The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship - North Carolina Adopts the "Nexus Test" in Pulliam v. Smith

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NOTE

THE EFFECT ON THE CHILD OF A CUSTODIAL PARENT'S INVOLVEMENT IN AN INTIMATE SAME-SEX RELATIONSHIP — North Carolina Adopts the "Nexus Test" in *Pulliam v. Smith*¹

I. INTRODUCTION

The State has a "duty of the highest order" to protect the welfare of children.² In child custody proceedings in North Carolina, courts carry out this duty by granting custody to the parent or third party that will best promote the interest and welfare of the child.³ A trial judge is given broad discretion to determine what is best for the child and what parental conduct will adversely affect the child.⁴ With such broad discretion, however, comes the danger that a trial judge's private biases regarding a parent's conduct or circumstances will unfairly influence custody determinations.

Custody determinations are particularly vulnerable to prejudice and bias when courts examine a parent's sexual conduct and its effect on the child. A parent's sexual conduct, like evidence of other conduct, is relevant to child custody determinations.⁵ However, since evidence regarding sexual conduct also reveals a parent's sexual orientation, a trial judge's private biases regarding

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¹. ___ N.C. App. ___, 476 S.E.2d 446 (1996) (as of the date of publication this case did not appear in the official reporter).
³. N.C. GEN. STAT. § 50-13.2(a) (1995); Hinkle v. Hinkle, 266 N.C. 189, 197, 146 S.E.2d 73, 79 (1966) ("The welfare or best interest of the child, in light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of the minor child. It is the polar star by which the discretion of the court is guided.").
the fitness of a parent involved in an intimate same-sex relationship often influence custody determinations.⁶

In Pulliam v. Smith,⁷ the North Carolina Court of Appeals took the first step toward eliminating the effects of prejudice and bias in custody disputes involving a parent in an intimate same-sex relationship. In Pulliam, the court held that a trial judge’s finding that a parent’s involvement in an intimate same-sex relationship adversely affects the child must be based on more than just the judge’s opinion, speculation and conjecture.⁸ In North Carolina, a court cannot conclude that a child is adversely affected by a parent’s involvement in an intimate same-sex relationship, unless the moving party produces evidence that “the conduct has or will likely have a deleterious effect on the children.”⁹

This Note examines the North Carolina Court of Appeals decision in Pulliam v. Smith.¹⁰ First, the Note discusses the facts of the case and the opinion of the North Carolina Court of Appeals. Then, the Note examines (1) child custody law in North Carolina; (2) North Carolina case law addressing the effect on the child of a custodial parent’s sexual conduct and sexual orientation; and (3) child custody disputes in other jurisdictions which involve a custodial parent in an intimate same-sex relationship. Next, the Note analyzes the decision in Pulliam and its effect on child custody law in North Carolina. Finally, the Note concludes that the North Carolina Court of Appeals reached the correct and proper outcome.


Some judges are deeply biased against lesbians and gay men, or less commonly, against individuals who engage in nonmarital heterosexual sex. For these judges, taking children away from lesbian and gay parents may be perceived as necessary without regard for any evidence. Denying custody or visitation may also serve the additional purpose of punishing the parent for immoral or improper conduct. Other judges may be fearful of the reaction of the electorate or specific communities within the electorate within which they live.

Id. at 660.

⁷ ___ N.C. App. ___, 476 S.E.2d 446.

⁸ Id. at ___, 476 S.E.2d at 449.

⁹ Id. at ___, 476 S.E.2d at 450.

¹⁰ Id. at ___, 476 S.E.2d at 446.
II. THE CASE

Frederick Smith ("Smith") and Carol Pulliam ("Pulliam"), formerly Carol Smith, were married in November of 1982.\(^{11}\) Two children were born to the marriage.\(^{12}\) In September 1990, Smith and Pulliam were separated and Pulliam moved to Kansas to live with William Pulliam.\(^{13}\) The children remained with Smith, their father.\(^{14}\)

In November of 1991, a California court awarded Smith and Pulliam joint custody of the children and Smith was awarded primary physical custody.\(^{15}\) From 1991 until August of 1994, the children lived in North Carolina with their father and his grandmother.\(^{16}\) Smith's grandmother helped care for the children while their father was at work.\(^{17}\)

In early 1994, Frederick Smith became involved in an intimate same-sex relationship with Tim Tipton,\(^{18}\) and in August of 1994, Tipton moved into Smith's home.\(^{19}\) Tipton has lived with Smith and his children since this date.\(^{20}\)

While living with their father, both children maintained above-average grades and good attendance records in school.\(^{21}\) Smith regularly attended parent-teacher conferences\(^{22}\) and helped both boys with their homework.\(^{23}\) Smith also coached one child's tee-ball team and helped coach the other child's baseball team.\(^{24}\)

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11. Id. at 447.
12. Id.
13. Id.
16. Pulliam, __ N.C. App. at ___, 476 S.E.2d at 447. Since the divorce in 1991, the children have lived with Carol and William Pulliam in Kansas for two months out of the summer. Carol and William Pulliam were not married until February 1993. Record at 34. Carol Pulliam is employed as a waitress/cook and earns approximately $250.00 per week. Id. at 30.
17. Record at 29. Frederick Smith works for General Electric in Hendersonville, North Carolina and earns approximately $449.00 per week. Pulliam, __ N.C. App. at ___, 476 S.E.2d at 447.
18. Record at 32.
19. Pulliam, __ N.C. App. at ___, 476 S.E.2d at 447.
20. Record at 32.
22. Id.
23. Id. at 3.
24. Id.
Tipton assisted Smith in the care of the children.\textsuperscript{25} Tipton took the boys to school, helped them with their homework, cooked their meals, and took care of the children while Smith was working.\textsuperscript{26}

Tipton and Smith sleep in the same bed in a room across the hall from the two boys.\textsuperscript{27} They openly embrace and kiss each other while the children are present, however, all other sexual activity occurs in the privacy of their bedroom.\textsuperscript{28}

When Carol Pulliam discovered that Smith was in a same-sex relationship with Tipton, she forced Smith to tell their youngest child, who was six years old at the time, about the nature of Smith's relationship with Tipton.\textsuperscript{29} Carol Pulliam threatened to tell the child herself if Smith refused to do so.\textsuperscript{30} The child became upset during the conversation with his parents and left the room in tears.\textsuperscript{31}

