Comment

Georgia's Children On Our Minds . . .

> Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed . . . . There is no reason in law, logic or social philosophy to obstruct such a favorable situation.[1]

I. INTRODUCTION

Although there is not a published opinion addressing same-sex couple adoption in Georgia,[2] it is currently a hot issue in many state courts and, most recently, in the Eleventh Circuit.[3] On January 28, 2004, a unanimous three-judge panel of the Eleventh Circuit Court of Appeals

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1. *In re* Evan, 153 Misc. 2d 844, 852 (N.Y. Sur. Ct. 1992).
2. *See Overview of State Adoption Laws*, Lambda Legal, *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=399 (Feb. 9, 2004).
3. *See In re* Evan, 153 Misc. 2d 844; *In re* Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993); Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210 (Fla. 2d Dist. Ct. App. 1993); Lofton v. Sec'y of the Dep't of Children & Family Servs., No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004).

declined to extend the reasoning of *Lawrence v. Texas*[4] to adoptions by homosexual couples.[5] Specifically, in *Lofton v. Secretary of the Department of Children & Family Services*,[6] the Eleventh Circuit upheld a Florida statute[7] prohibiting homosexuals from adopting children.[8]

The 1977 Florida statute at issue in *Lofton* is unique because it provides for an explicit ban on adoptions by homosexuals.[9] The statute states, "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[10] Most state adoption statutes, including Georgia's, while not specifically providing for homosexual adoptions, do not explicitly ban them.[11] In addition, the American Bar Association ("ABA") does not support a complete ban on homosexual adoptions, and its House of Delegates in February 1999 adopted a policy to support laws allowing homosexuals to adopt when the adoption is in the best interests of the child.[12]

Until *Lofton*, the decision in *Lawrence*, which overturned the Supreme Court's 1986 decision in *Bowers v. Hardwick*,[13] was largely viewed as a victory for the homosexual community.[14] This feeling gathered momentum after a November 2003 decision by the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*.[15] In *Goodridge* the court cited *Lawrence* and struck down a state ban on marriage licenses for same-sex couples.[16]

However, the Eleventh Circuit took a different approach with respect to *Lawrence* and concluded that the Supreme Court's ruling granted no fundamental right to homosexual sex.[17] The court concluded "that it is a strained and ultimately incorrect reading of *Lawrence* to interpret

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4. 123 S. Ct. 2472 (2003). In *Lawrence* the Supreme Court struck down a homosexual sodomy law. *Id.* at 2484.

5. Lofton v. Sec'y of the Dep't of Children & Family Servs., No. 01-161275, 2004 WL 161275, at *9 (11th Cir. Jan. 28, 2004).

6. 2004 WL 161275 (11th Cir. Jan. 28, 2004).

7. FLA. STAT. ch. 63.042(3) (2003).

8. *Lofton*, 2004 WL 161275, at *1.

9. *See* David L. Hudson, Jr., *Court Won't Tie Lawrence to Gay Adoption Law: 11th Circuit Rejects Arguments by Florida Foster Parents*, ABA Journal Report, *available at* www.abanet.org/journal/ereport/f6adopt.html (Feb. 6, 2004).

10. FLA. STAT. ch. 63.042(3) (2003).

11. *See Overview of State Adoption Laws, supra* note 2; O.C.G.A. §§ 19-8-3, 19-8-6 (1999 & Supp. 2003).

12. Hudson, *supra* note 9.

13. 478 U.S. 186 (1986).

14. *See* Hudson, *supra* note 9.

15. 798 N.E.2d 941 (Mass. 2003).

16. *Id.* at 959.

17. *Lofton*, 2004 WL 161275, at *9.

it to announce a new fundamental right."[18] The court also emphasized the factual differences between *Lawrence*, which dealt with a criminal law, and *Lofton*, which dealt with a matter of "statutory privilege."[19] Specifically, the court stated that adoption is a privilege and that a state has the right to set standards for potential adoptive parents.[20] Despite the decision in *Lofton*, the plaintiffs plan to ask for a rehearing before the three-judge panel or an en banc rehearing, or petition the United States Supreme Court for a writ of certiorari.[21]

After the recent court decisions concerning same-sex adoption in the Eleventh Circuit, as well as in neighboring states, one may ask where Georgia stands on this issue. This is a difficult question to answer, but one that merits probing. The literal wording of Georgia's adoption statutes does not explicitly provide for step-parent adoption, which could allow the adoption by two same-sex partners jointly.[22] However, it is also clear that at the trial-court level adoption by homosexual couples is permitted on a random basis depending on the county in which the petition is filed and the judge presiding over the individual case, with the majority of successful petitions in the Atlanta area.[23] Even under a literal reading of the Georgia adoption statutes, homosexuals as individuals (not couples) could potentially adopt a child.[24] However, there is currently no uniform manner to analyze the benefits or drawbacks to homosexual individuals in the application of the best-interest-of-the-child standard, which is the policy underlying these statutes.[25]

Same-sex adoptions have the potential to greatly impact children. For example, when children are denied adoption by one or both parents who are members of the same sex, the children lose more than stability. The children are denied the rights of inheritance and succession, medical insurance, life insurance, the capability of having one or two legal guardians who can sign for emergency medical care, and the benefits of educational funding that two parents can jointly provide.[26] Although there are legal documents, such as wills, available to parties to address some of these issues, every situation that may arise as a parent cannot be anticipated. It is a heavy burden to expect parents to contract for

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18. *Id.*
19. *Id*. at *10.
20. *Id*. at *3.
21. Hudson, *supra* note 9.
22. *See* O.C.G.A. §§ 19-8-3, 19-8-6 (1999 & Supp. 2003).
23. *Overview of State Adoption Laws, supra* note 2.
24. *See* O.C.G.A. § 19-8-3.
25. *Id*.
26. *See Evan*, 153 Misc. 2d at 845-47; *Tammy*, 619 N.E.2d at 316-17.

every right available automatically to other parents. For example, in the event of an emergency, a de facto parent needs the ability to consent to medical care when a child's biological parent or legal guardian is not present. Therefore, a ban on same-sex adoption without an inquiry into the specific facts of each case and each child's situation can potentially have unexpected consequences.

If a person or couple is willing to provide the aforementioned benefits to a child, is it fair to deny these benefits because of the potential parents' sexual preference, especially if this behavior is not proven to have negative effects on the child? Further, is it worse having two same-sex parents or no legal parents? Is it fair to permit adoption to some children and not others? Until the Georgia General Assembly addresses these issues through a new or amended adoption statute, these are questions that Georgia courts need to consider. The purpose of this Comment is to serve as an objective analysis of the current adoption law in this state and to help formulate a more cohesive application of Georgia's adoption law with respect to same-sex couples.

II. HISTORICAL ANALYSIS OF THE LAW IN GEORGIA

Many adoptions continue to be granted at the trial-court level, but there is no published case that directly addresses same-sex adoption in Georgia. Therefore, it is helpful to examine cases dealing with homosexuality in the context of child custody and child visitation, and to consider other, more general laws pertaining to homosexual conduct in order to formulate a broad picture of the current published law regarding homosexuality in this state. There appear to be two lines of cases in Georgia: (1) those that relied on *Bowers*, which held that private homosexual conduct received no federal constitutional protection,[27] and (2) those that departed from the reasoning in *Bowers*.[28] Many Georgia cases were decided before the Georgia Supreme Court decision in *Powell v. State*,[29] which declined to follow *Bowers*, and before the recent United States Supreme Court decision in *Lawrence*, which overruled Bowers.[30] Older cases in Georgia relied heavily on the reasoning that sodomy was a crime in Georgia, and therefore same-sex couples were given little if any protection by the law.[31] However, because the law is changing rapidly in this area, the courts do not have ample precedent to

27. Bowers v. Hardwick, 478 U.S. 186, 192 (1986); *see also* Gay v. Gay, 149 Ga. App. 173, 253 S.E.2d 846 (1979).

28. *See* Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981).

29. 270 Ga. 327, 510 S.E.2d 18 (1998).

30. *Lawrence,* 123 S. Ct. at 2473.

31. *See* City of Atlanta v. McKinney, 265 Ga. 161, 454 S.E.2d 517 (1995).

rely upon when deciding cases dealing with these issues. The case law appears to be piece meal, determined on a case-by-case basis, and often inconsistent. In this Section, I will discuss *Bowers* and all relevant cases, ending with the most recent Georgia decisions dealing with homosexuality, and especially those regarding homosexuality and children. In a later Section, I will discuss same-sex adoption cases from other jurisdictions, including Florida, that might serve as persuasive authority when a same-sex adoption petition reaches the appellate or supreme court level in Georgia.

