

## ADOPTION: HOW PROTECTING PRIVACY IS IN THE BEST INTEREST OF GEORGIA'S CHILDREN

### INTRODUCTION

In March 2008, the Georgia Court of Appeals, in *In re Hadaway*, was faced with the question of whether the sexual orientation of a putative adoptive parent can be considered as *per se* contrary to the best interest of a child, and thus, justify a categorical ban on adoption by homosexuals.<sup>1</sup> The Court left this question unanswered and decided the case on unrelated grounds.<sup>2</sup> Banning adoption by homosexuals is controversial leading to a highly visible debate in the media and judicial arena alike.<sup>3</sup> In refusing to address the issue, the Georgia Court of Appeals left the law in a state of uncertainty, but this uncertainty will have to be addressed in the near future.

The “best interest of the child” (hereinafter the best interest standard) is the standard used in most statutes regarding the

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1. *In re Hadaway*, 659 S.E.2d 863 (Ga. Ct. App. 2008).

2. *Id.*

3. Eight former members of Florida's State House and Senate, involved in enacting the ban on adoption by homosexuals signed a statement repudiating the ban. AMERICAN CIVIL LIBERTIES UNION, PRESS RELEASE, available at <http://www.aclu.org/lgbt/parenting/11856prs20020307.html> (last visited March 13, 2009)(hereinafter “ACLU Press Release”) ( signatories included former Senate President (and former U.S. Congressman) Harry Johnston; former House Speaker Tom Gustafson; former House members Elaine Bloom, Tony Fontana and Barry Kutun; and former Senators Sherrill “Pete” Skinner, Paul Steinberg and Sherman Winn). Furthermore, as I wrote this comment a trial judge in Florida ruled that Florida's ban on adoption by homosexuals was unconstitutional. Yolanne Almanzar, *Florida Gay Adoption Ban Is Ruled Unconstitutional*, N.Y. TIMES, November 26, 2008, at A21, available at [http://www.nytimes.com/2008/11/26/us/26florida.html?\\_r=1](http://www.nytimes.com/2008/11/26/us/26florida.html?_r=1); Amanda Ruggeri, *Judge in Miami Rules Florida Ban on Gay Adoption Unconstitutional*, WORLD REPORT, November 25, 2008, available at <http://www.usnews.com/articles/news/national/2008/11/25/judge-in-miami-rules-florida-ban-on-gay-adoption-unconstitutional.html>.

legal custody of a child.<sup>4</sup> Georgia statutes apply the best interest standard in adoption contexts,<sup>5</sup> yet the law is unclear as to whether the standard is guided by the same limitations and considerations in non-adoption contexts. As a statutory standard, the best interest standard should be applied uniformly across adoption and non-adoption contexts. When the Georgia Court of Appeals chose to ignore this issue, it invited future litigation, creating disconnect in the application of the best interest standard.

*In re Hadaway* was the tip of the iceberg. The legal ramification of this decision is implicit approval for every trial judge in Georgia to choose, based on personal preference, whether to consider homosexuality *per se* contrary to the best interest of a child in the adoption context. If a judge chose to condition adoption on sexual orientation, he would find possible support in the Eleventh Circuit opinion of *Lofton v. Secretary of the Dep't of Children and Family Servs.*, in which the court upheld Florida's statutory ban on adoption by homosexuals under the Federal Constitution.<sup>6</sup> This practice of conditioning adoption on sexual orientation, while not publicized, already exists in Georgia.<sup>7</sup> *In re Hadaway* provided the Court of Appeals with the opportunity to disavow the practice and harmonize the application of the best interest standard consistent with Georgia law, but the court declined to do so. The issue remains, as a statutory standard should the best interest standard be interpreted differently in the adoption

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4. In this paper "child custody" pertains to custody determinations between persons (between parents, parents and third parties, parents and adoptive parents, between non-parents). Custody determinations that are between the parents and the state, such as delinquency and deprivation proceedings, are not included. In those contexts the language changes to "needs of the child" or "safety" of the child but the application of this standard is functionally equivalent to the best interest standard in that the promotion of the child's welfare, safety, and development are paramount.

5. O.C.G.A. § 19-8-18(b) (2008), ("If the court is satisfied. . .that the adoption requested is for the best interest of the child it shall enter a decree of adoption. . .").

6. 358 F.3d 804 (11th Cir. 2004).

7. *See Hadaway*, 659 S.E.2d 863. Author is in part also basing this observation on experience with the Georgia Department of Family and Children Services as a social worker exposed to the State's adoption practices.

context, such that adoption can be conditioned upon sexual orientation? The application of the best interest standard, including treatment of homosexuality, shall be addressed in Part I of this comment.

Not only is conditioning adoption on sexual orientation inconsistent with the best interest standard, such an approach is an unjustified invasion of the adoptive parent's right to privacy. While the scope of privacy afforded to sexual conduct under the Federal Constitution is not well defined, sexual privacy is protected under Substantive Due Process.<sup>8</sup> The Supreme Court expressly held in *Lawrence v. Texas* that a state must have a legitimate interest for intruding into a person's sexual privacy that is independent of social or moral disapproval of the person's sexual practices.<sup>9</sup> Despite the Eleventh Circuit's decision in *Lofton*, conditioning adoption upon sexual orientation is an intrusion into privacy in violation of Equal Protection. Even if it is arguable that conditioning adoption on sexual orientation does not violate the Federal Constitution, it does violate Equal Protection under the Georgia Constitution, which protects sexual privacy under a fundamental right to privacy.<sup>10</sup> Part II of this Comment will address the constitutional ramifications of conditioning adopting on sexual orientation.

#### I. BEST INTEREST OF THE CHILD IN CUSTODY AND ADOPTION PROCEEDINGS

##### A. Georgia and Eleventh Circuit Decisions Conditioning Adoption on Sexual Orientation under the Best Interest Standard

###### 1. *In re Hadaway and the Georgia Court of Appeals Treatment of the Case*

While Georgia law is clear that the best interest standard *applies* in the adoption context,<sup>11</sup> it is unclear, however, whether

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8. In *Lawrence v. Texas* the Supreme Court held that sexual privacy is protected under Substantive Due Process but did not articulate the scope of the protection or whether sexual privacy is protected via strict scrutiny or mere rational basis. 539 U.S. 558 (2003).

9. *Id.*

10. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

11. *See Hester v. Mathis*, 248 S.E.2d 538 (Ga. Ct. App. 1978) (holding

the standard is *interpreted* differently in the context of adoption.<sup>12</sup> This is the issue left unanswered by the Georgia Court of Appeals in *In Re Hadaway*.<sup>13</sup> In *Hadaway*, the biological mother of a six-year-old girl formally transferred custody of her child to Ms. Hadaway and later decided it was in her daughter's best interest to remain with Ms. Hadaway permanently.<sup>14</sup> In accordance with Georgia law,<sup>15</sup> the Department of Family and Children Services conducted an investigation of Ms. Hadaway and her home,<sup>16</sup> noting that she then lived with her same-sex partner, but concluding the adoption was in the best interest of the child.<sup>17</sup> However, when the judge read the report, he concluded that Ms. Hadaway had misled the court in that she was attempting to adopt the child jointly with her partner contrary to Georgia Law.<sup>18</sup> The judge entered an order declaring the adoption contrary to the child's best interest on the basis that Ms. Hadaway was engaged in a lesbian relationship and, that such was in contravention of Georgia law.<sup>19</sup> The judge concluded that the child would "have

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the purpose of a hearing upon an adoption petition is to determine whether the adoption is in the best interest of the child); *Kirkland v. Lee*, 287 S.E.2d 365 (Ga. Ct. App. 1981) (stating that the best interest standard is a criterion in adoption cases); *Brant v. Bazemore*, 325 S.E.2d 905 (Ga. Ct. App. 1985) (holding that an adoption is to be approved or denied in accordance with the best interest of the child).

12. Emphasis added.

13. *In re Hadaway*, 659 S.E.2d 863, 863-67 (Ga. Ct. App. 2008). An appeal to the Georgia Supreme Court was not made.

14. *Id.* at 864.

15. O.C.G.A. § 19-8-16(a) (2008) (requires the court to order an investigation of the putative adoptive parent and their home).

16. *Hadaway*, 659 S.E.2d at 864.

17. *Id.* Under O.C.G.A. § 19-8-17(a)(5) (2008); (the Department is to note approval by determining "[w]hether or not the adoption is in the best interest of the child. . .").

18. *Hadaway*, 659 S.E.2d at 864; O.C.G.A. § 19-8-3 (2008) (only married persons can jointly adopt a child, if a couple is not married only the petitioner will be the legal parent of the child, domestic partners will not have any legal relationship with the child).