In November, Carol Pulliam sought a change of custody due to changed circumstances.\textsuperscript{32} In addition to the above findings, the trial court made the following findings of fact:

(17) That the two minor children on at least two days during their Easter/Spring break of 1995 accompanied Tim Tipton on his job maintaining lawns. That the Defendant testified that on at least one occasion when the two children accompanied Tipton, Defendant had no knowledge of who owned the said property that was being maintained by Tipton or where the said property was located . . . .\textsuperscript{33}

(24) That the [youngest] child . . . , sometime after being informed that the Defendant and Mr. Tipton were engaged in a homosexual

\begin{itemize}
\item \textsuperscript{25}Record at 30.
\item \textsuperscript{26}Brief for Appellant at 3.
\item \textsuperscript{27}\textit{Pulliam}, \textit{___} N.C. App. at \textit{___}, 476 S.E.2d at 448.
\item \textsuperscript{28}\textit{Id}.
\item \textsuperscript{29}Brief for Appellant at 3.
\item \textsuperscript{30}\textit{Id}.
\item \textsuperscript{31}\textit{Id}.
\item \textsuperscript{32}\textit{Pulliam}, \textit{___} N.C. App. \textit{___}, 476 S.E.2d 446. In the complaint filed by Carol Pulliam, five of the seven facts supporting her allegations of changed circumstances address Frederick Smith's same-sex relationship with Tim Tipton. One fact addresses the emotional stability of Frederick Smith and another fact addresses the re-marriage of Carol Pulliam. Brief for Appellant at 4. Carol Smith also testified that because of the "impact of the homosexual thing," she believed the children would be better off in her custody. \textit{Pulliam}, \textit{___} N.C. App. at \textit{___}, 476 S.E.2d at 448.
\item \textsuperscript{33}Record at 30-31.
\end{itemize}
relationship, asked Mr. Tipton if he (Mr. Tipton) was his stepfather.34

(26) That Defendant met Tim Tipton in February of 1994 at an establishment that served alcohol and at which homosexuals routinely gathered in Asheville, North Carolina.35

(27) That prior to meeting Tim Tipton, the Defendant called a gay and lesbian hot line . . . because he was confused about his sexual orientation . . . . 36

(29) Tim Tipton and the Defendant both testified that they engage in oral sex . . . about once a week . . . . 37

(30) That [oral sex] is in violation of G.S. § 14-177 and is a Class I Felony in the State of North Carolina . . . . 38

(33) The Defendant and Mr. Tipton on at least (1) occasion had a party for homosexuals at the home . . . . That the occasion was an anniversary party making the first year since the Defendant and Tim Tipton met at a homosexual bar in Asheville, North Carolina. 39

(35) Mr. Tipton keeps in the bedroom he shares with the Defendant pictures of "drag queens." These are pictures of men dressed like women. These pictures are not under a lock, and it is possible for the children to gain access to the pictures.40

(37) That the [youngest] child . . . on one or more occasions observed the Defendant and Tipton in bed together.41

(38) That the minor children never have friends stay over night while they are residing with the Defendant.42

34. Id. at 31-32.
35. Id. at 32. The trial court also found that "[t]he Defendant and Mr. Tipton on at least three (3) occasions since first meeting have gone to an establishment that caters to homosexuals. Id. at 33.
36. Id. at 32.
37. Id.
38. Id. The trial court also found "that despite the fact that the said behavior [oral sex] is a violation of G.S. § 14-177 the Defendant testified that there was nothing wrong with his relationship with Tim Tipton." Id.
39. Id. at 33.
40. Id. The trial court also found that "Mr. Tipton testified that these materials (photographs of "drag queens") were not something that a child should be subjected to . . . ." Id.
41. Id.
42. Id.
(39) Uncontroverted evidence was presented that on at least two occasions the Defendant struck the [youngest] child . . . on or about the head . . . .\textsuperscript{43}

(49) That from the evidence presented the Court would find that the Defendant's conduct is not fit and proper and will expose the two minor male children to unfit and improper influences.\textsuperscript{44}

(50) That there is a possibility of exposing the children to embarrassment and humiliation in public because of the homosexuality of the Defendant and his relationship with Tim Tipton.\textsuperscript{45}

(51) At a recent trip to Six Flags amusement park in Atlanta . . . the Defendant and Tim Tipton while in the presence of the minor children became embroiled in a dispute with third parties resulting from a cigarette butt being flicked or thrown at Tim Tipton. That a brief time after the cigarette butt was thrown or flicked onto Mr. Tipton, the individual responsible for throwing the cigarette butt and others began to huddle around the Defendant, Mr. Tipton, and the minor children. At this point Mr. Tipton stated to the group that "I don't think this is funny," and the group started laughing at Mr. Tipton and continued to annoy and harass Mr. Tipton. The Defendant then said to Mr. Tipton that it was not worth it and the Defendant, Mr. Tipton, and the minor children fled the group of people. That under the circumstances as described by the witnesses to the events that transpired at Six Flags, the Court finds as a fact that the homosexual relationship of the Defendant and Mr. Tipton probably precipitated the disturbance. The Court further finds as a fact that the response of the third parties probably placed the two minor children in physical danger. The Court also finds as a fact that the two minor children will probably or likely be exposed to that same danger of potential physical harm and/or public humiliation in the future as a result of the homosexual activity of the Defendant.\textsuperscript{46}

(52) That based on the foregoing findings of fact the Defendant is not providing a fit and proper environment for the rearing of the two minor children. Living daily under the conditions stemming from active homosexuality practiced in the Defendant's home may impose a burden upon the two minor children by reason of the social condemnation attached to such an arrangement, which will inevitably afflict the two children's relationships with their peers and with the community at large.\textsuperscript{47}

\textsuperscript{43.} Id.
\textsuperscript{44.} Id. at 34.
\textsuperscript{45.} Id.
\textsuperscript{46.} Id. at 34-35.
\textsuperscript{47.} Id. at 35.
The activity of the Defendant will likely create emotional difficulties for the two minor children. That evidence was presented that the [youngest] child . . . cried when he was told by the Defendant that he (Defendant) was homosexual. This evidence leads the Court to find that the . . . child . . . may already be experiencing emotional difficulties because of the active homosexuality of the Defendant. Furthermore the Court finds that it is likely that the [oldest] child . . . will also experience emotional difficulties because of the active homosexuality of the Defendant. 48