A. Bowers v. Hardwick

In *Bowers v. Hardwick*,[32] the United States Supreme Court, in June 1986, held that the right to privacy in the United States Constitution did not protect private sexual conduct between consenting homosexual adults: The Constitution did not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[33] Hardwick was charged with violating a Georgia statute criminalizing sodomy for committing sodomy with another adult male in the bedroom of his home. The prosecutor decided not to pursue the matter, but Hardwick brought suit in United States District Court, challenging the constitutionality of the statute. The court granted the defendant's motion to dismiss for failure to state a claim. The court of appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.[34] However, the United States Supreme Court held the Georgia statute constitutional.[35] The Court noted that none of the fundamental rights previously announced by the Court involving family relationships, marriage, or procreation bore any resemblance to the right to private conduct between consenting homosexual adults.[36] Further, the Court stated that "[a]gainst this background, [in which many states continue to criminalize sodomy] to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[37] Therefore, the Court noted that there should be great resistance to expanding the reach of the Due Process Clause to cover new fundamental rights.[38] The Court

32. 478 U.S. 186 (1986).
33. *Id*. at 192.
34. *Id*. at 187-89.
35. *Id*. at 186.
36. *Id*. at 190-91.
37. *Id*. at 194.
38. *Id*. at 195.

opined that it was irrelevant that the homosexual conduct in this case occurred in the privacy of Hardwick's home.[39]

In March 1996 the Georgia Court of Appeals decided *In re R.E.W.*,[40] which concerned a homosexual father who challenged an order from a juvenile court refusing to allow him unsupervised visitation with his daughter.[41] Pursuant to a custody agreement, the father had supervised visitation in the child's mother's home. Further, he was involved in a monogamous homosexual relationship for four years, but did not believe his daughter's best interest would be served by informing her of the sexual nature of his relationship. The father stated that he would actively conceal the sexual aspects of his relationship from his child. Additionally, in the home the father shared with his partner, he had his own bedroom, and few people knew he had a sexual relationship with his partner. The father also testified about his love for his daughter and that their relationship would be benefited by unsupervised visitation, which would allow them to participate in activities outside of the mother's home, such as taking trips.[42]

On appeal the court reversed the order, allowing the father's unsupervised visitation request, and held that the primary consideration should not be the sexual behavior of the father, but whether the child would be harmed by the conduct.[43] The court reasoned that the juvenile court premised its denial of the father's request on the finding that he was engaged in an "immoral" relationship.[44] Further, the court reasoned that the juvenile court "went to great lengths to define the father's lifestyle as immoral and illegal . . . ."[45] The court of appeals agreed that in some instances a parent's "immoral conduct" might warrant limitations on contact between a parent and a child, but only if it is shown that the conduct adversely affects the child.[46] The court then agreed with courts from other jurisdictions, holding that the primary consideration in determining custody and visitation issues is not the parent's sexual preferences but whether the child will be harmed by the parent's conduct.[47] The court further stated that

39. *Id*.
40. 220 Ga. App. 861, 471 S.E.2d 6 (1996).
41. *Id.* at 861, 471 S.E.2d at 7.
42. *Id*. at 861-62, 471 S.E.2d at 7-8.
43. *Id*. at 863-64, 471 S.E.2d at 8-9.
44. *Id*. at 862, 471 S.E.2d at 8.
45. *Id*. at 863, 471 S.E.2d at 8-9.
46. *Id*., 471 S.E.2d at 9.
47. *Id*.

> [for] [t]oo long . . . courts [have] labored under the notion that divorced parents must somehow be perfect in every respect. The law should recognize that parents, married or not, are individual human beings each with his or her own particular virtues and vices . . . . In domestic relations cases the courts should recognize that all parents have faults, and look not to the faults of the parents, but to the needs of the child.[48]

The court remanded the case and the juvenile court was instructed to award the father unsupervised visitation.[49]

In July of that same year, the Georgia Supreme Court denied certiorari in *In re R.E.W.*,[50] and Justice Carley strongly dissented to what he considered to be an erroneous opinion by the court of appeals.[51] Specifically, Justice Carley opined that at the time *In re R.E.W.* was decided sodomy violated Georgia law.[52] Therefore, he concluded that the opinion of the trial court should be reversed because it erroneously adopted the "minority rule," allowing unrestricted visitation rights of a parent involved in a homosexual relationship.[53] Carley noted that because the court did not reverse this erroneous opinion, "unless and until [the court] holds otherwise, the opinion of the Court of Appeals constitutes the applicable law in Georgia."[54] He concluded by stating that "[h]opefully, another case soon will present this Court with the opportunity to overrule this erroneous precedent."[55]

Two years later, in 1998, the Georgia Supreme Court provided constitutional protection for private homosexual conduct in *Powell v. State*.[56] In *Powell* the defendant was tried for rape and aggravated sodomy when he had a sexual relationship with his wife's seventeen-year-old niece. Defendant testified that the sexual acts were consensual, and the jury acquitted him. Subsequently, the trial court gave a jury instruction allowing the jury to consider a lesser included offense of sodomy, which did not depend upon consent. The jury then convicted defendant of sodomy, and he appealed, claiming that the trial court erred in giving the jury instruction and that the sodomy statute was

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48. *Id*. at 864, 471 S.E.2d at 9 (quoting Conkel v. Conkel, 509 N.E.2d 983, 985-86 (Ohio Ct. App. 1987)).
49. *Id.*
50. 267 Ga. 62, 472 S.E.2d 295 (1996).
51. *Id*. at 62, 472 S.E.2d at 296 (Carley, J., dissenting).
52. *Id.* (Carley, J., dissenting).
53. *Id*. (Carley, J., dissenting).
54. *Id.*, 472 S.E.2d at 297 (Carley, J., dissenting).
55. *Id*. (Carley, J., dissenting).
56. 270 Ga. 327, 336, 510 S.E.2d 18, 26 (1998).

unconstitutional.[57] The Georgia Supreme Court held that the trial court properly gave the jury instruction.[58] However, the court reversed the conviction, concluding that the statute at issue[59] was unconstitutional and violated defendant's right to privacy.[60] The court further held that the Georgia Constitution provided protection for sexual acts that occurred without force in a private home between persons legally capable of consenting.[61] This decision effectively granted a greater protection in Georgia to engage in private sexual conduct than the protection provided by the United States Constitution pursuant to *Bowers*.[62]

B. Lawrence v. Texas

In 2003 the United States Supreme Court overruled *Bowers* in *Lawrence v. Texas*.[63] In *Lawrence* petitioners appealed the decision of the Texas Court of Appeals, which upheld a Texas statute[64] making it a crime for two persons of the same sex to engage in certain sexual conduct. The state appellate court's decision to uphold the Texas law was based on the Supreme Court's decision in *Bowers*.[65] However, the United States Supreme Court noted that in the United States there was no history of laws specifically targeting homosexual conduct and that earlier sodomy laws were not directed at homosexuals but at all people.[66] The Court noted that laws and traditions in the last half of the twentieth century show awareness that the principles of liberty give protection to private consensual acts of adults.[67] The Court stated that its holding in *Bowers* demeaned the lives of homosexuals.[68] Therefore, the Court held that Texas could not demean petitioners' existence or control their future by making their private sexual conduct a crime.[69]

In 1979, before *Bowers*, the Georgia Court of Appeals, in *Gay v. Gay,*[70] held that a mother was fit to gain custody of her child when she

57. *Id*. at 327, 510 S.E.2d at 18.
58. *Id*. at 328, 510 S.E.2d at 21.
59. O.C.G.A. § 16-6-2(a) (2003).
60. *Powell*, 270 Ga. at 332, 510 S.E.2d at 24.
61. *Id*. at 329-30, 510 S.E.2d at 21-22.
62. *Id*. at 329 n.1, 510 S.E.2d at 21 n.1.
63. 123 S. Ct. 2472, 2484 (2003).
64. TEX. PENAL CODE ANN. § 21.06(a) (2003).
65. 123 S. Ct. at 2473.
66. *Id*.
67. *Id.* at 2474.
68. *Id.* at 2473.
69. *Id.* at 2484.
70. 149 Ga. App. 173, 253 S.E.2d 846 (1979).

had previously had a homosexual relationship with another woman, and the evidence of such relationship was based on hearsay.[71] By agreement of both parents, the juvenile court originally placed custody of their child in the Fulton County Department of Family and Children Services ("DFACS") for two years. At the end of that time, a new hearing was held on the question of permanent custody. Although two caseworkers from DFACS recommended that custody be placed with the mother, the trial court concluded as a matter of fact that the mother had a relationship with another woman and for this reason alone declined to follow the recommendation. Instead, permanent custody was awarded to DFACS with direction that the child not be placed with the mother.[72]

The court noted that the only evidence supporting the trial court's finding that the mother was involved in a homosexual relationship was hearsay testimony from the father and the maternal grandmother, both of whom wanted custody of the child.[73] Further, the mother denied that she was involved in a homosexual relationship.[74] The court reasoned that the trial court made express findings that the father was unfit to have custody of his child, that he had fathered five other illegitimate children, and that his only source of income was social security disability payments.[75] The court stated that while the father's financial situation alone was not enough to find him unfit, the fact that he had fathered numerous children without the ability to care for them financially was irresponsible.[76]

In contrast, the court noted that the trial court made no express finding that the mother was unfit.[77] Specifically, the court stated that the mother was employed in a stable job, and her fitness as a parent was strongly endorsed by DFACS.[78] The court reasoned that the trial court's decision not to follow this recommendation was based solely on the conclusion that the mother was engaged in a homosexual relationship with a woman who at one time dominated her emotionally and mistreated the child.[79] However, the court noted that there was no evidence introduced to show that this was presently true.[80] The father testified that he witnessed some homosexual activity between the mother

71. *Id*. at 175, 253 S.E.2d at 848.
72. *Id*. at 173, 253 S.E.2d at 847.
73. *Id*.
74. *Id*.
75. *Id*. at 174-75, 253 S.E.2d at 847-48.
76. *Id*. at 175, 253 S.E.2d at 848.
77. *Id.*
78. *Id*.
79. *Id.*
80. *Id*.