19. *Id.*; Brief for Appellant at 3, *In re Hadaway*, 659 S.E.2d 863 (Ga. Ct. App. 2008) (No. A07A1626), 2007 WL 4867255; Brief of Amici Curiae Child Welfare League of Am., et al., at 5, *Hadaway*, 659 S.E.2d 863 (No. A07A1626), 2007 WL 4867259.

a long-term exposure to the homosexual parent's lifestyle. . ."<sup>20</sup> and such exposure included "the dangers of isolation and stigma" from being raised by women ". . .who openly engage in a homosexual relationship."<sup>21</sup>

The trial judge did not discuss any evidence or make any findings regarding any actual impact on the child related to Ms. Hadaway's homosexuality or how the child was actually functioning, despite the fact that the child had now lived with Ms. Hadaway for almost nine months.<sup>22</sup> Rather, the judge treated Ms. Hadaway's homosexuality as *per se* contrary to the child's best interest. In addition to denying the adoption, the judge ordered the biological mother to resume custody of the child, which she did, under threat that if the mother did not "exercise continuous, good faith care, custody, and control of the said child, then the said child shall immediately be taken into shelter care and proceedings shall be initiated in the Juvenile Court" against the mother for child deprivation.<sup>23</sup> After being returned to the biological mother the child exhibited significant distress at being separated from Ms. Hadaway and the mother asked Ms. Hadaway to take the child back.<sup>24</sup> During the course of the proceedings, Ms. Hadaway moved from Wilkinson to Bibb County and upon resuming custody of the child, her attorney filed a new petition seeking legal custody of the child in Bibb County.<sup>25</sup> The judge in Wilkinson County held Ms. Hadaway and her attorney in contempt of court for filing the new petition.<sup>26</sup>

Ms. Hadaway's and her attorney's appeals were

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20. Brief for Amici at 11-12, *Hadaway*, 659 S.E.2d 863 (No. A07A1626), 2007 WL 4867259.

21. Brief for Appellant at 38-29, *Hadaway*, 659 S.E.2d 863 (No. A07A1626), 2007 WL 4867255.

22. See Brief of Appellant at 2, 38-39, *Hadaway*, 659 S.E.2d 863 (No. A07A1626), 2007 WL 4867255; Brief of Amici at 5, 12, *Hadaway*, 659 S.E.2d 863 (No. A07A1626), 2007 WL 4867259.

23. *Hadaway*, 659 S.E.2d at 865.

24. *Id.* It was the act of filing the new petition coupled with the fact that Ms. Hadaway has resumed physical custody of the child that served as the basis for the contempt charge.

25. *Id.*

26. *Id.* at 864.

consolidated.<sup>27</sup> Both argued that the trial judge erred in finding them in contempt on the grounds that the order was not directed at them and that the underlying order, denying the petition for adoption and revoking custody, was void and clearly erroneous.<sup>28</sup> The Court of Appeals only addressed the first argument, that the order was not directed at Ms. Hadaway or her attorney, and reversed the contempt charge.<sup>29</sup> The court made no mention of the trial court's treatment of homosexuality as *per se* contrary to the child's best interest. The only reference by the court of Appeals to the basis for denying the adoption petition is the statement that "the court found fault with Hadaway's filing for adoption as an individual when the home visitation report contained information about both Hadaway and her partner as if they were adopting as a couple, and for not disclosing that information in the adoption petition."<sup>30</sup> In fact, a person reading the *In re Hadaway* case would not even know that Ms. Hadaway was a homosexual or that homosexuality served as the basis for denying the adoption.

When the Court of Appeals completely ignored the trial judge's application of the best interest standard, it avoided an uncertain area of the law: whether the best interest standard is or should be interpreted differently in the adoption context than in other contexts.

2. *Lofton v. Secretary of Department of Children and Family Services and the Eleventh Circuit's Treatment of the Case*

Rather than rely on the discretion of trial judges as Georgia does, Florida statutorily bans adoption by homosexuals.<sup>31</sup> It does so while applying the best interest standard.<sup>32</sup> As the facts from *Lofton v. Secretary of the Dep't of Children and Family*

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27. *Id.* at 866.

28. *Id.*

29. *Id.* at 866-67.

30. *Id.* at 864.

31. The validity of this statute is currently unclear. A trial judge in Florida struck down the statute as unconstitutional in August 2008, but the case has yet to reach the Florida Court of Appeals. *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct.); FLA. STAT. ANN. § 63.042(3) (2003).

32. The judge is to approve the adoption if it "is in the best interest of the person to be adopted". FLA. STAT. ANN. § 63.142(4) (2008).

*Servs.*,<sup>33</sup> illustrate, even if the decision to condition adoption on sexual orientation was made by the legislature, the result is the same, the focus of the adoption shifts from the child to the putative adoptive parents.

In *Lofton*, the Eleventh Circuit Court of Appeals upheld Florida's express ban on homosexuals adopting.<sup>34</sup> Steven Lofton, the named plaintiff in the case, is a registered pediatric nurse who has raised three foster children from infancy.<sup>35</sup> Mr. Lofton sued to challenge the denial of his adoption application for one of these three children, called "John Doe."<sup>36</sup> When Doe was born, he tested positive for HIV and cocaine and was immediately placed in Florida's foster care system, which resulted in his placement with Mr. Lofton and his same-sex partner.<sup>37</sup> Miraculously, when Doe was eighteen months old, he sero-reverted meaning he has since tested HIV negative.<sup>38</sup> When Doe's HIV status changed, he became eligible for adoption, prompting Mr. Lofton to file an application for adoption which was denied based on his sexual orientation.<sup>39</sup>

When *Lofton* reached the Eleventh Circuit in 2004, Doe was thirteen years old and still living with Mr. Lofton.<sup>40</sup> Despite the fact that Mr. Lofton had raised Doe from infancy to thirteen years of age and that Doe considered Mr. Lofton and his partner his family, calling both men "dad", the court held that Florida could refuse to legally recognize this *de facto* family and deny Mr. Lofton permission to adopt Doe.<sup>41</sup> Thus, the denial of the adoption is in the best interest of Doe and Doe can be adopted by a heterosexual stranger.

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33. 358 F.3d 804 (11th Cir. 2004).

34. *Id.* at 815.

35. *Id.* at 807.

36. *Id.* (he is named "John Doe" to protect his identity).

37. *Id.*

38. *Id.*

39. Marisa Gonzalez, *If You Can't Fix it You've Got to Stand it: Lofton v. Secretary of Department of Children and Family Services and the Florida Adoption Statute's Discrimination Against Homosexuals and Foster Children*, 7 WHITTIER J. CHILD & FAM. ADVOC. 277, 298-99 (2008).

40. 359 F.3d at 807.

41. *See id.*

*B. Development and Application of the Best Interest Standard in Non-Adoption Context*

*1. Development of the Best Interest Standard in Georgia*

A fundamental rule of statutory construction is that statutory language, including standards, are to be interpreted in a manner consistent with statute's plain language and to effectuate legislative intent.<sup>42</sup> The best interest standard has been interpreted, albeit in very vague language, as a child-centered approach to custody determinations.<sup>43</sup> The court's focus is on the needs of the child, not the rights or interests of any putative custodians involved.<sup>44</sup> Despite the standard's proffered purpose, to focus solely on the needs of the child, public opinion and collective consciousness do infiltrate custody determinations in the adoption context.<sup>45</sup>

In order to analyze the application of the best interest standard in the adoption context, it is useful to understand the development of the standard in Georgia. The best interest standard was first applied in custody disputes between parents.<sup>46</sup> O.C.G.A. § 19-9-3, regulates custody disputes between parents, and provides, "[t]he duty of the judge in all such cases shall be to exercise discretion to look to and determine *solely what is for the best interest of the child* and what will best promote the child's welfare and happiness and to make his or her award accordingly."<sup>47</sup> Neither parent has a prima facie right to custody, nor are there any presumptions in favor of one parent: parents are initially on equal footing.<sup>48</sup> The standard affords the judge broad discretion to consider any and all circumstances that impact the child.<sup>49</sup> The standard is fact sensitive and, as such,

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42. *Currid v. DeKalb State Court Probation Dept.*, No. S08G0322, 2009 WL 735641 (Ga. 2009) (citing *Slakman v. Continental Cas. Co.*, 587 S.E.2d 240 (Ga. 2003)).

43. *See Clark v. Wade*, 544 S.E.2d 99, 102 (Ga. 2001).

44. *See id.*

45. *See infra* Part I-C.

46. O.C.G.A. § 19-9-3 (2008); *Clark v. Wade*, 544 S.E.2d 99, 102 (Ga. 2001).

47. O.C.G.A. § 19-9-3(a)(2) (emphasis added).

48. *Id.* § 19-9-3(a)(1).

