supreme Court should have used a standard that weighs a parent's nonmarital relationship along with other pertinent factors that affect a child's well-being. Thus, each parent's marital status should be only one of several considerations for a court to evaluate in custody decisions rather than the controlling factor. Unlike the presumption of unfitness approach, this method would not ignore considerations such as the child's preference, his or her relationship with each parent, or the child's adjustment to his or her present environment.¹⁰² These elements would be combined with the marital status of each parent in the court's determination of which parent would best promote the welfare of the child. Therefore, even if a parent was cohabitating with a person of the opposite sex, he or she would not be barred automatically from retaining custody of the child.

This weighing of factors approach would also limit judicial speculation in custody decisions.¹⁰³ By encouraging courts to give consideration to other factors in making the custody decision, the weighing of factors approach

and Social Planning, FAM. L.Q. 257, 274 (1979) (citing statistics which show that, while the number of children placed in foster care is increasing, the number of adoptive placements has been declining; therefore, many children who are placed in the state's care are left without a family home); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 224 (1979) (the author notes that children who are placed in foster care are often transferred three or more times within a five year period and are frequently placed in homes geographically distant from their natural parents and that such multiple transfers preclude the stability in the child's environment which is necessary for successful development).

Although an environment in which a parent is living with a person not his spouse may seem detrimental to the child's moral well-being, it does provide the child with a stable home and the care of a natural parent. When the alternatives to leaving the child in the cohabitating parent's custody are considered, this speculative harm does not justify placing the children in the care of the state.

101. ILL. REV. STAT. ch. 40, § 602 (1977) (reproduced at note 8 *supra*).

102. See notes 3-9 and accompanying text *supra*.

103. See notes 78-84 and accompanying text *supra*.

would emphasize the determinable needs of the child, not the unpredictable effects of a parent's cohabitational relationship on the child. Unlike the direct impact approach, however, the concern over the child's moral development would not be totally disregarded. Rather, it would be put into perspective as other considerations, such as the child's physical, mental and emotional needs, also assume significance in these custody decisions.

CONCLUSION

In the interest of discouraging cohabitation by restricting the rights of couples engaged in such relationships, the Illinois Supreme Court has infringed upon the rights of both the parents and children who are involved in custody disputes. The *Jarrett* decision eroded the best interest of the child standard by focusing on the moral well-being of the children to the exclusion of other pertinent factors that contribute to the child's welfare. Further, the court substituted the state's moral judgment for that of the parent, thereby abrogating significant, and arguably constitutional, interests a parent may have in the moral instruction of his or her child.

The *Jarrett* court's invocation of a presumption that a parent who is engaged in a cohabitational relationship is unfit to retain custody of his or her child is based upon the speculation that the child will imitate the parent's conduct. Removing a child from his or her home because of this presumption contradicts the best interest of the child standard. A more appropriate approach would consider all factors that contribute to the child's well-being. This approach would be consistent with the best interest of the child standard as it would consider all the factors specified in IMDMA. Such a weighing of factors method would assure that, in all cases, a child is placed in an environment which best promotes his or her welfare.

Nancy J. Vottero