and her partner two years earlier, but stated he had not witnessed any such conduct since that time.[81] Thus, the court reasoned that the only support for the trial court's finding of a homosexual relationship was hearsay and awarded the mother custody.[82]

Chief Justice Deen dissented in *Gay*, asking, "[d]oes an 'unnatural' consenting relationship with another woman possibly amounting to sodomy render a mother unfit? Do five freely made acts of generating illegitimate offspring possibly amounting to fornication and adultery render a father unfit?"[83] He opined that both issues involved "considerations of mixed questions of law and theology."[84] Further, he noted that although some religions permit these acts between consenting people, others conclude that these acts are always wrong.[85] He concluded by stating that "Georgia criminal laws are based on the latter."[86]

A few years earlier, in *Bennett v. Clemens*,[87] the Georgia Supreme Court denied custody of a child to her mother, in part because of the mother's alternative sexual lifestyle.[88] The paternal grandparents of a female child filed a petition seeking custody from the natural mother. The grandparents claimed that since the mother had been granted custody, she had abandoned and deserted the child, leaving her with others, and that the child was living in an immoral environment. A hearing was held, and temporary custody was given to the grandparents. The court subsequently awarded the grandparents permanent custody.[89] The supreme court noted that the mother moved to Atlanta and lived in different locations for several years with the child, worked for an underground newspaper, was arrested for possession of marijuana, then left her daughter with female friends and went to live in San Francisco.[90] The court further noted that the female friends, with whom the child was left, "smoked 'pot' on occasions, engaged in sexual acts with men and with each other in the presence of the child and . . .

81. *Id*.
82. *Id*.
83. *Id*. at 176, 253 S.E.2d at 848 (Deen, C.J., dissenting).
84. *Id.* (Deen, C.J., dissenting).
85. *Id*. (Deen, C.J., dissenting).
86. *Id*. (Deen, C.J., dissenting).
87. 230 Ga. 317, 196 S.E.2d 842 (1973).
88. *Id.* at 319, 196 S.E.2d at 843.
89. *Id*. at 318, 196 S.E.2d at 842.
90. *Id*. at 319, 196 S.E.2d at 843.

taught the child about 'the gay life.'"[91] Based upon these facts, the court affirmed the custody award to the grandparents.[92]

In his dissenting opinion, Justice Gunter criticized the majority opinion, stating that the judicial branch cannot impose a standard of morality upon parents when a determination must be made concerning the loss of permanent custody to a third party.[93] Specifically, Gunter noted that the natural parents in this case were both Harvard graduates and National Merit Scholars.[94] Additionally, he recognized that when the couple divorced, the mother was awarded custody, and there was no evidence in the record that the child's physical needs were not being provided for or that the child was neglected, abused, or mistreated in any way.[95] Further, he noted that the father wanted his ex-wife to have custody of their child and not the sixty-five-year-old grandparents.[96]

Additionally, Gunter noted that the only complaint by the grandparents in the record was that the child was "being brought up in an immoral, hippy-type environment," which was not in the child's best interest.[97] He further stated that the state's right to intrude upon the privacy of a parent-child relationship to review the manner in which a child is being raised is limited to situations in which a child is neglected, abused, or mistreated.[98] When none of those indicia are present, the state has no right to inquire into the way a parent chooses to raise the child.[99] Gunter stated that within the family relationship, the parent adopts a moral standard for the family members, and the state cannot intrude upon this relationship by asserting a different standard.[100]

In 1977, also before *Bowers*, the Georgia Supreme Court, in *Buck v. Buck*,[101] held that the trial court did not abuse its discretion by awarding custody to a mother when she admitted to a past homosexual relationship and maintained friendships with other homosexuals.[102] In this case, the husband appealed from a final divorce decree awarding his wife custody of their eighteen-month-old child "until such time as the

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91. *Id*.
92. *Id*. at 319.
93. *Id*. at 320, 196 S.E.2d at 843 (Gunter, J., dissenting).
94. *Id*. (Gunter, J., dissenting).
95. *Id*. (Gunter, J., dissenting).
96. *Id*. at 321, 196 S.E.2d at 844 (Gunter, J., dissenting).
97. *Id*. (Gunter, J., dissenting).
98. *Id*. (Gunter, J., dissenting).
99. *Id.* at 321-22, 196 S.E.2d at 844 (Gunter, J., dissenting).
100. *Id*. at 322, 196 S.E.2d at 844 (Gunter, J., dissenting).
101. 238 Ga. 540, 233 S.E.2d 792 (1977).
102. *Id.* at 541, 233 S.E.2d at 793.

said child reaches the age of 30 months."[103] The decree further provided that when the child reached thirty months of age, psychological evaluations of the parties and child were to be submitted to the court for a determination of permanent custody.[104]

On appeal the husband contended that the court abused its discretion in awarding custody to the wife because she admitted to a past homosexual relationship and continued to maintain friendships with homosexuals. Further, he claimed that the custody award was based on the court's subjective opinion that a strong psychological affinity existed between the young child and the mother.[105] However, the court concluded that the transcript contained reasonable evidence supporting an award of custody to either party, and that the trial court did not abuse its discretion in awarding custody to the mother despite the evidence pertaining to her homosexuality.[106]

In 1981 the Georgia Supreme Court recognized that sexual relations with someone of the same sex constituted adultery in *Owens v. Owens*.[107] This case imposed upon same-sex partners the same consequences as those for other adulterous couples in the state of Georgia.[108] In *Owens* the wife sued the husband for divorce on the ground that their marriage was irretrievably broken. During discovery the wife testified to admissions by the husband that he was either bisexual or homosexual.[109] She also "testified to certain instances during their marriage in which he had displayed homosexual tendencies."[110] The husband then filed a motion seeking to exclude any evidence of his admissions or instances of his homosexual behavior.[111] The trial judge ruled that "one spouse is prohibited from testifying to any tendencies toward, or admissions or instances of, adulterous heterosexual or homosexual behavior on the part of the other spouse."[112] The court agreed with the trial judge's ruling, noting that Georgia law requires that adultery be proven by outside evidence and not by the testimony of the other spouse.[113] The court further reasoned that "[a] person commits adultery when he or she has sexual

103. *Id.* at 540, 233 S.E.2d at 792.
104. *Id.*
105. *Id.* at 541, 233 S.E.2d at 793.
106. *Id.*
107. 247 Ga. 139, 140, 247 S.E.2d 484, 485-86 (1981).
108. *Id.* at 140, 247 S.E.2d at 485-86.
109. *Id.* at 139-40, 247 S.E.2d at 485.
110. *Id.*
111. *Id.* at 140, 247 S.E.2d at 485.
112. *Id.*
113. *Id.*

intercourse with a 'person' other than his or her spouse."[114] Therefore, the court held that both extramarital homosexual and heterosexual relations constitute adultery.[115]

Justice Clarke wrote a dissenting opinion in which he reasoned that under the majority's holding, one spouse would be allowed to testify that the other was guilty of nagging, but the other, who might have knowledge of homosexual conduct outside the marriage, would not be allowed to share this with the jury.[116] Justice Clarke stated that the definition of adultery does not demand that homosexual relationships fall within the definition.[117]

After *Bowers*, in *VanDyck v. VanDyck*,[118] the Georgia Supreme Court determined that O.C.G.A. section 19-6-19(b)[119] ("the live-in lover statute") did not permit modification of alimony when a former spouse was living in a romantic relationship with a person of the same sex.[120] This case contradicts *Owens* by not allowing the former spouse of a homosexual person to petition for a modification of alimony while permitting the former spouse of someone living with the opposite sex to do so, protecting the homosexual conduct from sanction. In *VanDyck* the former husband sought termination of his alimony obligation under the live-in lover statute on the grounds that his ex-wife was involved in a homosexual relationship.[121] The purpose of the statute is to give the divorced spouse the right to modify alimony payments to a former spouse when the former spouse begins living with someone else.[122] The trial court denied the wife's motion to dismiss the complaint. Further, the trial court, relying on legislative goals and intent, concluded that O.C.G.A. section 19-6-19(b) permits modification when an alimony recipient is sharing living quarters, and therefore expenses, with another person of either sex. The trial court concluded that any other construction of the statute would render it unconstitutional as a violation of the Equal Protection Clause of the United States Constitution.[123]

The Georgia Supreme Court noted that O.C.G.A. section 19-6-19(b) provides in part:

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114. *Id.*
115. *Id.*, 247 S.E.2d at 485-86.
116. *Id.* at 141, 247 S.E.2d at 486 (Clarke, J., dissenting).
117. *Id.* (Clarke, J., dissenting).
118. 262 Ga. 720, 425 S.E.2d 853 (1993).
119. O.C.G.A. § 19-6-19(b) (1999).
120. *Van Dyck,* 262 Ga. at 721, 425 S.E.2d at 854.
121. *Id.*
122. *Id*. at 722, 425 S.E.2d at 855.
123. *Id*. at 721, 425 S.E.2d at 854.

> Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. As used in this subsection, the word "cohabitation" means dwelling together continuously and openly in a meretricious relationship *with a person of the opposite sex*.[124]

The court stated that the plain language of the statute does not apply when the former spouse is involved in a homosexual relationship.[125] The court further opined that if the legislature intended the statute to allow modification on the finding of the alimony recipient's cohabitation with a person of either sex, it is the duty of the legislature, not the court, to amend the statute.[126] The court also stated that the statute, construed in light of its plain language, does not violate the Fourteenth Amendment of the United States Constitution.[127] The court reasoned that the statute applied equally to former spouses or alimony recipients of either sex, and was therefore not unconstitutional.[128] Specifically, the court stated that the legislature previously amended the statute, which formerly allowed modification based only on a former wife's cohabitation with a man, to currently allow modification of alimony payments to either former spouse when the former spouse is cohabitating with a person of the opposite sex.[129]

In the concurring opinion, Justice Sears-Collins stated that "alimony is based on an ex-spouse's need, and if in reality that need decreases, alimony probably should be reduced or even terminated."[130] "It should make no difference whether the ex-spouse has remarried, is living in a meritricious relationship with a person of the opposite sex, or is living with a gay partner."[131] Justice Sears-Collins also pointed out that while the relationships of married couples are clearly defined by law, lesbian and gay couples in Georgia cannot legally marry.[132] Thus, she noted that unlike couples of the opposite sex who live together but are

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124. *Id*. (quoting O.C.G.A. § 19-6-19(b)) (emphasis added).
125. *Id*.
126. *Id*. at 722, 425 S.E.2d at 855.
127. *Id*.
128. *Id*.
129. *Id*.
130. *Id.* (Sears-Collins, J., concurring).
131. *Id*. (Sears-Collins, J., concurring).
132. *Id*. (Sears-Collins, J., concurring).

not married, lesbian and gay couples are denied the "numerous legal rights that come with marriage."[133]

> These rights include the right to: a) file joint income tax returns; b) create a marital life estate trust; c) claim estate tax marital deductions; d) claim family partnership tax income; e) recover damages based on injury to a partner; f) receive survivors benefits; g) enter hospitals, jails and other places restricted to "immediate family"; h) live in neighborhoods zoned for "family only"; i) obtain "family" health insurance, dental insurance, bereavement leave and other employment benefits; j) collect unemployment benefits if they quit their job to move with their partner to a new location because he or she has obtained a new job; k) get residency status for a noncitizen partner to avoid deportation; l) automatically make medical decisions in the event a partner is injured or incapacitated; and m) automatically inherit a partner's property in the event he or she dies without a will. [In addition,] "[m]any of the other legal consequences of gay 'coupling' are not so immediately apparent, but surface only at times of stress—misunderstandings, separation and death."[134]

Furthermore, Justice Sears-Collins stated that based on the many rights denied to gay couples, it is clear that the law does not encourage permanent gay arrangements: The law does not provide gay couples the same acceptance and support, the same governmental, legal, or social service benefits, or the many tax and other economic benefits accorded to married couples.[135] She then stated that it would not be fair to expand the statute "so as to saddle gay and lesbian couples with a penalty accorded unwed heterosexual couples who live together who have the choice of taking advantage of the benefits of marriage without according homosexual couples who live together the benefits of a relationship" that can never be obtained under the law.[136] Therefore, this case, like *Owens*, concerned a matter of statutory interpretation in which the court reached an opposite result.

In 1995, in *City of Atlanta v. McKinney*,[137] the Georgia Supreme Court held that the City of Atlanta exceeded its power to provide benefits to employees and their dependents by recognizing domestic partners as "a family relationship" and by providing employee benefits to them as if they were legal spouses.[138] This case involved multiple

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133. *Id*. (Sears-Collins, J., concurring).
134. *Id.* at 722-23, 425 S.E.2d at 855 (Sears-Collins, J., concurring).
135. *Id*. at 723, 425 S.E.2d at 855 (Sears-Collins, J., concurring).
136. *Id*.
137. 265 Ga. 161, 454 S.E.2d 517 (1995).
138. *Id.* at 165, 454 S.E.2d at 521.

appeals challenging Atlanta ordinances that prohibited discrimination on the basis of sexual orientation, established a domestic-partnership registry for jail visitation, and extended insurance and other employee benefits to domestic partners of city employees. The trial court ruled that the city exceeded its powers in enacting the domestic-partnership ordinances, but dismissed the claims challenging the anti-discrimination laws.[139]

"In June 1993, the city council passed an ordinance [permitting] the establishment of a domestic partnership registry in the city's business license office."[140] Ordinance 93-0-0776 defined domestic partners as "'two people of the opposite or same gender who live together in the mutual interdependence of a single home and have signed a Declaration of Domestic Partnership.'"[141] The Declaration was "a city form in which the partners 'agree[d] to be jointly responsible and obligated for the necessities of life for each other.'"[142] In August 1993, the city council also enacted an ordinance extending employee benefits to domestic partners.[143] According to this newly adopted ordinance, the City of Atlanta recognized that domestic partners are a family relationship, but not a marital relationship.[144] The ordinance provided:

> sick leave, funeral leave, parental leave, health and dental benefits, and any other employee benefit available to a City employee in a comparable manner for a domestic partner, as defined herein, as for a spouse to the extent that the extension of such benefits does not conflict with existing laws of the State of Georgia.[145]

Subsequent to the passage of the ordinance, state actors filed a declaratory-judgment action seeking to have the four ordinances declared invalid and unconstitutional.[146]

The court described the issue in *McKinney* as "whether the city impermissibly expanded the definition of dependent to include domestic partners."[147] The court reasoned that although the ordinance did not define "dependent," other state statutes define it as a "spouse, child, or

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139. *Id*. at 161, 454 S.E.2d at 519.
140. *Id.* at 162, 454 S.E.2d at 519; ATLANTA, GA. CODE 93-0-0776 (1993).
141. 265 Ga. at 162, 454 S.E.2d at 519 (quoting ATLANTA, GA., CODE 93-0-0776).
142. *Id*.
143. *Id.* (citing ATLANTA, GA., CODE 93-0-1057, § 3 (1993)).
144. *Id.*
145. *Id.* (quoting ATLANTA, GA., CODE 93-0-1057, § 3).
146. *Id*.
147. *Id.* at 164, 454 S.E.2d at 521.

one who relies on another for support."[148] Therefore, the court concluded that the powers of municipalities must be strictly construed, and any doubt about the existence of a certain power must be resolved against the municipality.[149] Ultimately, the court stated that it was "beyond the city's authority to define dependents inconsistent with state law . . . ."[150]

Finally, in 2002, the Georgia Court of Appeals decided *Burns v. Burns*,[151] enforcing a child custody agreement against a homosexual mother and her partner.[152] The agreement prohibited either parent from having child visitation if he or she cohabited or had overnight stays with someone to whom he or she was not legally married.[153] The relevant custody provision provided: "[T]here shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom the party is not related within the second degree."[154] The mother contended on appeal that she and her female companion were married in Vermont and, pursuant to "the full faith and credit doctrine," were married in Georgia.[155] She further argued that she had a fundamental right to privacy, which included the right to define her own family, and the State of Georgia could not place limitations on that right.[156]

The court held that the mother and her female companion were not actually married in Vermont; they instead entered into a "civil union."[157] The statute under which they were joined "expressly distinguishe[d] between 'marriage,' which is defined as 'the legally recognized union of one man and one woman,' and 'civil union,' which is defined as a relationship established between two eligible persons pursuant to that chapter."[158] The court further noted that the next section of the Vermont statute re-emphasized the distinction, "requiring that eligible

148. *Id*. (citing O.C.G.A. §§ 20-2-886 (2001); 45-18-8 (1990); 34-9-13 (1993); 48-7-26 (Supp. 1994)).
149. *Id*. at 165, 454 S.E.2d at 521.
150. *Id*.
151. 253 Ga. App. 600, 560 S.E.2d 47 (2002).
152. *Id*. at 600, 560 S.E.2d at 48.
153. *Id.*
154. *Id*.
155. *Id*. at 601, 560 S.E.2d at 48.
156. *Id*.
157. *Id*.
158. *Id*., 560 S.E.2d at 48-49 (quoting 15 VT. STAT. ANN. §§ 1201(4), 1201(2) (2003)).

persons must 'be of the same sex and therefore excluded from the marriage laws of this state.'"[159]

Additionally, the court reasoned that even if Vermont purported to legalize same-sex marriages, such marriages would not be recognized in Georgia.[160] The court noted that O.C.G.A. section 19-3-3.1(a) clearly states that it is the public policy of Georgia to recognize only the union of a man and a woman.[161] Under O.C.G.A. section 19-3-3.1(b),

> no marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.[162]

Further, the court noted that Georgia is not required to give full faith and credit to same-sex marriages granted in other states.[163] The court stated that what constitutes a marriage in Georgia is a legislative function, and judges are bound to follow the clear language of Georgia statutes.[164]

The court opined that the mother's privacy claim ignored her role in creating the consent decree.[165] The court held that although she was entitled to the right of privacy, she waived that right when she agreed to the consent decree.[166] If the mother wanted to ensure that her civil union would be recognized in the same manner as a marriage, she should have included language to that effect in the consent decree.[167] The court concluded that the consent order provided that visitation would not be allowed during the time that either parent cohabited with another adult to whom he or she was not married, and that the mother and her companion were not legally married in Georgia.[168] Therefore,

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159. *Id.*, 560 S.E.2d at 49 (quoting 15 VT. STAT. ANN. § 1202(2) (2003)).
160. *Id.*
161. *Id.*; O.C.G.A. § 19-3-3.1 (1999 & Supp. 2003).
162. *Burns*, 253 Ga. App. at 601-02, 560 S.E.2d at 49 (quoting O.C.G.A. § 19-3-3.1(b) (1999)).
163. *Id.* at 602, 560 S.E.2d at 49 (citing 28 U.S.C. § 1738c (2003)).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

the court refused to construe the language of the decree beyond its plain meaning.