49. The statute provides a non-exhaustive list of seventeen factors the judge can consider. The list is too extensive to be included here, but note that

requires a case-by-case approach. However, inherent in this standard is one important limitation: the judge should consider circumstances that will impact the child directly; generalized views on social issues are irrelevant.<sup>50</sup>

In custody disputes between parents and non-parents, the best interest standard was not applied until 1996.<sup>51</sup> Prior to this, Georgia applied the “parental rights standard” and the “fitness standard” in custody disputes between parents and non-parents.<sup>52</sup> The focus was on biology to the exclusion of the needs of the child.<sup>53</sup> A non-parent seeking custody had to establish that either: (1) a parent had lost their constitutionally protected parental rights or (2) that the parent was unfit.<sup>54</sup> Neither doctrine addressed the needs of the child. Practically speaking, if a parent was alive and well and would not physically harm the child, all other factors were irrelevant.<sup>55</sup> Factors such as minimal contact or lack of an actual relationship between the child and biological parent were shoved to the wayside.<sup>56</sup> Not surprisingly, the application of these standards resulted in harsh and often unjust custody determinations.<sup>57</sup>

The inadequacy of these doctrines to address the needs of the child<sup>58</sup> led to the inclusion of the best interest standard in

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all seventeen factors focus on the interest of the child, not the interest of the parents in having custody. *Id.* at § 19-9-3(a)(3).

50. *See id.* § 19-9-3; *see also* Chapin v. Cummings, 12 S.E.2d 312 (Ga. 1940) (“[T]he ‘paramount interest of the child’ shall not be taken to mean that the court would in any given contest simply determine where the child might have the better financial, educational, or even moral advantages.”); *See also* GA. CONST. art. I, § 1, ¶ 25 (1983) (social status of citizen shall never be the subject of legislation).

51. *Clark*, 544 S.E.2d at 102.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.*

56. *See generally Clark*, 544 S.E.2d at 103 (discussing the harsh results of doctrines pre-dating the best interest standard in a dispute between parents and non-parents).

57. *Id.*

58. *Howell v. Gossett* illustrates the traditional biology-as-paramount approach. In *Howell*, the Georgia Supreme Court removed custody from the child’s stepfather upon the mother’s death and awarded custody to the biological father, despite the fact that the stepfather had raised the child from

O.C.G.A. § 19-7-1, which regulates custody disputes between parents and non-parents.<sup>59</sup> Under this code section a limited group of relatives can petition the court for custody of a child over a parent's objections.<sup>60</sup> In upholding the constitutionality of § 19-7-1, the Georgia Supreme Court noted that the statute left three important presumptions intact: first, that a parent is fit to have custody; second, that a parent acts in the best interest of their child; and third, that it is in a child's best interest to have custody awarded to a parent.<sup>61</sup> A non-parent seeking custody over the objection of a parent will have to rebut these presumptions by clear and convincing evidence.<sup>62</sup> Rebutting these presumptions requires the non-parent to show that awarding custody to the parent will result in physical *or* emotional harm to the child.<sup>63</sup>

While at first glance it appears that the presence of a presumption in favor of parental custody alters the best interest standard, in a dispute between a parent and non-parent, the application of the standard is basically the same.<sup>64</sup> The focus is still on the interest of the child; evidence of physical or emotional harm to the child can rebut the presumption in favor of a parent.<sup>65</sup> The focus is shifted from the child's biological

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infancy to age ten. The court's decision was based on the belief that custody should automatically vest in a fit biological parent, even one with a limited or non-existent relationship with the child. 214 S.E.2d 882 (Ga. 1975).

59. O.C.G.A. § 19-7-1(b.1) (2008); *Clark*, 544 S.E.2d at 102.

60. O.C.G.A. § 19-7-1(b.1) (eligible relatives include adult siblings, grandparents, aunts, uncles, and adoptive parents). It is important to note that the statute only regulates custody; it does not sever the parent-child relationship via termination of parental rights. Termination of parental rights is a separate legal issue that is outside the scope of this paper. Even if custody is awarded to a non-parent, "the parent retains significant rights, including the right to visitation and to obtain custody under changed circumstances. When parental rights are not severed, federal constitutional law does not require a showing that the parent is unfit before custody may be awarded to a third party." *Clark*, 544 S.E.2d at 105.

61. *Clark*, 544 S.E.2d at 104.

62. *Id.*

63. *Id.* (emphasis added).

64. Note that the presumption in favor of a parent does not alter the best interest standard so much as it alters the burden of proof required to overcome the presumption.

65. *Clark*, 544 S.E.2d at 104.

relationship with the parent to the needs of the child.<sup>66</sup> The same inherent limitation found in custody disputes between parents is present in the non-parent context: the judge must consider the direct impact that circumstances have on the child.<sup>67</sup>

In *Stills v. Johnson*, the Georgia Supreme Court expressly held that the best interest standard also governs disputes between non-parents, overruling precedent to the contrary.<sup>68</sup> “In a custody dispute between two non-parents, the standard must also be the best interest of the child. Otherwise the law would protect a child more in a custody dispute involving his or her own parent than in one involving non-parents.”<sup>69</sup> The judge is not choosing between competing non-parents (or parents for that matter) interests *in* the child; the judge is choosing the custody arrangement that is in the best interest *of* the child.<sup>70</sup> In order to ensure that a child is not less protected in the adoption context, the best interest standard must be guided by the same considerations and limitations as those present in a dispute between parents.<sup>71</sup> The focus of the court’s inquiry must be on the interests of the child; thus, the judge should consider factors that have an actual impact on the child. These include the child’s emotional ties with the putative custodian, the capacity of the putative custodian to meet the physical and psychological needs of the child and the putative custodian’s ability to support the child’s social and educational development.<sup>72</sup>

## *2. Consideration of a Parent’s Sexual Orientation in the Non-Adoption Context under the Best Interest Standard*

Homosexuality of a parent presented a complex problem in application of the best interest standard in many states during the mid to late 1990’s.<sup>73</sup> This is most likely because, unlike race,

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66. *Id.*

67. *See id.*

68. *Stills v. Johnson*, 533 S.E.2d 695 (Ga. 2000).

69. *Id.* at 700.

70. *See id.* (emphasis added).

71. *See id.*

72. *See* O.C.G.A. § 19-9-3(a)(3) (listing factors that can impact a child).

73. In 1996 when Georgia first addressed consideration of a parent’s homosexuality under the best interest standard only a minority of states required evidence of an adverse impact of a parent’s homosexuality on the child before sexual orientation becomes an appropriate factor for the court to

religion, and ethnicity, homosexuality has been labeled “immoral” and is often treated as representative of deviate sexual practices.<sup>74</sup> The development of case law in a majority of states, including in Georgia, resulted in a *de facto* category—immoral sexual conduct—which was treated as *per se* contrary to a child’s best interest.<sup>75</sup>

Homosexuality of a parent was problematic because orientation is not capable of objective measurement in the sense that emotional and financial stability are; sexual orientation cannot be analytically separated from the individual.<sup>76</sup> “[I]t might be argued that homosexual conduct in the home harms children and it is the homosexual conduct, rather than the status of being homosexual that is being highly frowned upon.”<sup>77</sup> Sexual conduct is inherently tied to sexual orientation, as they are two links in the same chain, the trait and the exercise of the trait.<sup>78</sup> In reality “[t]he status of homosexuality exists in one place: the bedroom.”<sup>79</sup> However, in Georgia, prior to 1996, it was acceptable to condition custody on the sexual orientation of the parents irrespective of any sexual conduct.<sup>80</sup> Thus the

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consider. *In re R.E.W.*, 471 S.E.2d 6, 9 (Ga. Ct. App. 1996). See *Chaffin v. Frye*, 119 Cal. Rptr. 22 (Cal. App. 2d 1975); *D. H. v. J. H.*, 418 N.E.2d 286 (Ind. Ct. App. 1st Dist. 1981); *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983); *Hall v. Hall*, 291 N.W.2d 143 (Mich. Ct. App. 1980); *DiStefano v. DiStefano*, 401 N.Y.S.2d 636 (N.Y. App. Div. 1978); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *Mohrman v. Mohrman*, 565 N.E.2d 1283 (Ohio Ct. App. 1989); *M. J. P. v. J. G. P.*, 640 P.2d 966 (Okla. 1982); *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985).

74. See 24A AM. JUR.2d *Divorce and Separation* § 937 (2008), Homosexuality of Parent (stating that “[a]lthough amorality, immorality, sexual deviation, and aberrant sexual practices may not ipso facto render a parent unfit to have custody of a child, a parent’s homosexuality may properly be considered. . .”).

75. *Id.*; *In re R.E.W.*, 471 S.E.2d at 9. (Court noted that only a minority of states refused to condition custody on sexual orientation); See e.g. *Truitt v. Truitt*, 431 N.W.2d 454, 458 (Mich. 1988) (noting that custody can be conditioned on the immorality of the parent); See also *supra* note 73.

76. Whether sexual orientation is an immutable characteristic in the same sense that race and gender are is beyond the scope of this comment.