Not included in the trial courts findings of fact was that during one of the parties at Smith's home, the boys stayed at their great-grandmother's house because Smith thought the children should not be in an atmosphere where there was drinking. 49 The trial court also failed to acknowledge the youngest child's testimony that he "feels comfortable" around Tipton, he likes Tipton's cooking, and he has no preference as to which parent he lives with. 50

Based on the above evidence, the trial judge concluded "[t]hat since the California judgment the Defendant is exposing the two minor children to conduct which is not fit and proper." 51 The Court further concluded that there had been a substantial change of circumstances which adversely affects or will likely adversely affect the two minor children and that it was in the best interest of the children that Pulliam have exclusive custody. 52 Finally, the Court concluded that "it is in the best interest of the two minor children that they not reside under the same roof as Mr. Tipton or any other person with whom the Defendant is having a homosexual relationship." 53

The North Carolina Court of Appeals reversed the decision of the trial court. 54 On appeal, the issues presented to the court were (1) whether the conclusion of a substantial change of circumstances is supported by the findings and (2) whether the findings are supported by the evidence. 55 The court held that the findings as expressed by the trial court support the conclusion, but that the

48. Id.
49. Pulliam, ___ N.C. App. at ___, 476 S.E.2d at 448.
50. Id.
51. Record at 36.
52. Id.
53. Id.
55. Id. at ___, 476 S.E.2d at 449.
order of the trial court must fail because the findings are not supported by the evidence.\(^56\)

III. THE BACKGROUND

A. Child Custody Law in North Carolina

When families are torn apart by legal separation and divorce, parents often find it difficult to agree on child custody arrangements. Therefore, courts are called upon to make these decisions. Child custody law in North Carolina mandates that the court resolve the initial custody determination by awarding custody to the parent or third party that will best promote the interest and welfare of the child.\(^57\) The trial judge has broad discretion in making this determination\(^58\) and can consider any number of factors that may affect the welfare of the child.\(^59\) Furthermore, when custody disputes are between a child's natural or adoptive parents, no presumption shall apply as to who will better promote the interest and welfare of the child.\(^60\)

The initial custody decree is not permanent in nature, and can be altered, modified, or reversed if (1) either party or anyone interested can show that there has been a substantial change of circumstances since the initial custody proceeding, and (2) the court determines that a change of custody is in the best interest of

\(^{56}\) Id.

\(^{57}\) N.C. GEN. STAT. § 50-13.2(a) (1995); See supra note 3.

\(^{58}\) Blackley, 285 N.C. at 362, 204 S.E.2d at 681 (A trial judge has broad discretion since the judge has had the opportunity to see and hear the parties and witnesses in the case.).


\(^{60}\) N.C. GEN. STAT. § 50-13.2(a) (1995); Phelps, 337 N.C. at 351, 446 S.E.2d at 21; Westneat v. Westneat, 113 N.C. App. 247, 251, 437 S.E.2d 899, 901 (1994). However, when an initial custody dispute is between a parent and a third party, there is a presumption in favor of the parent. Peterson, 337 N.C. 397, 445 S.E.2d 901 (absent a finding that parents are unfit or have neglected the welfare of their children the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail).
the child. 61 The party moving for modification of the custody order has the burden of showing a substantial change of circumstances. 62 To meet this burden, the moving party must show (1) a change of circumstances since the initial custody proceeding (2) which adversely affect the welfare of the child or will likely adversely affect the welfare of the child. 63 Once a substantial


63. See Ramirez-Barker, 107 N.C. App. at 77-78, 418 S.E.2d at 678-79; Purdue v. Purdue, 76 N.C. App. 600, 601, 334 S.E.2d 86, 87 (1985). A change in a custodial parents residence is not in itself sufficient to show a substantial change in circumstances. See Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977); Harrington v. Harrington, 16 N.C. App. 628, 192 S.E.2d 638 (1972); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969). However, such a change will be sufficient to support a finding of substantial change in circumstances if the change in residence can be shown to adversely affect the child. Ramirez-Barker, 107 N.C. App. 71, 418 S.E.2d 675. A child's preference to live with a particular parent has been considered. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984) (change of residence and child's preference to live with father is sufficient to support a finding of substantial change of circumstance). Adulterous conduct by the custodial parent will not in itself be sufficient to warrant a finding of substantial change in circumstances. See infra note 70. Religious beliefs of parents can only be considered in child custody disputes when such beliefs have an adverse effect on the child. See MacLagan, 473 S.E.2d 778; Peterson, 111 N.C. App. 712, 445 S.E.2d 901 (1993), rev'd on other grounds, 337 N.C. 397, 445 S.E.2d 901 (1994). Other changes that have been shown to adversely affect the child will support a finding of substantial change in circumstances. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989) (child's psychological state and mother's hostility towards the father's visitation supported a finding of substantial change in circumstances adversely affecting the child); White v. White, 90 N.C. App. 553, 369 S.E.2d 92 (1988) (birth of two additional children within two years to an unmarried woman together with the mother's loss of her job was shown to adversely affect the minor child); Teague v. Teague, 84 N.C. App. 545, 353 S.E.2d 242 (1987) (a finding that the child was in poor health and exhibited poor conduct when with the mother was sufficient to establish a substantial change of circumstances adversely affecting the welfare of the child); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979) (physical
change of circumstances is demonstrated, the court will conduct a "best interest" analysis based on evidence submitted by the parties. However, if the moving party does not meet its burden of showing changed circumstances, the court is without authority to undergo a "best interest" analysis.

A determination of changed circumstances is a question of law which must be supported by findings of fact that demonstrate "a nexus between the changes in circumstances and a concomitant adverse affect (or likely affect) on the children involved." "Evidence of 'speculation or conjecture that a detrimental change may take place sometime in the future' will not support a change in custody." The order of the trial judge can only be disturbed on appeal if the findings of fact are not supported by competent evidence in the record. If either the evidence does not support the findings of fact or the findings of fact do not form a valid basis for the conclusions of law, the judgment of the trial court must be reversed.

abuse being inflicted on the child); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977) (the birth of two illegitimate children and the mother's refusal to take the children to church constitutes a sufficient change in circumstances to warrant a change in custody); but see Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985) (birth of an illegitimate child and mother's change of residence when she married the baby's father were insufficient to find a substantial change adversely affecting the child).

64. Ramirez-Barker, 107 N.C. App. at 78, 418 S.E.2d at 679. There is no burden of proof on either party during the best interest analysis. Id.