In summation, there is not a published case in Georgia that addresses the issue of same-sex adoptions. The cases that are published involving homosexual rights were decided primarily before *Powell* and *Lawrence* discredited the reasoning in *Bowers*. Other states have increasingly recognized same-sex partnerships and marriages in recent months, so much of the reasoning of Georgia cases is outdated. But there are some common themes to draw from these cases. First, Georgia courts are concerned less with homosexual conduct than with the actual proven effect it has on children. Secondly, Georgia courts are more willing to give custody to homosexuals if the couple resolves not to share information about their sexual relationships with the children. Third, Georgia courts are not likely to recognize domestic-partnership benefits because of the state ban on same-sex marriages. Finally, private agreements between homosexual couples can be written to take into account the needs of children.

III. DISCUSSION OF THE PROBLEM

A. *Initial Reconsiderations*

The relevant adoption statutes in Georgia are O.C.G.A. sections 19-8-3[169] and 19-8-6.[170] O.C.G.A. section 19-8-3 provides:

> (a) *Any adult person* may petition to adopt a child if the person:
>
> (1) Is at least 25 years of age or is married and living with his spouse;
>
> (2) Is at least ten years older than the child;
>
> (3) Has been a bona fide resident of this state for at least six months immediately preceding the filing of the petition; and
>
> (4) Is financially, physically, and mentally able to have permanent custody of the child.
>
> (b) Any adult person, including but not limited to a foster parent, meeting the requirements of subsection (a) of this Code section shall be eligible to apply to the department or a child-placing agency for consideration as an adoption applicant in accordance with the policies of the department or the agency.
>
> (c) *If a person seeking to adopt a child is married, the petition must be filed in the name of both spouses; provided, however, that, when the*

169. O.C.G.A. § 19-8-3 (1999 & Supp. 2003).
170. O.C.G.A. § 19-8-6 (1999 & Supp. 2003).

> *child is the stepchild of the party seeking to adopt, the petition shall be filed by the stepparent alone*.[171]

O.C.G.A. section 19-8-6(a) provides in pertinent part:

> (1) A child whose legal father and legal mother are both living *but are not still married to each other may be adopted by the spouse of either parent only when the other parent voluntarily and in writing surrenders all of his rights to the child* to that spouse for the purpose of enabling that spouse to adopt the child and the other parent consents to the adoption and, where there is any guardian of that child, each such guardian has voluntarily and in writing surrendered to such spouse all of his rights to the child for purposes of such adoption; or
>
> (2) A child who has only one parent still living may be adopted by the spouse of that parent only if that parent consents to the adoption and, where there is any guardian of that child, each such guardian has voluntarily and in writing surrendered to such spouse all of his rights to the child for the purpose of such adoption.[172]

The general process of adopting a child in Georgia consists of the following steps. First, a verified petition for adoption and an exact copy of the petition must be filed with the clerk of the superior court having jurisdiction.[173] The superior courts have exclusive jurisdiction over all adoption matters except when such jurisdiction is granted to juvenile courts.[174] In instances in which the legal father and mother of the child are not living, any person related by blood to the child may file objections.[175] Prior to the date set by the court for a hearing on the petition, it is the duty of a court-appointed child-placing agency or any other independent agent appointed by the court to verify the allegations in the adoption petition, to make a complete and thorough investigation of the matter, including a criminal background check of each petitioner, and to report its findings and recommendations in writing to the court where the petition for adoption was filed.[176] In cases in which the child is being adopted by a step-parent or a relative, the investigation is not mandatory but may be required at the discretion of the court.[177]

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171. O.C.G.A. § 19-8-3 (emphasis added).
172. O.C.G.A. § 19-8-6(a) (emphasis added).
173. O.C.G.A. § 19-8-13 (1999 & Supp. 2003).
174. O.C.G.A. § 19-8-2(a) (1999).
175. O.C.G.A. § 19-8-15 (1999).
176. O.C.G.A. § 19-8-16(a) (1999 & Supp. 2003).
177. O.C.G.A. § 19-8-16(b).

After an agency's investigation of an adoption, the written investigation report must verify the allegations contained in the adoption petition.[178] The report must also include:

> [the] [c]ircumstances under which the child came to be placed for adoption; . . . [w]hether each proposed adoptive parent is financially, physically, and mentally able to have the permanent custody of the child; . . . [t]he physical and mental condition of the child, insofar as this can be determined by the aid of competent medical authority; . . . [w]hether or not the adoption is in the best interests of the child, including his general care; [the] [s]uitability of the home to the child; . . . [i]f applicable, whether the identity and location of the biological father who is not the legal father are known or ascertainable and whether the . . . [notice provisions regarding the biological father have been] complied with; and . . . [a]ny other information that might be disclosed by the investigation that would be of any value or interest to the court in deciding the case.[179]

If after conducting an investigation, the investigating agency disapproves of the adoption, it may file a motion to dismiss the petition.[180] After a hearing the judge may then grant the motion to dismiss.[181] If the court denies the motion to dismiss, the court must appoint a guardian ad litem who is authorized to appeal the ruling.[182] The court may also appoint a guardian for the child if it appears that the interest of the child and the petitioner are in conflict.[183]

In most instances, the hearing for consideration of the petition cannot be set earlier than sixty days after the filing of the petition.[184] In addition, to determine whether the specific requirements of the adoption provisions have been met, the court is charged with making the subjective determinations as to whether the petitioner is capable of assuming responsibility for the child, whether the child is suitable for adoption in a private family home, and whether the adoption is in the best interests of the child.[185] Due to the inherently subjective nature of the best-interest-of-the-child standard, judicial opinions differ as to which situations adequately meet this standard. The judge exercises

178. O.C.G.A. § 19-8-17(a)(1) (1999).
179. *Id.* § 19-8-17(a).
180. *Id.* § 19-8-17(b).
181. *Id.*
182. *Id*.
183. *Id.* § 19-8-17(c).
184. O.C.G.A. § 19-8-14 (1999 & Supp. 2003).
185. O.C.G.A. § 19-8-18(b) (1999 & Supp. 2003).

wide discretion in adoption proceedings, and the court's decision will not be disturbed unless abuse is clearly demonstrated.[186]

B. Types of Adoption

1. Second-Parent Adoption. There are three types of adoption: second-parent adoption, agency adoption, and private-placement adoption.[187] The term "second-parent adoption" in the context of this Comment refers to the action by a homosexual to legally adopt the children (biological or adoptive) of his or her partner, as might a stepmother or stepfather in a heterosexual family.[188] O.C.G.A. section 19-8-3(c) is presumably the section that would apply if the partner of a biological parent wished to adopt a child.[189] Second-parent adoptions have been permitted in Georgia for same-sex couples at the trial court level in some counties.[190] States with higher courts that have denied second-parent adoptions for same-sex couples have usually not denied adoption on the basis of sexual orientation per se, but on a combination of a narrow reading of the adoption statute and the unavailability of marriage to same-sex couples.[191] States that have permitted second-parent adoptions have interpreted the statutes to incorporate the best-interest-of-the-child standard and held this standard to be the determining factor when it comes to the welfare of children.[192] For example, the highest courts in Vermont, Massachusetts, and New York permit step-parent adoptions for same-sex couples.[193] Appellate level courts in New Jersey, Illinois, and the District of Columbia also permit step-parent adoptions for same-sex partners.[194] In addition, numerous states have permitted step-parent adoptions for same-sex couples at the lower court level, including Georgia, Alabama, Indiana, Ohio, Texas,

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186. Nix v. Sanders, 136 Ga. App. 859, 223 S.E.2d 21 (1975).

187. *Adoption by Lesbians and Gay Men: An Overview of the Law in the 50 States*, Lambda Legal, *available at* http://www.lambdalegal.org/cgi_bin/iowa/documents/record?record=11 (last acccessed Feb. 9, 2004).

188. *See In re* Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993); *In re* Evan, 153 Misc. 2d 844 (1992).

189. O.C.G.A. § 19-8-3(c).

190. *See* O.C.G.A. §§ 19-8-3, 19-8-6; *Overview of State Adoption Laws, supra* note 2.

191. *See In re* Angel Lace, 516 N.W.2d 678, 682-85 (Wis. 1994); *In re* T.K.J. & K.A.K., 931 P.2d 488, 491-92 (Colo. App. 1996).

192. *See B.L.V.B.*, 628 A.2d at 1276; *Evans*, 153 Misc. 2d at 845.

193. *See B.L.V.B.*, 628 A.2d at 1276; *Evans*, 153 Misc. 2d at 845; *Tammy,* 619 N.E.2d at 321.

194. *In re* C.M.A., 715 N.E.2d. 674, 680 (Ill. App. 1999); *In re* M.M.D. & B.H.M., 662 A.2d. 837, 840 (D.C. App. 1995).