77. *Gonzalez*, *supra* note 39, at 324.

78. See *id.*

79. *Id.* at 287.

80. See *In re R.E.W.*, 471 S.E.2d at 7 (the trial judge based his denial of extended visitation upon the father’s sexual orientation, not evidence of

inquiry was not whether the putative custodian was engaged in any particular sexual conduct that threatened the welfare of the child, rather the inquiry ended with sexual orientation. This approach contradicts the major concerns expressed regarding parenting by homosexuals which centers on sexual conduct and sexual experience.<sup>81</sup> Generally, Georgia, as well as other states, however, took custody away from homosexual parents based on either their orientation or their sexual conduct. Homosexuals were damned if they were celibate and damned if they weren't.

In 1996, the Georgia Court of Appeals, in *In re R.E.W.*, joined the minority of jurisdictions holding that sexual conduct alone, even conduct considered immoral, cannot be the basis of a custody determination.<sup>82</sup> The court held that the "primary consideration in determining custody and visitation issues is not the sexual mores or behavior of the parent, but whether the child will somehow be harmed by the conduct . . . ."<sup>83</sup> Parental sexual conduct is irrelevant unless and until there is some evidence of the conduct's adverse impact on the child.<sup>84</sup> In *In re R.E.W.*, a homosexual father living with his partner petitioned the court to expand his current visitation order to include unsupervised visitation with his child.<sup>85</sup> The trial court denied his petition, noting in the order that the judge "regularly disallowed" contact between children and parents if the parent is engaged in an "immoral" relationship, whether it was heterosexual or homosexual.<sup>86</sup> The trial judge also noted that the child would be exposed to the nature of the father's homosexual relationship.<sup>87</sup> The Court of Appeals reversed, holding that absent evidence the father's homosexuality would adversely impact the child it was

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sexual conduct).

81. *See infra* Part II-B(2).

82. 471 S.E.2d at 6. The appellate court recognized that this was a case of first impression and adopted the minority view regarding the homosexuality of a parent. The Georgia Supreme Court denied certiorari over the passionate dissent of Justices Carley, Hines, and Hunstien. *In re R.E.W.*, 472 S.E.2d 295 (Ga. 1996) (stating that the Court of Appeals adopted the "minority rule").

83. *In re R.E.W.*, 471 S.E.2d at 9.

84. *See id.* at 9.

85. 471 S.E.2d at 7-8.

86. *Id.* at 8.

87. *Id.*

error to focus on the sexual conduct of the father.<sup>88</sup> It reasoned that a parent's "undesirable" or "immoral conduct" might warrant restricting contact between a child and parent, "but *only* if it is shown that the child is exposed to the parent's undesirable conduct in such a way that it has or would likely adversely affect the child".<sup>89</sup> Furthermore, exposure to sexual conduct would adversely affect a child regardless of whether the conduct so witnessed is heterosexual or homosexual in nature.<sup>90</sup>

The court's holding, in effect, prohibits conditioning custody on sexual orientation alone. After *In re R.E.W.*, sexual conduct can be considered, but only if there is an affirmative showing of a connection between parental sexual conduct and an adverse impact on the child.<sup>91</sup> This limitation was reaffirmed by the Georgia Supreme Court in *Brandenburg v. Brandenburg*, in 2001.<sup>92</sup> In *Brandenburg*, the trial judge prohibited a father from exercising his visitation in the presence of his live-in girlfriend.<sup>93</sup> The court held that the trial court abused its discretion in prohibiting the father from exercising visitation in front of his live-in girlfriend absent evidence that exposure to the father's live-in girlfriend would adversely impact the children.<sup>94</sup> The court's holding, dealing with the cohabitation choices of heterosexual parents, arguably removes sexual orientation from consideration in custody determinations by expanding *In re R.E.W.* to apply to heterosexual sexual conduct also.<sup>95</sup> It is not sexual orientation, but sexual conduct that is a *possible* consideration of the court; however, even sexual

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88. *Id.* (noting that the father would be expected to make sure his daughter was not exposed to sexual conduct regardless of the orientation of the participants).

89. *Id.* (emphasis added).

90. *Id.*

91. *See id.* (the court expressly uses the term "only" when describing when parental immoral conduct can warrant restrictions on parent child contact).

92. 551 S.E.2d 721 (Ga. 2001).

93. *Id.* at 721.

94. *Id.*

95. *See Brandenburg*, 551 S.E.2d. at 721; *See also Moses v. King*, 637 S.E.2d 97, 101 (Ga. Ct. App. 2007) (noting in dicta that a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent evidence that the child was harmed or exposed to inappropriate conduct" and citing to *Brandenburg* for support).

conduct is an inappropriate consideration unless there is evidence that such conduct does or will adversely impact the child.<sup>96</sup> Sexual conduct and sexual orientation simply cannot be treated as *per se* contrary to the best interests of the child.<sup>97</sup>

*C. Application of the Best Interest Standard in the Adoption Context*

The best interest standard is the primary focus of any adoption petition. “The purpose of the hearing, upon the petition of adoption, is to determine the disposition of that petition which is in the best interest of the child.”<sup>98</sup> Practically speaking, as is the case in the non-adoption context, the focus is on the child and factors that are considered irrelevant are not to be considered.<sup>99</sup> Simply stated, “[i]s the adopting parent worthy and able to care for the child” and “[i]s the adoption [in] the best interest of the child?”<sup>100</sup>

It is an abuse of discretion to base a denial of an adoption on factors that do not address the fitness of the adopting parent or actually impact the child.<sup>101</sup> For instance, in *Hester v. Mathis*, the Georgia Court of Appeals reversed the denial of an adoption petition, because the trial judge based its decision on irrelevant factors.<sup>102</sup> The trial court denied the adoption because the adoption would terminate a family name, meaning that the family line would cease to exist.<sup>103</sup> The court held that it was an abuse of discretion for the trial judge not to limit its

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96. *In re R.E.W.*, 471 S.E.2d at 9 (holding that parental “immoral conduct might warrant limitations on the contact between parent and child” only if it’s shown that the parental conduct has an adverse impact on the child).

97. *See id.*; *See also Brandenburg*, 551 S.E.2d at 721.

98. *Hester v. Mathis*, 248 S.E.2d 538, 539 (Ga. Ct. App. 1978).

99. *See id.*

100. *Id.* Later cases restate this limitation of the court’s discretion in similar language and cite to *Hester* for support. *See generally Brant v. Bazemore*, 325 S.E.2d 905, 906 (Ga. Ct. App. 1985) (citing *Hester* for support) (for the holding that the trial court “should only consider such evidence as is relevant to the issue” of adoption and not “erroneously” interject the interests of others).

101. *Hester*, 248 S.E.2d at 539 (holding that the trial court “should only consider such evidence as is relevant to the issue” of adoption and not “erroneously” interject the interests of others).

102. *Id.*

103. *Id.*

consideration to the fitness of the adoptive parent and the interest of the child, rather than the interests of others or a general interest in a “family name and the heritage which accompanies it.”<sup>104</sup>

The fact that the trial judge should not interject the interests of outsiders not affecting the child’s welfare,<sup>105</sup> which would include even commonly held beliefs, into his disposition of an adoption petition contradicts the notion that societal views of homosexuality are a permissible consideration in an adoption.<sup>106</sup> Some might argue that homosexuality is tied to both the “fitness” of a putative adoptive parent, as well as the best interest of a child, which if true makes it an appropriate consideration at all times. This explanation, however, leads to contradictory results.

*D. Reconciling the Best Interest Standard in the Adoption and Non-Adoption Contexts*

The Georgia Supreme Court explained that the purpose behind applying the best interest standard in disputes between non-parents, as well as those between parents, is to “ensure that children are treated fairly as individuals . . . .”<sup>107</sup> All children have a constitutional right to be protected in their person and the state has “compelling interest in protecting the welfare of children.”<sup>108</sup> The court reasoned that if the best interest standard did not control in disputes between non-parents, children would be less protected than in a dispute between parents.<sup>109</sup> Thus, in a custody determination where the best interest standard is not applied, or applied incorrectly, children are treated unfairly; their interests are subordinated to the interests of others.

To illustrate the inherent contradiction between the applications of the best interest standard in the non-adoption and adoption context, consider the facts of *In re Hadaway* and *Lofton* discussed earlier.<sup>110</sup> In both cases the deciding factor held

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104. *Id.*

105. *See Brant*, 325 S.E.2d at 906.

106. *See id.*

107. *Stills v. Johnson*, 533 S.E.2d 695, 700 (Ga. 2000).

108. *Clark v. Wade*, 544 S.E.2d 99, 107 (Ga. 2001).

109. *Stills*, 533 S.E.2d at 700.

110. *See supra* Part I- A(1)-(2).

to be contrary to the child's interest was the sexual orientation of the putative adoptive parent, not the actual emotional or physical condition of the child in the petitioners' care.<sup>111</sup> There was no evidence of any direct impact the putative adoptive parent's sexual orientation actually had on the child; the only evidence relating to sexual conduct at all was the petitioners' sexual orientation. Yet, if these cases arose in the non-adoption context, sexual orientation would be irrelevant unless and until there was evidence of an adverse impact upon the child. These cases illustrate how the same standard can result in contradictory results if the standard is not applied uniformly in both the adoption and non-adoption contexts.<sup>112</sup>

The adoption context is not sufficiently different to provide justification for interpreting the same statutory standard differently. There can hardly be a situation where the needs of the child should be more paramount than that of society, especially in situations where the child is currently a ward of the state. Unless courts apply the same best interest standard, children will be *less* protected in the adoption context, contradicting the very purpose of the best interest standard.<sup>113</sup> The inconsistency shows that the focus is on alleged societal interests rather than the interests of the child, which is the outcome the Georgia Supreme Court expressly avoided in *Stills*—the unequal treatment of children in differing custody contexts.<sup>114</sup> If children are to be *at least as protected* in adoption as they are in custody disputes, the standard must be applied in the same manner, requiring evidence of whether putative adoptive parent's conduct has or most likely will adversely impact the child. The homosexuality of a putative adoptive parent cannot be treated as *per se* contrary to the best interest standard without undermining the purpose of the standard— to focus on children first and always. The best interest standard

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111. *In re Hadaway*, 659 S.E.2d 863 (Ga. Ct. App. 2008); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

112. Note that in this context uniform only applies to the applicable limitations of the best interest standard, not uniformity regarding results. The standard is meant to focus on the child involved in the present proceeding and as such results will and must vary according to the needs of the child before the court.

113. Emphasis added.

114. 533 S.E.2d at 700.

necessitates a case-by-case determination of the child's needs, which is impossible if sexual orientation is a basis for denying an adoption.<sup>115</sup>

As a statutory standard, limitations that develop in one custody context should result in a correlative limitation in the standard's application in all contexts to which it applies. This will provide increased guidance for courts applying the standard and ensure that children are treated equally in various settings, a result that is consistent with the legislature's inclusion of the standard in adoption statutes. Moreover, interpreting the best interest standard to treat homosexuality as *per se* violative of the standard is an unjustified intrusion into the putative adoptive parents' right to privacy.

## II. ADOPTION AND THE CONSTITUTIONAL RIGHT TO PRIVACY UNDER THE GEORGIA AND FEDERAL CONSTITUTIONS

### A. *Conditioning Adoption On Sexual Orientation Alters The Best Interest Standard In A Manner That Infringes On The Putative Adoptive Parent's Constitutional Right To Privacy*

Usually interaction between parental conduct and the application of the best interest standard does not necessitate a constitutional analysis regarding whether consideration of such conduct is violative of either the Federal or Georgia Constitution.<sup>116</sup> This is because, practically speaking, the standard is concerned with the impact parental conduct has on the child. As the Supreme Court stated in *Palmore v. Sidoti*, a state is under the "highest duty" in making custody

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115. Because the best interest standard focuses on the individual child any custody determination is very fact specific and can only be reached on a case-by-case basis.

116. For instance in *In re R.E.W* and *Brandenburg*, the courts' holding in both cases resulted in increased protection for the parents' right to privacy. The holding in *In re R.E.W.* resulted in increased protection of sexual orientation while *Brandenburg*, resulted in increased protection of choice of parental cohabitation. Neither case was tied to any constitutional rights parents have in their children. However, despite the right to privacy undertones neither court expressly addressed any constitutional rationale for the results it reached. See *In re R.E.W.*, 471 S.E.2d 6 (Ga. Ct. App. 1996); See *Brandenburg v. Brandenburg*, 551 S.E.2d 721 (Ga. 2001).

determinations.<sup>117</sup> If the application of the best interest standard does not infringe upon a putative custodian's constitutional rights, the issue is one of statutory construction; but if the application of the standard does infringe upon such rights, the issue becomes one with constitutional implications.

For instance, in *Palmore*, custody of a three-year-old child was removed from the mother, a Caucasian, after she married a black man.<sup>118</sup> The trial judge cited the "damaging" impact that the stigma of being raised in an interracial home would have on the child as contrary to the best interest of the child.<sup>119</sup> The Supreme Court, acknowledging that the child would likely be exposed to social stigma which would have an impact on the child, held that the impact was insufficient to deprive the mother of custody.<sup>120</sup> More important for this discussion is the fact that the Court did not condition its holding on the mother's constitutional rights as a parent; the Court's holding expressly held the custody determination violated the Fourteenth Amendment's prohibition on race-based discrimination.<sup>121</sup> The Court went on to opine that "[p]rivate bias may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>122</sup> The impact of the mother's marriage on the child was not sufficient to enable Florida to condition custody on constitutionally protected rights, in this case the right to be free from race-based discrimination. *Palamore*, at a minimum, stands for the proposition that a state cannot violate a parent's (including step-parents) constitutional rights under the guise of the best interest standard without evidence of a sufficiently adverse impact on the child.<sup>123</sup> Treating constitutionally protected conduct as *per se* contrary to the best interest of a child appears to run afoul of the Federal Constitution.

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117. 466 U.S. 429, 433 (1984).

118. *Id.* at 432.

119. *Id.* at 431.

120. *Id.* at 432-33.

121. *Id.* at 433.

122. *Id.*

123. Some states had reached this conclusion regarding constitutionally protected conduct before the Supreme Court's decision in *Palmore*. See e.g. *Osier v. Osier*, 410 A.2d 1027, 1031 (Me. 1980) (stating that when applying the best interest standard the court should employ the "least possible intrusion upon the constitutionally protected interests of the parents").

Sexual privacy is protected under both the Federal and Georgia Constitutions,<sup>124</sup> thus, the question is not whether such a right exists, but whether a state can intrude upon that right in its adoption scheme. At first glance, it appears that privacy and adoption cannot exist concurrently. Adoption is a public act where the putative adoptive parent asks the government to intrude and investigate their lives.<sup>125</sup> However, asking the government for access to a privilege that is available to the general population should not necessitate sacrifice of a person's constitutional freedoms.<sup>126</sup> To hold otherwise would enable the government, by conditioning privileges upon constitutional sacrifice, to force conformity within society. Imagine if adoption was conditioned upon being a Protestant Christian. It would be no justification at all for the government to claim that, by petitioning to adopt, putative adoptive parents surrender their religious freedom. Those that currently conform to the government's standards will always have access to the privilege while the non-conformers' access is conditioned upon sacrifice. Legally and logically, there is a difference between the government investigating a putative adoptive parent's private life with an eye towards the interests of the child and categorically excluding persons from adopting based on private sexual conduct. Only conduct that will adversely impact the child is a necessary or relevant consideration.<sup>127</sup>

The Federal Constitution protects sexual privacy under the Fourteenth Amendment through the Substantive Due Process Doctrine<sup>128</sup> and, at a minimum, requires that the government's

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124. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (protecting sexual privacy under Substantive Due Process); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (sexual privacy is protected as a liberty interest under the Georgia Constitution).

125. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 810 (11th Cir. 2004).

126. *See Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987) (holding that "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to *modify his behavior*. . . the compulsion may be indirect, [but] the infringement upon free exercise is nonetheless substantial" and such conditioning violates the constitution).

127. *See supra* Part I-B.

128. *Lawrence*, 539 U.S. at 565.

intrusion satisfy rational basis review. Even assuming *arugendo* that such an approach does not violate the Federal Constitution, it certainly violates the Georgia Constitution, which protects privacy as a fundamental right requiring strict scrutiny.

*B. Conditioning Adoption on Sexual Orientation violates Equal Protection under the Federal Constitution*

*1. Statutorily Banning Adoption by Homosexuals-  
Constitutional Challenges to Florida's Ban on Adoption  
by Homosexuals as an Illustration*

Conditioning adoption upon sexual orientation likely violates equal protection under the Federal Constitution despite the fact that sexual privacy under the Federal Constitution is not as well defined as under Georgia law.<sup>129</sup> Currently, only Florida has enacted an express prohibition banning adoption by any homosexual, whether single or cohabitating with a domestic partner.<sup>130</sup> Because Georgia does not have a statutory ban on a homosexual adopting, this comment will focus on Florida's statutory adoption scheme to analyze the constitutionality of conditioning adoption on sexual orientation.<sup>131</sup> Whether sexual privacy is a fundamental right under the Federal Constitution, and thus protected via strict scrutiny, is beyond the scope of this comment. Rather, the premise from which this section begins is

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129. The Courts of Appeals for the Fifth and Eleventh Circuits have reached contradicting results regarding the scope of sexual privacy afforded under the Federal Constitution. *See Reliable Consultants, Inc. v. Phe, Inc.*, 517 F.3d 738, 744 (5th Cir. 2008) (holding that public morality cannot serve to unduly burden a constitutional right to engage in private intimate that is protected under Substantive due process under the Fourteenth Amendment); *Lofton*, 358 F.3d at 815-816 (noting that the effect of *Lawrence v. Texas*, was to establish a greater respect than previously existed in the law, but that the Court did not locate this right directly in the Constitution, it is a by-product of several constitutional principles and liberty interests).

130. FLA. STAT. ANN. § 63.042(3) (2003). Mississippi expressly prohibits couples of the same gender from adopting. MISS. CODE ANN. § 93-17-3(5) (2008); and Utah has only gone so far as to prohibit adoption by any single adult that is cohabitating with another person, regardless of gender. UTAH CODE ANN. § 78B-6-117(3) (1953).

131. Additionally, because Georgia and Florida are both in the Eleventh Circuit analyzing Florida's statutory ban is indicative of how a Georgia statute would fair under the Federal Constitution.

that, at a minimum, sexual privacy is a substantive right protected under the Fourteenth Amendment. As such, the focus will be on whether intruding into the sexual privacy of one class, homosexuals, by conditioning adoption on sexual orientation satisfies rational basis review under the Fourteenth Amendment's guarantee of Equal Protection.<sup>132</sup>

In *Lofton v. Secretary of the Dep't of Children and Family Servs.*, the Eleventh Circuit Court of Appeals applied only a rational basis review.<sup>133</sup> The court found the prohibition rationally related to a legitimate state interest.<sup>134</sup> The statute was challenged on several grounds. Most important to this comment was the plaintiff's assertion that Florida's statute violated equal protection because it treated similarly situated persons differently; heterosexual singles are eligible to adopt while homosexual singles are not.<sup>135</sup>

Florida's assertions and the Eleventh Circuit's reasoning for disallowing adoption into a homosexual household follow the same common themes present in the majority of research conducted to date on the issue.<sup>136</sup> The research focuses on four main areas: first, whether children of lesbian and gay parents will experience more difficulties in the area of sexual identity than children of heterosexual parents; second, whether children raised by homosexual parents will have more difficulty in personality development in addition to sexual identity; third, is a common fear that children living with gay or lesbian parents will be more likely to be sexually abused by the parent or by the parent's friends or acquaintances; and finally, whether children

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132. While *Lawrence v. Texas* expressly held that sexual privacy is protected under the Substantive Due Process clause of the Fourteenth Amendment the Florida statute specifically names homosexuals as a class ineligible to adopt I approach this section via equal protection. *Lawrence*, 539 U.S. at 558; FLA. STAT. ANN. § 63.042(3).

133. 358 F.3d 804, 815 (11th Cir. 2004).

134. *Id.*

135. FLA. STAT. ANN. § 63.042(3).

136. Ellen C. Perrin, MD *et al.*, *Technical Report: Co-parent or Second-Parent Adoption by Same-sex Parents*, 109 PEDIATRICS 341 (Feb. 2002) (noting the four main areas of concern regarding parenting by homosexuals); *Resolution on Sexual Orientation, Parents, and Children*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 2004) available at <http://www.apa.org/pi/lgbq/policy/parentschildren.pdf> (last visited April 2, 2009) (hereinafter "APA Resolution") (same).

of lesbian and gay parents will experience difficulty in understanding and exercising social relationships.<sup>137</sup>

The main premise evident in the Eleventh Circuit's analysis is a state is reasonable in concluding that exposure to homosexual parenting undermines a child's development of sexual and gender identities.<sup>138</sup> For instance, the court's first basis for upholding the ban is that Florida is reasonable in asserting its legitimate interest in placing children in families with married mothers and fathers.<sup>139</sup> The state argues that dual-gender parenting plays a "vital" role in shaping a child's sexual and gender identities.<sup>140</sup>

The court's second basis for upholding the ban is that Florida could "rationally conclude that homosexual and heterosexual singles are not similarly situated."<sup>141</sup> The basis for the court's conclusion was twofold: first, heterosexual singles have the possibility of marrying in the future and, thus, provide a dual-gender household,<sup>142</sup> and second, heterosexual parents, including single ones, can "relate" to the child as they transition into "heterosexual adulthood."<sup>143</sup>

The court's analysis regarding a heterosexual parent's ability to marry in the future represents an *ad hoc* rationale that is not supported by Florida's statute or by the court's own reasoning. First, the statute does not express any preference for married putative adoptive parents rather than single parents.<sup>144</sup> Second, as Judge Bracket opined in her dissent to the denial of a rehearing en banc to the *Lofton* case, "[e]valuations of prospective parents are based on present, not 'eventual' statuses and conditions."<sup>145</sup> Third, "experience leads one to believe that single heterosexuals who adopt are less likely to marry in the future, not more likely."<sup>146</sup> Finally, the court takes the position that to argue a "rational basis does not exist for placing adoptive

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137. Perrin, *supra* note 136; APA Resolution *supra* note 136.

138. *See Lofton*, 358 F.3d at 817-818.

139. *Id.* at 818.

140. *Id.*

141. *Id.* at 821-822.

142. *Id.* at 822.

143. *Id.*

144. *See* FLA. STAT. ANN. § 63.042(2)(b)-(c) (2003).

145. *Lofton*, 377 F.3d at 1297 (denial of rehearing en banc).

146. *Id.* at 1298.

children in the *mainstream* of American family life” is irrational.<sup>147</sup> As Judge Bracket points out, if this was a supportable position there would be nothing preventing a court from placing children in Christian homes only, as Christianity is considered “mainstream,” or placing white children only with white parents.<sup>148</sup>

The court treated the relationship between a homosexual and heterosexual parent as fundamentally different, or at least different enough, to treat the two types of parents legally separate. The court opined that “[i]t is in the best interest [of a child] if his or her parents can personally relate to the child’s problems and assist the child in the difficult transition to heterosexual adulthood.”<sup>149</sup> The court reasoned that a child will need a heterosexual adult to educate him or her about relationships with the opposite sex via stories of the adult’s own adolescence.<sup>150</sup> The court went on to state that “it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years.”<sup>151</sup> The court does not explain why it is “more important” during puberty; however, it appears that the court assumes that a homosexual parent cannot educate a child about puberty and, thus, the child cannot become a heterosexual adult if raised by a homosexual parent. In effect, the court held that it was reasonable to assume that homosexuals are not suited to be adoptive/legal parents.<sup>152</sup>

This assertion is seriously undermined by Florida’s actual practices as homosexuals can become foster parents. Therefore, on a daily basis, homosexuals are assisting children in their “transition into heterosexual adulthood.”<sup>153</sup> Foster parents are responsible for the day-to-day care giving responsibilities of the children placed with them.<sup>154</sup> They are the present parents in a

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147. *Id.* at 1276 (emphasis added).

148. *Id.* at 1276.

149. *Id.* at 822.

150. *Id.*

151. *Id.*

152. *Id.* at 822-823.

153. *Id.* at 822.

154. Gonzalez, *supra* note 39, at 299 (Mr. Lofton testified that I have been his parent in every way. For example, every day I wake him up in the morning and help him get dressed and ready to go to school; I help him with

foster child's life rather than the state, who is like an absent father that sends child support. The entire purpose of foster parents is to provide the love, affection, and nurturing that the intangible "state" cannot. Foster parents are required to educate and socialize the children living with them, not the state.<sup>155</sup> Most importantly, as sad a fact as this might be, many children remain in foster care for years, especially if the child is older when taken into foster care.<sup>156</sup> Foster children are not packed up and taken to the local state office to learn about puberty or heterosexual adulthood, but do so through their foster parents.

The court simply ignores the practical application of Florida's ban in that homosexuals are *de facto* parents already through the foster care system where they are given the responsibilities of child rearing. The court further ignores the reality of foster care placement and adoption statistics. Approximately half of all foster parents in this country are not related to the children placed with them.<sup>157</sup> States overwhelmingly must rely on volunteers, not relatives, to provide homes for these children.<sup>158</sup> Moreover, the majority of children in foster care are adopted by their foster parents.<sup>159</sup> Allowing children to be adopted by the foster parents that have been raising them makes sense; it is a legal recognition of a *de facto* family, yet Florida is the only state in the union that rebukes this approach. Rather than address the disparity between Florida's use of homosexual foster parents and banning of adoptions by homosexuals, the court dismissed the issue as nothing more than the executive branch's "handiwork" and that it was "irrelevant."<sup>160</sup>

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his homework when he comes home from school; we have a family dinner every night, cooked by Roger . . . I teach him manners, respect and other values that I consider important. I make sure he is safe. He calls me 'Dad.')

155. *Id.*

156. Thirteen percent of children in foster care remain in the system for over five years and children are known to remain in foster care from a pre-puberty age through age eighteen. Children's Bureau, U.S. Dep't. of Health & Human Services, The AFCARS Report State Specific Adoption and Foster Care Data, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report14.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm) (last visited March 31, 2009).

157. *Id.*

158. *See id.*

159. *Id.*

160. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d

Even legislators partly responsible for the enactment of Florida's ban on adoption by homosexuals in 1977 have acknowledged that they were "wrong" and that the "discriminatory" ban should be "overturned."<sup>161</sup> Former state House member Elaine Bloom stated that "[t]he hysteria of the times led us to do the wrong thing."<sup>162</sup> The statements by former Florida Legislatures, made two years before the Eleventh Circuit decided *Lofton*, contradict the notion that they were thinking of the best interest of children when the ban was enacted. Rather, it appears the sole basis for the ban's enactment was fear and moral disapproval and, as the Supreme Court held in *Lawrence v. Texas*, a state cannot justify treating one group differently on the basis of social bias and moral disapproval of that group.<sup>163</sup> As one commentator, critical of the Eleventh Circuit's reasoning, stated "[t]he alleged 'issue' at hand is homosexuality, not the best interest of the child, and in Florida, this has become detrimental to both potential adoptive parents and to the thousands of children who will age out of the Florida foster care system without ever knowing the joy of having a legal parent."<sup>164</sup>

## 2. Medical and Social Research Regarding Parenting by Homosexuals

There is extensive overlap between the current research regarding parenting by homosexuals and the Eleventh Circuit's rationale in upholding Florida's ban on adoption by homosexuals.<sup>165</sup> The reasonableness of the Eleventh Circuit's decision to uphold a categorical ban on adoption by homosexuals has been greatly undermined by evidence causing strong opposition.

The leading professional child welfare and child health organizations oppose the categorical exclusion of putative adoptive parents on the basis of sexual orientation.<sup>166</sup> These

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804, 824 (11th Cir. 2004).

161. ACLU Press Release, *Supra* note 3.

162. *Id.*

163. 539 U.S. 558, 578 (2003).

164. Gonzalez, *supra* note 39, at 293.

165. *See infra* Part II-B(1).

166. The American Psychiatric Association, the American Psychological Association, the American Academy of Pediatrics, the American Academy

organizations have released statements regarding their professional assessments of the research conducted to determine what impact, if any, parenting by homosexuals has on child development. In 2002, the American Psychiatric Association, which includes over 38,000 physician members, released a statement regarding its position on prohibiting homosexuals from adopting stating:

Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.<sup>167</sup>

Likewise, the American Psychological Association (APA), with over 150,000 professional members, as a result of its review of the relevant research, expressly opposes “any discrimination based on sexual orientation in matters of adoption. . .”<sup>168</sup> The APA released its official position statement in 2004 stating that “[r]esearch has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”

Mental health professionals are not alone in concluding that research undermines any negative connection between a child’s development and the sexual orientation of the person raising them. The American Academy of Pediatrics, with over 60,000 pediatrician members, issued a report in 2002 which

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of Child and Adolescent Psychiatry, the American Academy of Family Physicians, and the National Association of Social Workers have all released statements or reports opposing conditioning child custody or adoption on sexual orientation. See THE AMERICAN PSYCHIATRIC ASSOCIATION, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES, POSITION STATEMENT (2002), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200214.aspx>, (last visited November 12, 2008) (hereinafter Psychiatric Association Statement); See also APA Resolution, *supra* note 136 and accompanying text.

167. Psychiatric Association Statement, *supra* note 166.

168. APA Resolution, *supra* note 136.

summarized its review of the relevant research:

A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes.<sup>169</sup>

The findings of these child health and child welfare organizations<sup>170</sup> severely undermine the reasonableness of conditioning adoption upon sexual orientation. Moreover, the research calls into question the assertion that a dual-gender household is "vital" for a child to develop their sexual identity.<sup>171</sup> As the Supreme Court has noted, the simple fact that Congress, or here a state legislature, has made findings of fact is not dispositive in and of itself.<sup>172</sup> "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake,"<sup>173</sup> and as the Supreme Court held in *Lawrence*, sexual privacy is protected under the Federal Constitution.<sup>174</sup> There is a limit to when the government can disagree or ignore science and/or common knowledge.<sup>175</sup>

Rather than actually address the relevant research conducted

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169. Perrin, *supra* note 136.

170. I do not attempt to include all statements of professional child health and child welfare organizations, it would become redundant and it is not the purpose of this article to conduct an independent review of the relevant research and literature regarding this issue.

171. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). Note that this assertion is also greatly undermined by the number of single parents in this country.

172. *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610 (2007).

173. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 60, 52 S.Ct. 285, 76 L.Ed. 598 (1932)).

174. As stated earlier however, the scope of that protection is unknown and beyond the scope of this comment. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

175. *Stenberg v. Carhart* supports the proposition that medical certainty can reach a point where contrary views cannot be given legal weight. 530 U.S. 914, 937 (2000) (stating that "[w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary").

by the prominent child health and child welfare organizations, the Eleventh Circuit simply held Florida was reasonable in its disagreement with such research and it was reasonable to question the methodology of such research. Moreover, the only research actually cited by the Eleventh Circuit was of independent researchers who contradict the majority of child health and welfare professionals, despite the lack of both prominence and support for such research.<sup>176</sup>

Both Florida's assertions and the Eleventh Circuit's treatment of the relevant research appear to be without merit and in defiance of the common understanding in the mental health and child welfare communities. It is hard to imagine, in light of the foregoing, how it is "reasonable" to ban adoption by homosexuals. It appears the real basis for the ban is moral disapproval of the homosexual lifestyle, a position admitted by persons partly responsible for the enactment of Florida's statutory ban.<sup>177</sup> Interestingly, Florida applies the best interest standard, and its focus on general policy determinations, rather than evidence regarding how children are functioning, illustrates how the standard can generate contradictory results if it is not limited.<sup>178</sup>

As this comment was being written, a Miami-Dade Circuit Judge in Florida struck down Florida's ban on homosexual adoption as unconstitutional and approved an adoption by a homosexual foster parent of his two foster sons.<sup>179</sup> The Judge held that the ban violated Equal Protection under both the Federal and Florida Constitutions because the ban failed to provide even a rational basis for the categorical exclusion of homosexual putative adoptive parents.<sup>180</sup> The Judge reasoned

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176. *Lofton*, 358 F.3d at 825 n.24-25.

177. *Gonzalez*, *supra* note 39, at 303-04 (stating that "the Florida adoption ban came into being as the result of widespread anti-gay hatred throughout the state").

178. *Id.* at 293 (commenting that "[t]he alleged 'issue' at hand is homosexuality, not the best interest of the child, and in Florida, this has become detrimental to both potential adoptive parents and to the thousands of children who will age out of the Florida foster care system without ever knowing the joy of having a legal parent.").

179. *In the Matter of the Adoption of John Doe*, 2008 WL 5006172 (Fla. Cir. Ct.).

180. *Id.* at 27.

that “. . .developments in the fields of social science, psychology, human sexuality, social work and medicine, the existence of additional studies, the re-analysis and peer review of prior studies. . .” in addition to the endorsements of major child welfare organizations necessitate the conclusion that it is unreasonable to categorically ban adoption by homosexuals.<sup>181</sup> This recent decision further undermines the soundness of conditioning adoption upon sexual orientation and, thus, sexual privacy.

Even if it is arguable that conditioning adoption upon sexual orientation does not violate a putative adoptive parent’s right to privacy under the Federal Constitution, it does violate Georgia’s more protective right to privacy.

*B. Conditioning Adoption on Sexual Orientation Violates Equal Protection under Georgia’s Constitution*

Conditioning adoption on the sexual orientation of an applicant raises a significant legal issue under Georgia law. Georgia law treats sexual privacy as encompassed within the fundamental right to privacy protected under the Georgia Constitution.<sup>182</sup> Thus, conditioning adoption on sexual orientation creates a classification that is directly based on a fundamental right, sexual privacy. “The Georgia equal protection clause, which is construed to be consistent with its federal counterpart, requires that the State treat similarly situated individuals in a similar manner.”<sup>183</sup> If the classification at issue “. . .impedes the exercise of a fundamental right, it is tested under a standard of strict judicial scrutiny,”<sup>184</sup> and the state’s proffered classification must serve a compelling government interest.<sup>185</sup>

Georgia was the first state to recognize a right to privacy inherent in its state constitution.<sup>186</sup> Since then, Georgia has mostly retained its pioneer status in developing a “rich appellate

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181. *Id.*

182. *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998).

183. *Id.*; *See* GA. CONST. art. I, § I, ¶ II (1983).

184. *City of Atlanta v. Watson*, 475 S.E.2d 896, 899 (Ga. 1996).

185. *Powell*, 510 S.E.2d at 24.

186. *Pavesich v. New England Life Ins.*, 50 S.E.2d 68 (Ga. 1905); *Powell*, 510 S.E.2d at 21 (stating that Georgia was the first “court of last resort in this country recognized the right of privacy”).

jurisprudence in the right to privacy.”<sup>187</sup> As the Georgia Supreme Court opinioned in *Powell v. State*, “it is clear from the right of privacy appellate jurisprudence. . . that the ‘right to be let alone’ guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution . . . .”<sup>188</sup>

In *Powell v. State*, the Georgia Supreme Court held that under the Georgia Constitution the right of sexual privacy is a fundamental right encompassed within the broader right to privacy.<sup>189</sup> It is limited to sexual conduct that is performed in private, between consenting adults, is not coerced, and for non-commercial purposes.<sup>190</sup> The court reasoned that it could not “think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual

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187. *Powell*, 510 S.E.2d at 21. Following *Pavesich* Georgia has expanded the right to privacy to include freedom from “the publicizing one’s private affairs with which the public has no legitimate concern.” *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882 (Ga. 1957), and the “the right to define one’s circle of intimacy.” *Macon-Bibb County & Sewerage Auth. v. Reynolds*, 299 S.E.2d 594, 596 (Ga. Ct. App. 1983).

188. 510 S.E.2d at 22; *See State v. Miller*, 398 S.E.2d 547 (Ga. 1990) (holding Georgia Constitution provides broader protection than the First Amendment); *Green v. State*, 398 S.E.2d 360 (Ga. 1990) (holding Georgia Constitution grants a broader right against self-incrimination than the federal constitution); *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989) (holding Georgia Constitution provides a more extensive guarantee against cruel and unusual punishment than does the federal constitution); *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827 (Ga. 1988) (holding Georgia Constitution’s excessive fines clause is more expansive than the Eighth Amendment); *D.B. v. Clarke County Bd. of Educ.*, 469 S.E.2d 438 (Ga. Ct. App. 1996) (holding Georgia Constitution’s guarantee of a free education is broader than that provided by the U.S. Constitution). *See also Grissom v. Gleason*, 418 S.E.2d 27 (Ga. 1992), where the Georgia Supreme Court observed that Georgia’s equal protection clause might be interpreted to offer greater rights than the equal protection clause found in the federal constitution.

189. 510 S.E.2d at 24. In *Powell*, the Court struck down Georgia’s sodomy statute as unconstitutional intrusion upon the right of privacy before the U.S. Supreme Court reversed *Bowers v. Hardwick*, the case that upheld Georgia’s sodomy statute as non-violative of the Federal Constitution. *Id.*; *See Bowers v. Hardwick*, 478 U.S.186 (1986).

190. *See id.*; *See generally In re C.P.*, 555 S.E.2d 426 (Ga. 2001).

activity.”<sup>191</sup> The court expressly rejected the proposition that “the furtherance of ‘social morality,’” [and] giving ‘due regard to the collective will of the citizens of Georgia,’ is a constitutional basis for legislative control of the non-commercial, unforced, private sexual activity of those legally capable of consenting to such activity.”<sup>192</sup> Furthermore, the court’s repeated references to *Bowers v. Hardwick*, which expressly deals with homosexual conduct, supports the position that sexual privacy, protected under the Georgia Constitution, extends to homosexuality.<sup>193</sup>

In *Lawrence v. Texas*, a case dealing specifically with homosexuality, the U.S. Supreme Court held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason” for attempting to prohibit the practice.<sup>194</sup> In effect, this is what conditioning adoption on sexual orientation accomplishes. If a person will refrain from homosexual conduct, thus refrain from being a homosexual,<sup>195</sup> then they can adopt a child. While *Lawrence* is unclear regarding the scope of protection afforded sexual privacy under the Federal Constitution, it is clear that a State must have more than moral disapproval of the group or practice to justify infringing upon a person’s sexual privacy.<sup>196</sup> Considering that Georgia already recognizes sexual privacy as a fundamental right, then any review of an adoption scheme that is conditioned upon sexual orientation should go much further than the rationale employed in *Lawrence*.

Consider the result if adoption was conditioned on all single

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191. *Powell*, 510 S.E.2d at 24.

192. *Id.* at 24-25 ( the court noted that the state “has a role in shielding the public from inadvertent exposure to the intimacies of others, in protecting minors and others legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will”).

193. The Court cites *Bowers v. Hardwick* specifically for the proposition that protection of privacy under the Georgia Constitution is “far more extensive” than that afforded by the Federal Constitution. *Id.* at 331; see *Bowers v. Hardwick*, 478 U.S. 186 (1986).

194. 539 U.S. 558, 578 (2003).

195. How a person can refrain from their sexual orientation, much like refraining from their race, appears impossible, however this point is beyond the scope of this comment.

196. See *Lawrence*, 539 U.S. at 578.

putative adoptive parents refraining from sexual activity. Heterosexual and homosexual singles would be treated similarly, thus equal protection would not be implicated. However, such a prohibition would infringe upon all applicants right of sexual privacy, a fundamental right, and as such the prohibition would be analyzed under Georgia's substantive due process and still require strict scrutiny.<sup>197</sup> However, if adoption is conditioned on sexual orientation, then similarly situated heterosexuals would be treated differently under Georgia law;<sup>198</sup> they could exercise their right of sexual privacy while the homosexual applicants cannot. Conditioning adoption upon sexual orientation creates a class, and since the classification at issue impedes a fundamental right under Georgia's Constitution, strict scrutiny applies. Therefore, the State must have a compelling interest and the classification must be narrowly tailored to that interest- the promotion of child welfare.<sup>199</sup>

Because "social morality" alone is not sufficient to justify this classification,<sup>200</sup> the State must look elsewhere to justify a classification based on sexual orientation. It is clear that the state has a compelling interest in promoting the welfare of children,<sup>201</sup> however this alone is insufficient; the classification chosen here, sexual orientation, must be narrowly tailored to the promotion of child welfare.

There is simply not enough evidence of a connection between the sexual orientation of a parent and a child's development to warrant the use of such a classification in the adoption context.<sup>202</sup> If the state were found to have a compelling justification for the classification, then the same justification should be compelling in the non-adoption context. Thus, sexual

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197. *See generally* Barnhill v. State, 575 S.E.2d 660 (Ga. 2003) (under substantive due process the infringement of a fundamental right must be narrowly tailored to serve a compelling state interest).

198. Georgia law provides that "any adult" can adopt, this means that single adults can adopt a child. O.C.G.A. § 19-8-3(a) (2008).

199. *See* Powell v. State, 510 S.E.2d 18, 25 (Ga. 1998); *See* Clark v. Wade, 544 S.E.2d 99, 107 (Ga. 2001).

200. *Powell*, 510 S.E.2d at 25.

201. *Clark*, 544 S.E.2d at 107.

202. *See infra* Part II-B(2) (discussing the research and official positions of child health and child welfare organizations regarding parenting by homosexuals).

orientation could serve as the basis for removing custody from biological parents. This is, of course, contrary to Georgia law.<sup>203</sup> Both the adoption and non-adoption contexts involve the promotion of a child's welfare; both purportedly focus on what serves the best interest of a child, so what works for adoption should work for custody and vice versa.

#### CONCLUSION

Georgia should not attempt to follow in Florida's footsteps and statutorily ban adoption by homosexuals. First, because of the fundamental importance placed on privacy in Georgia and second, because Georgia also needs the continued assistance of homosexual foster parents. In order to avoid any constitutional infirmity in the adoption context, courts need to apply the best interest standard uniformly among the adoption and non-adoption contexts. As a matter of statutory construction, if a limitation develops in the non-adoption context, unless that limitation is specifically tied to that context, it should correlate with a similar development in the adoption context. The best interest standard is a single standard guiding custody determinations; it should not be interpreted differently in the adoption context.

Georgia's right to privacy, encompassing sexual privacy, is protected in the non-adoption context by requiring evidence of an adverse impact on a child before custody can be based on such conduct. The best interest standard should be interpreted to include this limitation in the adoption context. By focusing on sexual conduct that adversely impacts a child rather than sexual orientation, application of the best interest standard likely avoids constitutional infirmity under both the Georgia and Federal Constitutions.

It will not be difficult to determine the existence of, or absence of evidence that will adversely impact a child in the adoption context, despite the private nature of sexual conduct. Georgia law already requires a thorough investigation into the home life of a putative adoptive parent. Putative adoptive parents open their homes, lives, and finances for review when applying to adopt in this State. Any evidence of sexual conduct

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203. *See supra* Part I-B(2).

that would likely adversely impact a child should be readily apparent during this evaluation period. However, if there is any concern that this process is insufficient, additional criteria can easily be added to the investigatory procedure.

If the proffered purpose of the best interest standard is the welfare of children, the first step is to ensure that in any given situation, the focus remains on the child. The standard mandates a case-by-case approach where the needs of the child are paramount and general societal opinions and political agendas must take a back seat.

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