65. See id. at 77, 418 S.E.2d at 678; Dobos, 111 N.C. App. at 226, 431 S.E.2d at 863.


67. Ramirez-Barker, 107 N.C. App. at 78, 418 S.E.2d at 679 (quoting Wehlau v. Witek, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985)); Benedict v. Coe, 117 N.C. App. 369, 451 S.E.2d 320 (1994) (a finding that the custodial mother is overprotective, without evidence that such conduct is harmful to the child, is not sufficient to justify a finding that there has been a substantial change of circumstances).

68. Blackley, 285 N.C. at 362, 204 S.E.2d at 681.

North Carolina courts have consistently ruled that adulterous conduct and an unmarried custodial parent’s sexual conduct and involvement in an intimate opposite-sex relationship does not per se adversely effect a child or render a parent unfit. Until Pulliam, North Carolina courts had not directly addressed whether a child is per se adversely affected by the custodial parent’s involvement in an intimate same-sex relationship. Two previous custody disputes have involved parents who allegedly engaged in homosexual conduct. Only one custody dispute has involved a parent who was involved in an intimate same-sex relationship.

In Spence v. Durham the mother sought a change of custody due to changed circumstances. Three years prior to this action,
the children's maternal and paternal grandparents had been granted joint custody of the children. At trial, testimony revealed that some years ago both parents had engaged in inappropriate sexual conduct and that the mother had allegedly made homosexual advances to teenage girls in the presence of her two daughters who were infants at the time. Spence testified that she never had homosexual tendencies and two expert witnesses testified as to the fitness of Spence. The trial judge held there had been a substantial change of circumstances since the initial custody proceedings and that, given the age of the grandparents, awarding custody to the mother was in the best interest of the children.

The Court of Appeals reversed the order of the trial judge holding that the "evidence does not support the findings of fact and that the findings of fact do not support the judgment." The Supreme Court reversed the Court of Appeals and held that the trial judge did not abuse his discretion in awarding custody to the mother. In the majority opinion, the Supreme Court addressed the inappropriate sexual conduct of Spence that had occurred some years ago, not her sexual orientation or her involvement in an intimate same-sex relationship with another adult.

In Newsome v. Newsome, the Court of Appeals affirmed a trial court order granting custody of the child to the father and remov-

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75. Id. at 675, 198 S.E.2d at 540.
76. Id. at 698, 198 S.E.2d at 552 (Lake, J., dissenting). The father had "habitually committed adultery, maintaining his mistress, a teenage girl in the home where he and the mother lived with these children." Id. The mother consented to the father's behavior. Id.
77. Id.
78. Id. at 699, 198 S.E.2d at 553.
79. Id. at 680, 198 S.E.2d at 543.
80. Id. at 682, 198 S.E.2d at 544.
81. Id. at 683, 198 S.E.2d at 544.
82. Id. at 687, 198 S.E.2d at 547.
83. In the initial custody decree the Georgia court found that "(1) the father habitually committed adultery, maintaining his mistress, a teenage girl, in the home where he and the mother lived with these children; (2) The mother consented to, condoned, encouraged, aided and abetted in this conduct, going so far as to turn over and go to sleep without protest when awakened by the father and his mistress engaging in sexual intercourse while in the same bed with her, and thereafter serving them breakfast in bed; and (3) the mother made sexual advances to various teenage girls visiting her home sometimes in the presence of her two daughters, then mere infants, the general course of these actions being with the knowledge and consent of the father, her husband." Id. at 698, 198 S.E.2d at 552 (Lake, J., dissenting).
ing custody from an alleged lesbian mother.\textsuperscript{84} William Newsome alleged that his ex-wife, Cheryl Newsome, had engaged in an illicit homosexual relationship with another woman.\textsuperscript{85} Cheryl Newsome denied being homosexual.\textsuperscript{86}

The trial judge made various findings of fact which supported William Newsome's allegations, however, the judge did not find that Cheryl Newsome was homosexual.\textsuperscript{87} The judge found that Cheryl Newsome was a loving mother who was interested in the well-being of her child, and that both parents were fit and proper persons to have custody of the child.\textsuperscript{88} Notwithstanding this fact, the trial judge concluded there had been a substantial change of circumstances since the initial custody proceeding and William Newsome should be awarded custody of the child.\textsuperscript{89}

The Court of Appeals in \textit{Newsome} affirmed the holding of the trial court, however, the court held that it was unnecessary for Mr. Newsome to show that there had been a substantial change of circumstances.\textsuperscript{90} Thus, after weighing the evidence, the trial judge only needed to decide what was in the best interest of the child.\textsuperscript{91} The court did not find that Cheryl Newsome was involved in a same-sex relationship or that Newsome's conduct had adversely affected her child. Therefore, \textit{Newsome}, like \textit{Spence}, provides little guidance in determining the effect of a parent's involvement in an intimate same-sex relationship on the child.

Prior to \textit{Pulliam}, \textit{Woodruff v. Woodruff} \textsuperscript{92} was the only North Carolina child custody case which involved a parent in an intimate same-sex relationship. In \textit{Woodruff}, the Court of Appeals affirmed a trial court order granting a homosexual father unsupervised overnight visitation rights with his son.\textsuperscript{93} The trial

\begin{itemize}
\item \textsuperscript{84} \textit{Newsome}, 42 N.C. App. 416, 256 S.E.2d 849.
\item \textsuperscript{85} \textit{Id.} at 418, 256 S.E.2d at 850.
\item \textsuperscript{86} \textit{Id.} at 421, 256 S.E.2d at 852.
\item \textsuperscript{87} \textit{Id.} at 423, 256 S.E.2d at 853.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 424, 256 S.E.2d at 854. The court held that "there is no indication . . . that [initial] custody was litigated and decided by the judge after hearing evidence tending to show the circumstances as they then existed relating to the best interest of the child." \textit{Id.} Therefore, the court concluded that there was no need to show a substantial change in circumstances. \textit{Id.}
\item \textsuperscript{91} N.C. GEN. STAT. § 50-13.2(a) (1995).
\item \textsuperscript{92} \textit{Woodruff}, 44 N.C. App. 350, 260 S.E.2d 775.
\item \textsuperscript{93} \textit{Id.}
\end{itemize}
court found that Sammy Woodruff has homosexual tendencies. The court also concluded that Sammy Woodruff was a “fit and proper parent.” Thus, the holding in Woodruff supports the contention that the sexual orientation of a parent will not per se adversely affect the child or render a parent unfit.