Maryland, and Michigan, to name a handful.[195] However, these trial-court decisions do not hold much precedential value and depend on the subjective tastes of the individual judges. In contrast, three states—Wisconsin, Florida, and New Hampshire—have expressly forbidden step-parent adoptions for same-sex couples by law.[196] Further, a majority of states, including Georgia, have either not considered this issue or the issue has not reached the appellate or supreme court level.[197]

O.C.G.A. section 19-8-6 provides that when a child is adopted, the existing parent loses all legal rights with respect to that child unless the adopting parent is the spouse or step-parent of the child's existing parent.[198] Therefore, except with respect to a spouse of the petitioner and relatives of the spouse, a decree of adoption terminates all legal relationships between the adopted individual and his relatives, including his parent. Accordingly, after the child is adopted he becomes a stranger to his former relatives for the purposes of inheritance, and instruments that do not expressly include him by name, or some designation based on a parent-child or blood relationship.[199]

In summation, Georgia law provides that a child whose legal father and mother are living but are not still married may be adopted by either parent's spouse. However, such an adoption can only take place when the parent whose spouse is not seeking to adopt surrenders all rights to the child to the petitioner for the purpose of enabling the petitioner to adopt. If the child has a guardian, the guardian also must surrender all rights to the child. Additionally, the petitioner's spouse must consent to the adoption.[200] If the child sought to be adopted has only one parent still living, the surviving parent must consent. In this situation, any guardian of the child must surrender all rights to the petitioner.[201] The written surrender, as well as the acknowledgment of the surrender, must be attached to the petition for adoption when it is filed.[202] The petitioner must also file all appropriate certificates regarding the child's birth, the marriage of each petitioner, the divorce or death of each adoptive child's parent, any applicable guardianship papers, and a record detailing the child's background information.[203] The pertinent ques-

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195. *Overview of State Adoption Laws, supra* note 2.
196. *Overview of State Adoption Laws, supra* note 2.
197. *See Overview of State Adoption Laws, supra* note 2.
198. O.C.G.A. § 19-8-6(a)(1).
199. O.C.G.A. § 19-8-19(a)(1) (1999 & Supp. 2003).
200. O.C.G.A. § 19-8-6(a)(1).
201. *Id.* § 19-8-6(a)(2).
202. O.C.G.A. § 19-8-13(a)(4).
203. *Id*.

tion then becomes whether one partner will have to face losing rights to her child in order for the other partner to gain them. Further, because consent to the termination of parental rights is a prerequisite for a court to permit an adoption, and because, in this scenario, the original parent does not logically wish to give up his or her rights, courts may feel forced to deny the adoption based on the plain language of the law.[204] An additional question specific to Georgia is whether this issue will ever reach the attention of the legislature or higher courts, or if same-sex adoptions will continue to be decided only by the interpretations of trial judges.

2. Agency Adoption. Agency adoption refers to adoption of a foster child placed in an individual's care by a state child welfare agency for a specific period of time.[205] O.C.G.A. section 19-8-3(a) permits an unmarried person to become a foster parent.[206] Once a foster child becomes eligible for adoption, foster parents are usually given preference if they choose to adopt.[207] With same-sex couples the usual practice is for an individual to apply to be a foster parent in hopes the state will allow the partner to later adopt as a second-parent.[208] An agency adoption can also involve second-parent adoption if the partner of the legal foster parent joins in the foster parent's petition to adopt.[209]

3. Private-Placement Adoption. Private-placement adoptions refer to adoptions arranged without the direct involvement of the state. These adoptions usually include adoptions through privately run, state-approved adoption agencies, the adoption of children of family members or friends when the biological parents consent or are deceased, and adoption of foreign orphans brought into the United States. Because adoption is a creation of state statute, every adoption, even those privately arranged, must be approved by the court and generally require a home investigation, like agency adoptions. The standard for all adoptions is the best interests of the child, and private agencies licensed by the state must follow the same guidelines as those for state agencies in evaluating the prospective parents and the placement of children. Thus, private-placement adoption issues largely mirror the issues involved with agency adoptions. If a homosexual couple, rather than

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204. *See Angel Lace*, 516 N.W.2d at 682-85; *T.K.J.*, 931 P.2d at 491-92.
205. *Adoption by Lesbians and Gay Men, supra* note 187.
206. O.C.G.A. § 19-8-3(a).
207. *See id*.
208. *Adoptions by Lesbians and Gay Men, supra* note 187.
209. *Adoptions by Lesbians and Gay Men, supra* note 187.

just an individual, wishes to adopt a child through a private-placement adoption, the issue of whether state law allows second-parent adoptions becomes relevant.[210]

C. *Persuasive Authority from Other Jurisdictions*

Although Georgia's higher courts have not had the opportunity to hear a same-sex adoption petition, a literal interpretation of the current statute could result in denials of same-sex adoptions.[211] However, an individual homosexual person may adopt under the "any person" provision of the current adoption statute, as long as the adoption is found to be in the best interest of the child.[212] Further, some Georgia trial courts award second-parent adoptions.[213] In addition to the statute, there is an overriding premise in Georgia, and in most states, that adoption statutes should be construed in the best interest of the child.[214] This tool of construction leaves room for discretionary interpretation by an individual judge in each particular case.[215] When faced with this issue, Georgia courts may logically look to decisions from neighboring jurisdictions.

A neighboring state in the same federal circuit as Georgia that will likely be considered for its persuasive authority is Florida. Florida is one of the few states with an explicit prohibition against homosexual adoption.[216] Florida statute 63.042(3) provides that no "homosexual" may adopt.[217] However, it is important to look at the reasoning of the courts in Florida to determine if this is the best approach. For example, in *Department of Health & Rehabilitative Services v. Cox*,[218] a Florida district court of appeal upheld the constitutionality of the statute and refused to allow two men to adopt a child.[219] The court reasoned that the word "homosexual" within the statute was not vague because the legislature is not required to define every word in a statute for it to survive a vagueness challenge.[220] Plaintiffs also alleged that the statute violated their privacy rights, but the court noted that plaintiffs

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210. *Adoption by Lesbians and Gay Men, supra* note 187.
211. *See* O.C.G.A. §§ 19-8-3, 19-8-6.
212. *See* O.C.G.A. § 19-8-3.
213. *See Overview of State Adoption Laws*, *supra* note 2.
214. *See* Shepard v. Landers, 193 Ga. App. 392, 388 S.E.2d 12 (1989); 2 AM. JUR. 2d *Adoption* § 137 (2003).
215. *See Nix*, 136 Ga. App. at 859, 223 S.E.2d at 21.
216. *See Overview of State Adoption Laws*, *supra* note 2.
217. FLA. STAT. ch. 63.042(3) (2003).
218. 627 So. 2d 1210 (2d Fla. Dist. Ct. App. 1993).
219. *Id*. at 1220.
220. *Id*. at 1214.

volunteered the information that they were homosexual.[221] The court reasoned that the statute did not mandate any specific inquiry into any individual applicant's background and that adoption was not a private matter but a statutory privilege.[222] Further, the court stated that the adoption statute did not violate due process because the opportunity to adopt an unrelated child is not a fundamental right.[223] The court also opined that the right to engage in homosexual activity is not a fundamental liberty.[224] The court denied an equal protection claim by plaintiffs and upheld the Florida adoption statute stating that plaintiffs did not overcome the statute's presumption of rationality.[225] In 1995 the Florida Supreme Court affirmed the district court in part, but remanded the equal protection issue to the trial court for further proceedings, stating that the record was insufficient to determine that the statute could be sustained under a rational basis scrutiny.[226]

In contrast, in *Jacoby v. Jacoby*,[227] Florida's Second District Court of Appeal reversed a decision that denied child custody to a child's biological mother and her female partner.[228] During the couple's marriage, Mrs. Jacoby informed her husband that she had fallen in love with a family friend who was a lesbian. Mrs. Jacoby and her children then moved into the home of her female partner. While the divorce was pending, the children visited Mr. Jacoby every other weekend and then rotated custody, alternating between the two homes on a weekly basis. Both parties sought primary custody of the two children. Mrs. Jacoby proposed that the children live with her and her partner, and Mr. Jacoby proposed that the children live with him and his soon-to-be new wife and her children.[229]

The psychologist at trial stated that both parties were good parents but that the mother had better parenting skills. Other evidence showed that the children had stronger emotional ties to the mother and that she would be the best at promoting contact with the noncustodial parent. Therefore, the psychologist recommended that the mother receive primary custody. However, the lower court awarded custody to the father.[230]

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221. *Id*. at 1215.
222. *Id*. at 1216.
223. *Id.* at 1217.
224. *Id*.
225. *Id*. at 1220.
226. Cox v. Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995).
227. 763 So. 2d 410, 412 (Fla. 2d Dist. Ct. App. 2000).
228. *Id.*
229. *Id*.
230. *Id*.

The district court reasoned that to properly consider conduct such as sexual orientation on the issue of custody, the conduct must have a direct effect or impact on the children.[231] Therefore, "'[t]he mere possibility of negative impact on the child is not enough.'"[232] The court held that the connection between the conduct and the harm must have an evidentiary basis and cannot be assumed.[233] The court reasoned that although the district court's order addressed the community's reactions to homosexuals by noting that a social stigma attaches to homosexuality, even if the reactions were true, the law could not give effect to private biases.[234] Even if the law permitted consideration of personal biases, and even if the court accepted the assumption that living with the mother and her partner would hurt the children, these biases and harm would derive, not from the fact that the children were living with their homosexual mother, but from the fact that she is a homosexual.[235] Therefore, the court held that the district court's reliance on perceived biases was an improper basis for child custody determinations and that the children were not harmed by living with their mother and her partner.[236]

In *Kazmierazak v. Query*,[237] a Florida district court of appeal affirmed a trial court order dismissing a nonbiological parent's petition for custody and denied her motion for temporary visitation of her partner's biological child.[238] Appellant argued that she was entitled to an evidentiary hearing to establish that she was a "psychological parent" of appellee's biological child.[239] As a psychological parent, she contended that she had parental status equal to the biological mother, which gave her standing to seek custody or visitation of appellee's child over objection.[240] In her petition, appellant alleged that "appellee 'may not be a fit and proper person to retain custody of the minor,' and 'it is in the best interests of the minor' that custody be granted to appellant."[241] However, appellant did not seek relief under any statute, did

231. *Id*. at 413 (citing Maradie v. Maradie, 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996)).
232. *Id.* (quoting *Maradie*, 680 So. 2d at 543).
233. *Id*. (citing *Maradie*, 680 So. 2d at 543).
234. *Id*. (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
235. *Id*. (citing Conkel v. Conkel, 509 N.E.2d 983 (Ohio App. 1987); M.P. v. S.P., 404 A.2d 1256 (N.J. App. Div. 1979)).
236. *Id*. at 413-14.
237. 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999).
238. *Id*. at 106.
239. *Id.*
240. *Id*.
241. *Id*. at 107.

not allege that the child was suffering any demonstrable harm, and did not allege that it would be detrimental to the child to deny her custody or visitation.[242] The district court reasoned that appellant's petition "confront[ed] a procedural hurdle" in that she was not seeking relief pursuant to a statute.[243] Further, the court reasoned that under Florida law, to invoke the jurisdiction of the court, a nonparent may petition for custody or visitation of another's child only under statutory authority.[244]

The court further noted that although appellant's petition was not filed pursuant to a statute, appellant argued that, as a psychological parent, her status was equivalent to that of a biological parent, thereby allowing her to petition for custody.[245] Although the court previously recognized the concept of a psychological parent, the court in those cases focused solely on the best interests of the child without explicitly resolving the question of whether the psychological parent had standing to seek visitation.[246] Thus, the court reasoned that in previous cases the biological parent's right to privacy went unresolved and must be reconsidered in light of recent precedent.[247] Specifically, the court stated that subsequent to the decision in those cases, the Florida Supreme Court, citing the fundamental and constitutional right of privacy, reaffirmed adoptive or biological parents' rights to make decisions about their children's welfare without interference by third parties.[248] Therefore, the court noted that the state cannot intervene into a parent's fundamental or constitutionally protected right of privacy without a showing of demonstrable harm to the child.[249] Although the court had recognized the concept of a psychological parent, in light of recent Florida Supreme Court jurisprudence, it could not construe these cases as holding that a psychological parent is entitled to parental status equivalent to that of the biological parent.[250] Therefore, the court held that without a status equivalent to the biological parent, appellant

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242. *Id*.
243. *Id*.
244. *Id*. (citing Russo v. Burgos, 675 So. 2d 216, 217 (Fla. 4th Dist. Ct. App. 1996); *In re* C.M. & F.M., 601 So. 2d 1236 (Fla. 4th Dist. Ct. App. 1992); M.M.M.A. v. Jonely, 677 So. 2d 343, 346 (Fla. 5th Dist. Ct. App. 1996)).
245. *Id*.
246. *Id*. at 108.
247. *Id*. at 109.
248. *Id*. (citing Von Eiff v. Azicri, 720 So. 2d 510, 514-15 (Fla. 1998)).
249. *Id*.
250. *Id*.

lacked standing to seek custody or visitation of appellee's biological child against appellee's wishes.[251]

Justice Gross concurred specially, stating that "[t]he real problem in this area is section 63.042(3) . . . , which prevents someone like appellant from creating that type of legal relationship with a child that would confer legal rights and obligations."[252] Neither this court nor the Florida Supreme Court has ruled on the constitutionality of section 63.042(3) under the privacy amendment of the Florida Constitution or the Equal Protection Clause.[253] Gross noted that in *Cox*, the court passed on the constitutionality of the statute, but that case did not appear to be the last word on the issue.[254] He further opined that an important factor driving the decision in *Cox* was the absence of any evidence in the record in support of the parties' positions.[255]

Additionally, Georgia may look to the law of Alabama as persuasive authority. Alabama falls in the middle range on this issue, much like Georgia.[256] The adoption statute in Alabama provides for adoption by "any adult person or husband and wife jointly."[257] Second-parent adoptions have been approved in some Alabama lower courts,[258] but the case law reveals hostility toward gay parents.[259]

For example, in 1998, in *Ex parte J.M.F.*,[260] the Alabama Supreme Court denied custody to a child's mother and her female partner who openly displayed their homosexual relationship.[261] The parties were divorced, and the trial court awarded custody of the parties' minor daughter to the mother. Shortly thereafter, the mother began a homosexual relationship and decided that both she and her daughter should live with her partner. Although the apartment had three bedrooms, the mother began sharing a bedroom with her girlfriend. The father was aware of the relationship but believed that the mother and her girlfriend would maintain a discreet relationship. However, the father later learned that his former wife was sharing a bedroom with her girlfriend, that their child occasionally slept with them in their bed, and

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251. *Id*. at 110.
252. *Id*. at 111 (Gross, J., concurring specially).
253. *Id*. (Gross, J., concurring specially).
254. *Id*. (Gross, J., concurring specially) (citing *Cox*, 627 So. 2d 1210).
255. *Id*. (Gross, J., concurring specially) (citing *Cox*, 627 So. 2d 1210).
256. *See Overview of State Adoption Laws, supra* note 2.
257. ALA. CODE § 26-10A-5 (2003).
258. *See Overview of State Adoption Laws*, *supra* note 2.
259. *See Ex Parte* J.M.F., 730 So. 2d 1190 (Ala. 1998).
260. 730 So. 2d 1190 (Ala. 1998).
261. *Id*. at 1191-92.

that they kissed in the child's presence.[262] Also, during the father's visitation, his child informed him that "girls could marry girls and boys could marry boys."[263] Subsequently, the father moved to modify the divorce judgment to obtain custody of the daughter.[264]

After considering all the evidence, the trial court entered an order changing custody to the father, finding that this change would materially promote the child's best interests. The court also set forth the mother's visitation rights.[265] "The court initially restricted the mother's visits by ordering that she not 'exercise her right of visitation with the minor child of the parties in the presence of a person to whom she is not related by blood or marriage.'"[266] The trial court subsequently modified the order to provide that "the restriction 'shall not apply and be considered as being applicable to the general public, casual, professional, platonic or business relationships.'"[267]

The court of appeals pointed out that, in Alabama, evidence of a parent's heterosexual misconduct cannot, in itself, support a change of custody unless the trial court finds that the misconduct has a detrimental effect upon the child.[268] Applying this standard, the court determined that the record contained no evidence indicating that the mother's relationship had a "substantial detrimental effect" upon the child, and thus concluded that the trial court improperly changed custody based solely upon the mother's homosexuality.[269]

However, the supreme court noted that "[t]he trial court was presented with evidence of two important changes in the circumstances of the parties that occurred since their divorce."[270] First, there was evidence that the mother and her girlfriend established an open lesbian relationship, which they explained to the child and demonstrated with affection in the presence of the child on a regular basis.[271] Further, although the mother testified that she did not have any significant concern about the adverse effect of her changing from a married heterosexual to a committed homosexual would have on her child, the mother stated that it would be up to the child to cope with any ridicule or prejudice that she

262. *Id*.
263. *Id*. at 1192.
264. *Id*.
265. *Id*. at 1193-94.
266. *I*d. at 1194.
267. *Id*.
268. *Id.*
269. *Id*.
270. *Id*. at 1195.
271. *Id*.

might suffer because "all children have to cope with prejudice anyway."[272] The court further noted that the mother and her girlfriend had homosexual couples as guests in their home and would not discourage the child from adopting a homosexual lifestyle.[273]

There was also evidence indicating that the father is no longer a single parent, but had established a happy marriage with a woman who loves the child, assists in her care, and has demonstrated a commitment to sharing the responsibility of child rearing.[274] Additionally, the court noted that the child expressed love for the stepmother and acceptance of her as a parental figure.[275] The court considered the fact that the father and the stepmother had a house with ample room for the child, and that they were able to provide for her material, emotional, and physical needs.[276]

Lastly, the court noted that the trial court reviewed a number of scientific studies concerning the effects on children who are raised by homosexual couples.[277] Much of the information presented by those studies suggested that a homosexual couple with good parenting skills is just as likely to successfully rear a child as is a heterosexual couple.[278] However, the court noted that other studies indicated "that a child reared by a homosexual couple is more likely to experience isolation, behavioral problems, and depression and that the optimum environment for rearing a child is one where both a male and a female role model are present, living together in a marriage relationship."[279]

The court concluded that while the evidence showed that the mother loved the child and provided her with good care, it also showed that she chose "to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most of its citizens.'"[280] The court stated that the record contained

> evidence from which the trial court could have concluded that "[a] child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development" and that "the degree of harm

272. *Id*.
273. *Id*.
274. *Id*.
275. *Id*.
276. *Id*.
277. *Id*.
278. *Id*.
279. *Id*. at 1195-96.
280. *Id*. at 1196 (quoting *Ex Parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998)).

> to children from the homosexual conduct of a parent is uncertain . . . and the range of potential harm is enormous."[281]

Georgia courts may also consider cases from jurisdictions whose courts unequivocally permit same-sex adoptions.[282] For example, the Supreme Court of Vermont, in *In re B.L.V.B. & E.L.V.B.*,[283] held that denying an adoption by same-sex partners would be inconsistent with the best interests of the children and public policy of the state.[284] In this case, a nonbiological mother sought to adopt the biological child of her partner. The couple had lived together monogamously for over seven years, and the biological mother was impregnated by an anonymous sperm donor.[285] The supreme court reasoned that the "paramount concern" of the court should always be the child's best interests.[286] Further, the court opined that by permitting the adoption, it furthered the original purpose of the adoption statute (promoting the child's best interests) and allowed children the benefits and security of a legal relationship with their parents.[287] The court noted that reproductive technologies and society's recognition of alternative lifestyles has advanced, so that a biological connection is no longer the only "organizing principle" of family structures.[288]

The court stated that courts are left to protect the public interest in the children's financial support and emotional well-being by developing theories of parenthood so that a "parent" may be awarded custody, visitation, or reached for support.[289] It further stated that a court should work to prevent the years of litigation that can result while children remain in limbo and are sometimes denied the affection of a "parent" who has been with them since birth.[290]

Furthermore, the adoption statute in this case is very similar to the adoption statute in Georgia.[291] Specifically, the Vermont statutes permit adoption by an individual or husband and wife together.[292] The adoption statute requires termination of parental rights for a person not

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281. *Id.* (quoting Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 883, 895 (1997)).
282. *See also Tammy*, 619 N.E.2d at 315; *In re Bruce*, 661 A.2d 107 (Conn. 1995).
283. 628 A.2d 1271 (1993).
284. *Id.* at 1276.
285. *Id.* at 1272.
286. *Id.* at 1276.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Compare* O.C.G.A. §§ 19-8-3 and 19-8-6 to 15 VT. STAT. ANN. §§ 431, 438 (2003).
292. *See* 15 VT. STAT. ANN. §§ 431, 448; *B.L.V.B.*, 628 A.2d 1271.

married to the biological parent to adopt the child.[293] However, the supreme court reasoned that this provision anticipated that the child would actually be removed from the home of the biological parent.[294] In the case of a same-sex couple, the court noted that it would not make sense to terminate the parental rights of the biological parent when the parent will remain in the same household with the child and newly adopted parent.[295] The court opined that the purpose of the statute as a whole was to clarify and protect the legal rights of an adopted person, not to prohibit adoptions by certain individuals.[296] Further, the court stated that a narrow construction of the statute requiring termination of the biological parents' parental rights "would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisbutably in the best interests of the children."[297]

Also, in *In re Evan*,[298] the Surrogate's Court of New York County granted an adoption to a same-sex couple, finding that it was in the best interests of the child.[299] The court reasoned that if the adoption was denied and the couple later separated, the woman who was not the child's biological mother would have no rights to visitation even if evidence showed that denying visitation would be harmful to the child.[300] The court opined that it is better for a child to continue a relationship with both parents, and the law recognizes this concept by presuming that parental visitation is in the best interests of the child absent proof that it will be harmful.[301] The court also noted that even if the couple in this case stayed together, significant emotional benefits would result from the adoption, such as the child's formal recognition in an organized society.[302] Further, the child would gain generous medical and educational benefits through the adoption.[303]

The court also noted that although the actual number of children being raised in lesbian homes was unknown, as of 1987, estimates

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293. *See* 15 VT. STAT. ANN. § 448; *B.L.V.B.*, 628 A.2d 1271.
294. *B.L.V.B.*, 628 A.2d at 1274.
295. *Id.*
296. *Id.*
297. *Id.* (citing Lubinsky v. Fair Haven Zoning Bd., 527 A.2d 227, 228 (1986)).
298. 153 Misc. 2d 844 (N.Y. Sur. Ct. 1992).
299. *Id.* at 851.
300. *Id.* at 846.
301. *Id.* (citing Wise v. Del Torro, 505 N.Y.S.2d 880 (N.Y. App. Div. 1986); Resnick v. Zoldan, 520 N.Y.S.2d 434 (N.Y. App. Div. 1987); Bubbins v. Bubbins, 493 N.Y.S.2d 869 (N.Y. App. Div. 1985)).
302. *Id.*
303. *Id.*

ranged from six to ten million.[304] In addition, research on the differences between children of homosexual and heterosexual parents, in otherwise comparable circumstances, revealed no significant disadvantages of the former over the latter.[305]

Also, the New York statute in this case is similar to the previously mentioned Vermont and Georgia adoption statutes.[306] Specifically, it allows adoption by an unmarried person and a husband and wife jointly and requires the termination of parental rights by the biological parent when someone other than a legal spouse petitions to adopt the child.[307] However, the court stated that to terminate the rights of the biological mother when she will continue to be a mother to the child in the same household is an absurd interpretation of the adoption statute and should be avoided.[308] Moreover, the court reasoned that an underlying policy of the statute was to allow a husband and wife to jointly adopt a child and that this policy is furthered by permitting the adoption of a child who recognizes these life-long partners as parents.[309]

Therefore, there are currently three different forms of jurisprudence pertaining to same-sex adoption in the United States. First, adoption statutes in Florida are among the minority and explicitly ban adoption by homosexuals in general. Second, adoption statutes in Alabama and Georgia do not explicitly ban homosexual adoptions but do not expressly provide for them. Higher courts in these states have not addressed this issue, but lower courts have permitted some same-sex adoptions. Finally, statutes in states like Vermont and New York do not explicitly provide for same-sex adoptions, but the courts have looked to the best interests of the children and the purpose behind the adoption statutes in order to permit adoptions when they are in the best interests of children.

IV. POLICY CONSIDERATIONS AND THE BEST FIT FOR GEORGIA

When adoption statutes were first written, it would have been hard for any legislature to anticipate the changes the family structure has embraced over the last fifty years. Because most adoption statutes do not specifically permit or prohibit adoptions by same-sex couples, until the legislature amends adoption statutes, courts in most states are left

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304. *Id.* at 851.

305. *Id.*

306. *Compare* O.C.G.A. §§ 19-8-3 and 19-8-6, 15 VT. STAT. ANN. §§ 431, 438 to N.Y. DOM. REL. §§ 110, 117(1) (2004).

307. *See* N.Y. DOM. REL. §§ 110, 117(1).

308. 153 Misc. 2d at 848.

309. *Id.* at 846.

with the uncertainty of interpreting a statute not designed to cope with this issue. For example, only three states, including Florida, have adoption statutes that specifically deny adoption to homosexuals.[310] These statutes have come under tremendous criticism by the ABA and have faced many state and federal constitutional challenges.[311]

Because Georgia falls within the middle range of states on this issue, not specifically prohibiting the adoptions, but not strongly embracing them, it is hard to speculate whether Georgia's higher courts will permit adoptions by same-sex couples in the near future. However, an educated guess can be formulated in light of the history of Georgia case law and the judicial opinions and policies handed down from other courts. It is especially important to emphasize the policy behind these opinions when dealing with a subject as sensitive as adoption. The determination of the best interest of the child is inherently subjective and leaves judges with an extremely difficult decision.

At first blush, Georgia case law seems to be very limiting in the rights it affords homosexuals. However, as previously noted in this Comment, not many cases have been decided since *Bowers* was overturned by the United States Supreme Court and discredited by Georgia. Further, in the context of family law, it is clear that courts will not look at conduct in and of itself, but at the effect that conduct has on children. Therefore, in a situation in which a homosexual couples chooses not to share their sexual beliefs with a child, the court would probably be more likely to grant an adoption. Scientific studies probably will play a large role in determining what really is in the best interest of children. This seems to be more of a battle of the experts, as it is easy to obtain statistics that go either way. An example of this is *Ex parte J.M.F.*,[312] in which the Alabama Supreme Court decided a case largely based on studies highlighting the negative impact homosexual behavior would have on the child.[313] However, in *In re Evan*[314] a New York court reviewed studies that pointed largely to the opposite result and permitted the same-sex adoption.[315]

Same-sex adoption seems to be highly analogous to the area of child custody, in which scientific studies are often introduced to determine the

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310. *See* FLA. STAT. ch. 63.042(3) (2003).

311. *See* David L. Hudson Jr., *Court Won't Tie Lawrence to Gay Adoption Law 11th Circuit Rejects Arguments by Florida Foster Parents*, ABA Journal Report, *available at* http://www.abanet.org/journal/ereport/f6adopt.html (Feb. 6, 2004).

312. 730 So. 2d 1190 (Ala. 1998).

313. *Id.* at 1196.

314. 153 Misc. 2d 844 (1992).

315. *Id.* at 850 n.1.

harmful effects on a young child of moving to a different state. It is likely that wealthier homosexual couples who can afford a good expert witness will be more likely to succeed in adoption. This view is also somewhat reflective of the reason the majority of same-sex adoptions in this state occur in the Atlanta area.

V. CONCLUSION

When it comes to children, cases are always decided on a case-by-case basis depending on the individual facts. Adoptions for same-sex couples should not be different. To make the best decisions, courts need to be equipped with the best resources and tools to adequately determine what is in a child's interest without stereotyping or generalizing conduct to every individual. This issue raises a lot of hard questions that go beyond the law to morality, theology, and societal norms. