When the 2013 General Assembly repealed the criminal statute that prohibited cohabitation, it most likely realized that its action would not affect the practice of criminal law, given that the statute was not enforced. The repeal of Virginia Code § 18.2-345 will instead have its impact outside the area of criminal law, namely, in family law. This development comes several years after the Supreme Court of Virginia declared that Virginia Code § 18.2-344, prohibiting fornication, is unconstitutional. (In that case, the Court relied on the U.S. Supreme Court’s ruling in Lawrence v. Texas, which struck down the anti-sodomy statute in Texas.) Even though the statute prohibiting cohabitation’s cousin, adultery, is still on the books, it is subject to serious constitutional challenge if the opportunity ever arises. For family law practitioners, this means that the cohabiting household may not be, and should not be, automatically ruled out as an alternative for the child’s primary residence.

Public Policy Based on Anti-Fornication and Anti-Cohabitation Statutes

While the cohabitation statute was not enforced, it was still relied upon, along with the fornication statute, as the basis for public policy pronouncements by the Supreme Court of Virginia. For example, in an employment law case, the Court made it clear that there are public policies in the commonwealth “against fornication and lewd and lascivious behavior” and that these policies are “embodied” in Va. Code § 18.2-344 (fornication statute) and § 18.2-345 (cohabitation statute). That public policy has also become instrumental in child custody cases. There is a general prohibition of cohabitation when children are involved. Some courts routinely make it a part of custody and visitation orders that no one of the opposite sex, not related by blood or marriage, may stay overnight while the parent has the child. And courts that do not routinely order such prohibition are likely to do so if the issue is raised by one of the parties.

Similarly, guardians ad litem (GALs) have felt obligated to recommend a prohibition against cohabitation in custody and visitation cases no matter what the facts may show. One of the Virginia State Bar’s public information pamphlets, prepared by the Family Law Section and
titled Marriage in Virginia, summarizes the current law:

An important consideration for people considering living together is the custody of children. If a child’s other parent objects to the living situation in the household, he or she may persuade a court to change the child’s custody or visitation accordingly. Parents have a duty to act in their child’s best interests in all situations. Cohabitation outside of marriage may present inappropriate situations for children. In such cases, a court will act in the best interests of the child in any visitation or custody modification. Courts in Virginia still view marriage as being in the best interests of the children.

Many agree that children should not be exposed to cohabitation — no matter how much family structures have changed in the last few decades. But the recently repealed statute criminalizing cohabitation had contributed to, or formed the sole basis of, the sometimes outright prohibition of cohabitation in custody and visitation cases. This had been done by either granting physical custody to the non-cohabiting parent or by granting physical custody to the cohabiting parent on the condition that the cohabiting parent ceases the cohabitation. Additionally, the orders prohibited the non-custodial parent from having overnight guests of the opposite sex who were not related by blood or marriage during the times that the child was visiting that parent.

This sentiment had been reinforced by appellate decisions in divorce cases in which adulterous relationships in the open were condemned. In Brown v. Brown, a 1977 case, the Court affirmed a trial court’s ruling that gave custody of the children to the father based upon the mother’s living arrangements with another man after the parents’ separation. While the case involved a mother living with another man while she was still married to the children’s father, the sentiments expressed by the Court had been similarly applied to cohabitation cases where the parties were divorced or were never married to each other.

Notably, the Court of Appeals of Virginia — which is in effect the court of last resort in domestic relations cases — has shown more flexibility. In Sutherland v. Sutherland, for example, the court of appeals affirmed a trial judge’s award of custody in a divorce case to the mother even though the mother was living with another man. The court of appeals declared that Brown did not establish a per se rule and that it had relied on other factors, such as the mother having a dirty house, in affirming the award of custody to the father. As the Sutherland court stated, “The controlling consideration is always the child’s welfare and, in determining the best interest of the child, the trial court must consider all the facts.”

Despite the flexibility shown by the court of appeals, judges generally rule, and the GALs generally recommend, against cohabitation when the issue comes up in a custody or visitation case. With the repeal of the cohabitation statute, however, juvenile court and circuit court judges, and the GALs, have more leeway to examine a cohabitation situation without automatically rejecting it as an option.

Factors to Consider in Cohabitation Cases
Many judges and GALs will continue to rule against and recommend against cohabitation in custody and visitation cases no matter which criminal laws are repealed. Even absent a moral objection to cohabitation, many would rather have children not live in a cohabiting household. But the ideal situation is sometimes not the realistic one.

The cohabiting household may not be the better alternative in most custody cases. But this means that it may be the better alternative in some cases. For example, the cohabiting parent may be significantly more involved and attentive than the other parent when it comes to the child’s education and health. Moreover, the cohabiting parent’s partner may bring resources to the household and a measure of security to the cohabiting parent and the child, especially at night. The only way to know is for the judges and the GALs to seriously examine all alternatives available.

The cohabiting household may not be the better alternative in most custody cases. But this means that it may be the better alternative in some cases.

Va. Code § 20-124.3 lists ten factors that the courts are to consider in custody and visitation cases. Since no specific provision is made for considering cohabitation issues, the last factor on the list, “such other factors as the court deems
necessary and proper to the determination” would apply in this context. And “such other factors” could, at a minimum, include the following:

- The length of time that the parent and her partner have been in a relationship.
- The background of the partner.
- The relationship between the child and the parent’s partner.
- The future plans of the parent and the partner. 18
- The child’s feelings about the parent’s partner, assuming that the child is old enough to express such opinion, and the reasons for the child’s opinion.
- Any objectively legitimate concerns raised by the other parent about the partner.
- Any tangible benefits to the child from cohabitation, including financial resources of the partner.
- The alternatives other than cohabitation.

The most important factor is the background of the partner. In addition to the obvious issues such as prior criminal record or prior CPS involvement, the courts and the GALs should consider the partner’s prior relationship history, job stability, and residence stability. The above factors, some derived from the typical factors that the courts and the GALs examine, should help in an objective assessment of the cohabitation situation.

prohibiting cohabitation reinforced this tendency, if not outright caused it. With the repeal of that statute, the outright rejection of cohabitation should give way to an unbiased evaluation of all feasible alternatives to determine what is truly in the best interest of the child.

Endnotes:

2 The last three reported cases involving prosecution for cohabitation were in 1973, 1929, and 1886. Everette v. Commonwealth, 214 Va. 325, 200 S.E.2d 564 (1973); Johnson v. Commonwealth, 152 Va. 965, 146 S.E. 289 (1929); Pruner v Commonwealth, 82 Va. 115 (1886). See also, Doe v. Duling, 782 F.2d 1202 (4th Cir. 1986) (dismissing challenge to constitutionality of the fornication (Va. Code § 18.2-344) and cohabitation (Va. Code § 18.2-345) statutes because of no danger of plaintiffs being prosecuted despite their admitted fornication and cohabitation activities).
3 The repealed § 18.2-345 provided:

If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or, whether married or not, be guilty of open and gross lewdness and lasciviousness, each of them shall be guilty of a Class 3 misdemeanor; and upon a repetition of the offense, and conviction thereof, each of them shall be guilty of a Class 1 misdemeanor.

The maximum penalty for a Class 3 misdemeanor is a fine of $500; the maximum penalties for a Class 1 misdemeanor are 12 months in jail and a fine of $2,500. Va. Code § 18.2-11.


6 Va. Code § 18.2-365: “Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor.” The maximum penalty for a Class 4 misdemeanor is a fine of $250. Va. Code § 18.2-11.

7 In 2004, a case from Shenandoah Valley made headlines when a man was prosecuted for adultery. With the backing of civil liberties’ groups, he made known his intention to mount a constitutional challenge. However, in a plea deal, he agreed to do 20 hours of community service in return for the dismissal of the charge. The fact that the defendant used to be the city attorney for the

But there will be times that the best interests of the child require that the other parent be the custodial parent and be allowed to have a partner share the home.

Conclusion

Undoubtedly, it is tough to seriously consider a cohabiting household for custody purposes when the other parent points out that his child should not be exposed to unmarried people living together. While that parent’s motivation may be legitimately questioned — parties in family law cases are certainly known to use many tools, including children, to make life more difficult for the other party — the motivation of the objecting parent should not be relevant.

But there will be times that the best interests of the child require that the other parent be the custodial parent and be allowed to have a partner share the home. Many judges and GALs are reluctant to contemplate such a possibility. The statute
jurisdiction may have also led to the notoriety of
the case. Michelle Boorstein, Virginia Adultery
Case Goes from Notable to a Nonevent, WASH.

8 Mitchem v. Counts, 259 Va. 179, 523 S.E.2d 246
(2000).

9 Natalie Angier, The Changing American Family,
N.Y. TIMES, November 25, 2013 (describing the
changing family structure and citing statistics such as
as 1) 41 percent of babies today are born out of
wedlock and 2) from 1996 to 2012 the number of
cohabiting couples increased from 2.9 to 7.8 mi-
lion), reprinted in part as What's a Typical
American Family?, THE VIRGINIAN-PILOT,
November 28, 2013, at 1.

10 Of course, in the appropriate circumstances,
courts will need to modify their standard language
to take into account gay couples and use language
such as “romantic partners” rather than “guests of
the opposite sex.”


12 The Supreme Court of Virginia was seemingly
condemning all cohabitation, no matter the mar-
tal status of the offending parties, when it stated:
“An illicit relationship to which minor children are
exposed cannot be condoned.” Brown, 218 Va. at
199, 237 S.E.2d at 91.

13 Va. Code § 17.1-410 provides in relevant parts:
When the Court of Appeals has (i) rejected a
petition for appeal, (ii) dismissed an appeal
in any case in accordance with the Rules of
Court, or (iii) decided an appeal, its decision
shall be final, without appeal to the Supreme
Court, in . . . [c]ases involving the affirmance
or annulment of a marriage, divorce, custody,
spousal or child support or the control or
disposition of a juvenile and other domestic
relations cases arising under Title 16.1 or
Title 20, or involving adoption . . . .
Notwithstanding the [foregoing] provisions,
in any case other than an appeal pursuant to
§ 19.2-398, in which the Supreme Court
determines on a petition for review that the
decision of the Court of Appeals involves a
substantial constitutional question as a deter-
minative issue or matters of significant
precedential value, review may be had in the
Supreme Court . . .


15 Id. at 43, 414 S.E.2d at __.

16 Id. at 43-44, 414 S.E.2d at __.

17 Va. Code § 20-124.3 lists these factors:
1. The age and physical and mental condition
of the child, giving due consideration to the
child’s changing developmental needs; 2. The
age and physical and mental condition of
each parent; 3. The relationship existing
between each parent and each child, giving
due consideration to the positive involve-
ment with the child’s life, the ability to accu-
rately assess and meet the emotional,
intellectual and physical needs of the child; 4.
The needs of the child, giving due considera-
tion to other important relationships of the
child, including but not limited to siblings,
peers and extended family members; 5. The
role that each parent has played and will play
in the future, in the upbringing and care of
the child; 6. The propensity of each parent to
actively support the child’s contact and rela-
tionship with the other parent, including
whether a parent has unreasonably denied
the other parent access to or visitation with
the child; 7. The relative willingness and
demonstrated ability of each parent to main-
tain a close and continuing relationship with
the child, and the ability of each parent to
cooperate in and resolve disputes regarding
matters affecting the child; 8. The reasonable
preference of the child, if the court deems the
child to be of reasonable intelligence, under-
standing, age and experience to express such
a preference; 9. Any history of family abuse
as that term is defined in § 16.1-228 or sexual
abuse. If the court finds such a history, the
court may disregard the factors in subdivi-
sion 6; and 10. Such other factors as the
court deems necessary and proper to the
determination.

18 Of course, there would be an incentive on the part
of the parent and the partner to say that they have
future plans of getting married. But such healthy
skepticism should not diminish the significance of
this factor.

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