C. Child Custody Disputes in Other Jurisdictions Which Involve a Custodial Parent in an Intimate Same-Sex Relationship

Numerous jurisdictions have been presented with custody disputes involving a custodial parent in an intimate same-sex relationship. These jurisdictions have adopted one of three basic approaches to determine whether a parent’s involvement in an intimate same-sex relationship harms or will likely harm the child. A minority of courts have adopted either a per se approach or a “permissible determinative inference” approach. A majority of courts have adopted a “nexus test.”

Courts that adopt the per se approach disqualify any parent who engages in “particular conduct or exhibits particular characteristics.” All parents who engage in certain conduct or “fall into a particular category — for example, all lesbian or gay parents, or more broadly, all parents cohabiting with another adult to whom they are not married” are considered unfit to have custody of a child. In Roe v. Roe, the Virginia Supreme Court adopted the per se approach in reversing a trial court order granting custody of the child to a homosexual father. The Virginia Supreme Court held that the father’s “continuous exposure of the child to

94. Id. at 352, 260 S.E.2d at 776.
95. Id. at 352, 260 S.E.2d at 776.
97. Shapiro, supra note 6, at 625.
98. Id. at 626.
99. Id. at 634.
100. Id. at 626.
101. Id.
102. Id. at 633.
103. Roe, 324 S.E.2d 691.
his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."\textsuperscript{104} Few courts, however, have adopted a true \textit{per se} approach.\textsuperscript{106}

In the "permissive determinative inference" approach, courts permit a trial judge to "infer harm to a child in the absence of any evidence of harm. Further, the permissible inference is one that, standing alone, can justify the court's decision to deny custody."\textsuperscript{106} In \textit{Thigpen v. Carpenter},\textsuperscript{107} the Arkansas Court of Appeals applied the "permissive determinative inference" approach.\textsuperscript{108} In \textit{Thigpen}, the Court of Appeals held that "it has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children."\textsuperscript{109}

The "permissive determinative inference" approach differs from the \textit{per se} approach. When courts adopt a \textit{per se} rule, the trial judge has no discretion; he or she is bound to hold in accordance with adopted rules.\textsuperscript{110} However, when a court adopts a "permissive determinative inference" approach, the trial judge is vested with "an absolute and unreviewable discretion, for an inference is permitted even in the absence of supporting evidence."\textsuperscript{111} Furthermore, "a court's decision to draw [or not to draw] the inference can never be deemed incorrect on appeal."\textsuperscript{112}

A majority of jurisdictions use a "nexus test" approach to determine whether a parent's involvement in an intimate same-sex relationship adversely affects or will likely adversely affect the

\begin{thebibliography}{9}
\bibitem{104} Id. at 694.
\bibitem{105} Shapiro, \textit{supra} note 6, at 634. The adoption of a \textit{per se} rule raises constitutional issues. However, it is beyond the scope of this note to discuss the constitutional issues raised by the adoption of a \textit{per se} rule. For a discussion of constitutional issues, see generally Shapiro, \textit{supra} note 6; Note, \textit{Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis}, 102 \textit{Harv. L. Rev.} 617 (1989).
\bibitem{106} Shapiro, \textit{supra} note 6, at 634.
\bibitem{107} Thigpen, 730 S.W.2d 510.
\bibitem{108} Shapiro, \textit{supra} note 6, at 639.
\bibitem{109} Id. at 513.
\bibitem{110} Id. at 634-35.
\bibitem{111} Id.
\bibitem{112} Id.
\end{thebibliography}
child. Courts using this approach require a causal link to be established between the parent's conduct and harm to the child.

In *S.N.E. v. R.L.B.*, the Alaska Supreme Court adopted the "nexus test" approach. In *S.N.E.*, the father sought a change of custody due to the mother's involvement in an intimate same-sex relationship. The superior court awarded custody to the father, and the mother appealed. The Alaska Supreme Court reversed the order of the superior court finding that "[c]onsideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests."

IV. THE ANALYSIS

A. North Carolina Fails to Consider the Per Se and "Permissive Determinative Inference" Approaches

In *Pulliam*, the North Carolina Court of Appeals did not consider adopting either the *per se* or "permissive determinative inference" approaches to determine whether a parent's involvement in an intimate same-sex relationship adversely affects the child. In its brief opinion, the Court of Appeals began its analysis by discussing North Carolina child custody law in change of custody proceedings. The court then stated the general rule in North Carolina that "there must be 'a nexus' between the change of circumstances and the adverse effects on the child." The court

113. Shapiro, *supra* note 6, at 635. Courts in 28 states have adopted this approach. These states include Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Washington. *Id.* at 635 n.67. Also, the District of Columbia statutorily mandates that child custody determinations be made without regard to sexual orientation. *Id.*


116. Shapiro, *supra* note 6, at 635 n.67.


118. *Id.* at 879.


120. *Id.* at ___, 476 S.E.2d at 449.

121. *Id.*
further noted that evidence of ‘speculation or conjecture that a
detrimental change may take place sometime in the future’ will
not support a change in custody.”

Applying these rules, the
court concluded that the order of the trial judge must fail since the
evidence presented by Pulliam did not show that the children
have been or will be adversely affected by Smith’s relationship
with Tipton.

The Pulliam court, however, failed to address the policy rea-
sions behind rejecting the per se and “permissive determinative
inference” approaches. Jurisdictions that have adopted one of the
above approaches, as well as some jurisdictions that have adopted
the “nexus test” approach, have reasoned that homosexual par-
ents should be denied custody of their children because: (1) homo-
sexual orientation will subject the child to social condemnation
and embarrassment; (2) homosexual influences will adversely
affect the child’s sexual orientation; and (3) children will be
exposed to immoral and illegal conduct.

(1) Social Condemnation

Jurisdictions which have rejected the per se and “permissive
determinative inference” approaches in favor of a “nexus test”
approach have addressed the presumed adverse effects of societal
prejudice on the child. In response to the contention that the
child will be subjected to social condemnation and humiliation,

122. Id.
123. Id.
124. See generally Stephen B. Pershing, “Entreat Me Not To Leave Thee”:
Bottoms v. Bottoms And The Custody Rights of Gay and Lesbian Parents, 3 WM.
& MARY BILL RTS. J. 289, 303-11 (1994). The Missouri Court of Appeals denied a
lesbian mother custody of her children stating:

Union, Missouri is a small, conservative community with a population of
about 5,000. Homosexuality is not openly accepted or widespread. We
wish to protect the children from peer pressure, teasing, and possible
ostracizing they may encounter as a result of the ‘alternative life style’
their mother has chosen.


125. Note, Custody Denials to Parents in Same-Sex Relationships: An Equal
Protection Analysis, supra note 105, at 617; Conkel v. Conkel, 509 N.E.2d 983,

126. Note, Custody Denials to Parents in Same-Sex Relationships: An Equal
Protection Analysis, supra note 105, at 617; See generally Pershing, supra note
126, at 292-303.
courts have cited *Palmore v. Sidoti*\(^\text{127}\) for the principle that possible injury from private bias and social stigma cannot be used to remove a child from the custody of a parent.\(^\text{128}\)

In *Palmore*, a father sought a change of custody because of the mother's involvement in an interracial relationship, resulting in marriage two months later.\(^\text{129}\) The trial court granted the father's motion stating:

[D]espite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child]

\(^{127}\) *Palmore*, 466 U.S. 429 (1984). See also Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, supra note 105. Possible or speculative injury from private biases associated with a custodial parent's involvement in a same-sex relationship in itself should not divest a parent of custody of a child. *Id.* at 626-627. Neither the race nor gender of a custodial parents' significant other should be held to *per se* adversely affect a child. *Id.*


Of overriding importance is that within the context of a loving and supportive relationship, there is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother . . . . If defendant retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice. Taking the children from the defendant can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others. 510 N.Y.S.2d at 964 (quoting *M.P. v. S.P.*, 404 A.2d 1256, 1262-63 (N.J. Super. Ct. App. Div. 1979)); see also *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987). *But see* *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (Concluded that *Palmore* does not apply since "[h]omosexuals are not offered the constitutional protection that race, . . . national origin, . . . and alienage . . . have been afforded.").

\(^{129}\) *Palmore*, 446 U.S. at 430.
will, if allowed to remain in her present situation . . . suffer from the social stigmatization that is sure to come.\(^\text{130}\)

The Florida District Court of Appeals affirmed the holding of the trial court.\(^\text{131}\)

The United States Supreme Court reversed the Florida Court of Appeals and held that possible injury from private bias associated with a custodial parent's involvement in an interracial relationship \textit{in itself} cannot divest a parent of custody of a child.\(^\text{132}\) (emphasis added) The Court found that the trial court's decision to remove the children from their mother's custody was based solely on the race of the mother's husband.\(^\text{133}\) The Court further stated that "it is clear that the outcome would have been different had [the mother] married a Caucasian male of similar respectability."\(^\text{134}\) The Court concluded that private biases regarding interracial marriages "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\(^\text{135}\)

The Court in \textit{Palmore} acknowledged that racial prejudice exists and children living in inter-racial homes may be subject to different pressures and stresses as a result of societal prejudice.\(^\text{136}\) Children living with a parent involved in an intimate same-sex relationship will also be subject to different pressures. Courts have reasoned that since societal prejudice and bias concerning the race of one's partner cannot be the sole basis for removing a child from the custody of a parent, neither can societal prejudice and bias concerning the sex of one's partner.\(^\text{137}\)

\textbf{(2) Influencing Sexual Orientation}

In response to claims that homosexual influences will adversely affect the child's sexual orientation, courts have relied

\(^{130}\) \textit{Id.} at 431.

\(^{131}\) \textit{Id.} The Florida Supreme Court was without jurisdiction to review the case because the Court of Appeals affirmed without opinion. \textit{Id.} The Court agreed to hear the case because it raised "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." \textit{Id.} at 432.

\(^{132}\) \textit{Id.} at 433.

\(^{133}\) \textit{Id.} at 432.

\(^{134}\) \textit{Id.}

\(^{135}\) \textit{Id.}

\(^{136}\) \textit{Id.} at 433.

\(^{137}\) \textit{See} S.N.E., 699 P.2d at 879; \textit{M.A.B.}, 510 N.Y.2d. at 964; \textit{Conkel}, 509 N.E.2d at 987.
upon expert testimony. In Conkel v. Conkel, the trial court granted a homosexual father overnight visitation with his two sons. The mother appealed the ruling on numerous grounds, one of which was that the children’s exposure to their father would “trigger homosexual tendencies in them.” The Ohio Court of Appeals rejected this argument since no evidence was presented to support it. The Court of Appeals then concluded that “there is no consensus on what causes homosexuality, but there is substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual.”

In Woodruff, the North Carolina Court of Appeals also acknowledged expert testimony in affirming the trial court’s decision to grant unsupervised overnight visitation rights to a homosexual father. At trial a clinical psychologist testified that there was no known cause of male homosexuality and that the “son of a homosexual father will not inherit that homosexuality.”

(3) Morality and Illegality

Courts that grant either unsupervised visitation or primary custody of the child to a parent involved in an intimate same-sex relationship usually do not discuss the issue of morality. However, one court noted the following:

If defendant, [who is involved in a homosexual relationship], retains custody [of the children], . . . this does not necessarily portend that their moral welfare and safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral

138. See Conkel, 509 N.E.2d at 986; Woodruff, 44 N.C. App. at 353, 260 S.E.2d at 776.
139. Conkel, 509 N.E.2d 983.
140. Id. at 984.
141. Id. at 986.
142. Id. But see J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989) (“[E]xpert testimony is not a necessary basis for a determination that exposure to a homosexual influence will adversely affect a child . . . . the father’s acknowledgment that he was living with an avowed homosexual certainly augurs for potential harm to the child that the trial court was perfectly competent to assess.”).
144. Id. at 353, 260 S.E.2d at 776.
judgments, and better able to understand the importance of con-
forming their beliefs to the requirements of reason and tested
knowledge, not the constraints of currently popular sentiment or
prejudice.  

On the other hand, courts finding that a child is adversely
affected by a custodial parent's involvement in an intimate same-
sex relationship have relied on the premise that homosexual con-
duct is illicit and immoral. In addition, where a state criminal-
izes certain sexual conduct, courts have found that exposure to
illegal conduct will adversely affect the child.

In Pulliam, the trial court found that Smith and Tipton had
engaged in oral sex in violation of N.C. Gen. Stat. § 14-177. Pulliam also admitted that she and her husband participated in
oral sex. The Court of Appeals, however, did not discuss the
specific sexual conduct of either parent in its opinion.

The courts failure to conclude that Smith's violation of a crim-
inal statute per se adversely affects the child is consistent with
prior child custody case law in North Carolina. Adultery is also
statutorily prohibited in North Carolina. However, courts
have consistently held that such conduct does not per se adversely
affect the child or render a parent unfit. Thus, the Pulliam
courts failure to follow the "illegality" rationale is consistent with
prior case law.

B. North Carolina adopts the "Nexus Test" Approach

In Pulliam, the North Carolina Court of Appeals joined a
majority of states in adopting a "nexus test" approach to deter-

146. See Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985); See generally Thigpen v.
147. See J.P., 772 S.W.2d at 792; Thigpen, 730 S.W.2d at 514. Other courts in
child custody disputes have ignored a State statute making certain sexual
conduct illegal. See In re R.E.W., 471 S.E.2d 6 (Ga. Ct. App.), cert. denied, 472
S.E.2d 295 (Ga. 1996) (father was awarded unsupervised visitation with his child
when he admitted engaging in sodomy, which is against the criminal law of
Georgia). It has also been reasoned that since an intimate same-sex relationship
is not legally recognized, a parent involved in such relationship is unsuitable.
148. Record at 32.
149. Brief for Appellant at 17.
150. N.C. GEN. STAT. § 14-184 (1995). Adultery and fornication are
misdemeanors in North Carolina. Id.
151. See supra notes 70-71.
mine if a child is adversely affected by a parent’s involvement in an intimate same-sex relationship. In North Carolina, before a judge finds that a custodial parent’s involvement in an intimate same-sex relationship adversely affects the child, “there must be evidence that [such] conduct has or will likely have a deleterious effect on the children.” Based on the evidence presented to the court in Pulliam, it is clear that Carol Pulliam did not establish that Smith’s conduct has or will likely have an adverse effect on the children.

Carol Pulliam sought a change of custody solely because of Smith’s involvement with Tipton. Pulliam testified that she thought the children would be better off in her custody because of the “impact of the homosexual thing” on the children. Furthermore, five out of seven allegations supporting Pulliam’s contention of a substantial change of circumstances directly addressed Smith’s involvement in an intimate same-sex relationship. Therefore, Pulliam had the burden of establishing that Smith’s

152. ___ N.C. App. ___, 476 S.E.2d 446 (1996). The court stated that North Carolina “has been consistent in rejecting the opinion that conduct of a parent, ipso facto, has a deleterious effect on the children.” Id. at ___, 476 S.E.2d at 450. Thus, the court simply followed the general rule in North Carolina.

153. Id. at ___, 476 S.E.2d at 450.

154. Id. at ___, 476 S.E.2d at 448.

155. Brief for Appellant at 4. In the complaint, Pulliam alleged that:

(a) Upon information and belief, that starting at some point in time after the California Custody Order went into effect, the Defendant determined that he was a homosexual and began to live the lifestyle of a homosexual. (b) Upon information and belief, that on or about the 20th day of February, 1994, the Defendant had a homosexual lover move into his home at 9 Roberts Street, Fletcher, North Carolina. That during the time the homosexual lover was living with Defendant, the two minor children were also living with the Defendant. (c) Upon information and belief, the Defendant and his homosexual lover shared the same bedroom, and that the two minor children were aware of this behavior. (d) Upon information and belief, that on or about the 18th day of August, 1994, the Defendant told the two minor children that he was a homosexual and explained to the two minor children what it meant to be a homosexual. (e) That the Defendant told the Plaintiff on or about the 16th day of August, 1994, that the Defendant was a homosexual. (f) Upon information and belief, the Defendant lacks the necessary emotional stability necessary to properly care for the two minor children. (g) Since the rendition of the California decree the Plaintiff has re-married and is able to provide a fit, proper and stable home for the minor children.

Record at 6-7.
involvement with Tipton adversely affects or will likely adversely affect the children.

Pulliam did not present any evidence suggesting that Smith's conduct harmed or would likely harm the oldest child. The only evidence presented to the trial judge which suggested that Smith's relationship harmed the youngest child was the fact that the child became upset the night that Smith told him he was a homosexual.\textsuperscript{156} Based on this evidence, the trial judge inferred that Smith's relationship with Tipton harmed the children or would likely harm the children if custody remained with Smith.

If the court had adopted either the \textit{per se} or "permissive determinative inference" approach, the mere fact that Smith and Tipton were involved in a homosexual relationship would have been sufficient to justify the trial judge's findings.\textsuperscript{157} However, if either of these approaches had been adopted, the Court of Appeals would have created an exception to the general rule in North Carolina which requires a moving party to establish a nexus between the changed circumstances and the harm or likely harm to the child.\textsuperscript{158}

C. \textit{Effect of Pulliam}

The obvious effect of \textit{Pulliam} is the adoption of the "nexus test" approach to determine whether children are harmed or will likely be harmed by a parent's involvement in an intimate same-sex relationship. The holding in \textit{Pulliam} also identifies specific parental conduct which does not \textit{per se} adversely affect a child. First of all, a custodial parent that allows his or her same-sex partner to live in the home will not \textit{per se} adversely affect the child. Second, a violation of N.C. Gen. Stat. \textsection{14-177} in the privacy of one's own bedroom does not \textit{per se} adversely affect a child. Finally, a custodial parent who embraces and kisses his same-sex partner in front of a child will not \textit{per se} adversely affect a child.

\textit{Pulliam} also identifies specific findings which will support a conclusion that there has been a substantial change in circumstances which adversely affect the child.\textsuperscript{159} The trial judge found that Frederick Smith's relationship with Tim Tipton: (1) "will expose" the children to "unfit and improper influences"; (2) "is det-
rimental to the best interest and welfare of the two minor children”; and (3) is likely to cause the oldest child emotional difficulties. 160

Based on these findings, the trial judge concluded: (1) that Smith did not provide “a fit and proper environment in which to rear the two minor children,” (2) that “there had been “a substantial change of circumstances . . . affecting the two minor children or that will likely or probably adversely affect the two minor children”, and (3) that “it was in the best interest of the two minor children that they not reside under the same roof as Mr. Tipton or any other person with whom the Defendant is having a homosexual relationship.” 161 Thus, where a moving party can present competent evidence on which the trial judge can rely to make similar findings, Pulliam will support a conclusion of a substantial change of circumstances which adversely affect the child.

Pulliam, however, is limited in two respects. First, the decision does not eliminate the effects of prejudice and bias in custody determinations involving a parent in an intimate same-sex relationship. Second, the decision does not address the effect of a parent’s involvement in an intimate same-sex relationship on the “best interest of the child” analysis.

The mere adoption of a “nexus test” approach does not eliminate the effects of prejudice and bias on custody determinations. 162 The “nexus test” only requires that a moving party present evidence which shows that the custodial parents conduct harms or will likely harm the child. Evidence presented at trial can be in the form of expert witnesses and/or lay witnesses who testify to such harm. However, after the evidence is presented, the trial judge alone determines which evidence is most credible, and whether the moving party has satisfied its burden of showing that the parent’s same-sex relationship adversely affects or will likely adversely affect the child. 163

160. Id. at __, 476 S.E.2d at 449. The trial judge also found that Smith’s relationship (4) may possibly expose the children “to embarrassment and humiliation”; (5) “may impose a burden upon the two minor children by reason of the social condemnation attached to such an arrangement; and (6) may cause Joey emotional difficulties. The Court of Appeals held that these findings were based on mere “speculation and conjecture” and thus cannot be used to support a finding of changed circumstances. Id.

161. Record at 36.
162. Shapiro, supra note 6, at 660-64.
163. Many people, including judges, perceive lesbians and gay men as exclusively sexual beings, while heterosexual parents are perceived as
In *Pulliam*, no expert witness testified as to the harm or possible harm the minor children would suffer if custody was granted to Smith. No witness testified as to any differences in the children’s behavior before and after they were told of their father’s homosexuality. Finally, no *guardian ad litem* was appointed to represent the children and make recommendations as to what was in their best interest. The only evidence of harm or likely harm to the children was testimony indicating that the youngest child became upset on the night that he was told his father was homosexual. From this evidence, however, the trial judge still managed to find that the children were harmed or likely to be harmed by Smith’s relationship with Tipton.

If the trial judge can justify a finding of harm or likely harm from only a scintilla of evidence, a judge will clearly be able to justify a finding of harm or likely harm if both parties present competent evidence supporting their respective contentions. A trial judge, given his broad discretion, would only need to find that the evidence suggesting that the parent’s conduct will harm the child is more credible. Therefore, the adoption of the “nexus test” approach will not altogether eliminate the effects of bias and prejudice on custody determinations.

Since the *Pulliam* court did not reach the issue of the “best interest of the child,” it is unclear how a parent’s involvement in an intimate same-sex relationship will factor into the “best interest” analysis in initial and change of custody proceedings. In North Carolina “trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child. Furthermore, these factors may include the consideration of constitutionally protected choices or activities of parents.”

Two factors that have been considered in child custody disputes are a parents age and religious preferences.

people who, along with many other activities in their lives, occasionally engage in sex. The mere identification of a parent as lesbian or gay, quite apart from proof of any sexual conduct, may become a relevant factor for the court.

*Id.* at 624.

164. Brief for Appellant at 3.
166. ___ N.C. App. at ___, 476 S.E.2d at 450.
168. *Id.*
In *Phelps v. Phelps*, the North Carolina Supreme Court affirmed a trial court's decision denying a fifty-five year old father custody of his child and awarding custody to a thirty-three year old mother. The trial court stated that the child is young and Mr. Phelps "is not a young man, and . . . it is important that this child be raised in one home. And that home has to be the one that is apparently going to last the longest." The North Carolina Supreme Court held that the age of a parent can be used as a factor in the "best interest" analysis. The court stated that:

> It is simple logic that all else being equal a fifty-five-year-old person has a shorter remaining lifespan than a thirty-three-year-old person. The consideration of continuity and stability in the life of a child will logically lead a judge to consider the age of a parent. We conclude that considerations of all aspects of both parents' lives, including the potential for continuity and stability, is necessary to promote the governmental interest of granting custody based on the best interest of the child.

Unlike age, the sexual orientation of a parent will not in itself interfere with the "potential for continuity and stability." A court could presume that a same-sex couple is less stable than an opposite-sex couple because of the same-sex couple's inability to marry. However, one court has held that the presumption that a same-sex relationship might be less stable and long-lasting than a marital relationship is conjecture, and therefore, can't be used to remove a child from the custody of a parent.

In *Peterson v. Rogers*, the North Carolina Court of Appeals held that "although a court may consider a child's spiritual welfare as part of the best interests determination, a court may not base its findings on its preference for any religion or particular faith." The court further held that "a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child."

Similar reasoning could be applied in child custody disputes involving a parent in an intimate same-sex relationship. If such reasoning were applied, a trial judge, when conducting a "best

171. *Id.* at 344, 446 S.E.2d at 22.
172. *Id.* at 354, 446 S.E.2d at 23.
175. *Id.* at 719, 433 S.E.2d at 775.
interest" analysis, would not be able to consider a parent's involvement in an intimate same-sex relationship unless such relationship was shown to adversely affect the child. Religious freedom, however, is specifically protected by the First Amendment to the Constitution. Therefore, it is unclear whether similar protections must be given to parents involved in intimate same-sex relationships.

Finally, the United States Supreme Court's holding in Palmore, that possible injury from private biases and social stigma cannot be used to remove a child from the custody of a parent, may also limit the courts ability to deny custody to a parent involved in an intimate same-sex relationship. In Phelps, however, the North Carolina Supreme Court interpreted Palmore narrowly as applying only to "suspect classes." Therefore, all else being equal, it is unclear whether the holding in Palmore could be used to prevent courts in North Carolina from denying custody of a child to a parent involved in an intimate same-sex relationship.

V. CONCLUSION

in Pulliam v. Smith, the North Carolina Court of Appeals took a small step toward eliminating the effects of prejudice and bias in child custody determinations which involve a parent in an intimate same-sex relationship. In a change of custody proceeding, Pulliam clearly provides that a moving party must provide evidence showing that a parent's relationship adversely affects or will likely adversely affect the child.

The adoption of the "nexus test," however, will not eliminate prejudice and bias in initial and change of custody proceedings involving a parent in an intimate same-sex relationship. Therefore, courts must further define the parameters of the "nexus test" so that the state, while fulfilling its duty to protect the welfare of children, can also protect parents' interest in the care and custody of their children.

Vicki Parrott

177. Palmore, 466 U.S. 429.
178. Phelps, 337 N.C. at 353-54, 446 S.E.2d at 22-3.
179. See id. at 352, 446 S.E.2d at 22 (citing Stankowsky v. Kramer, 455 U.S. 745, 753 (1982)).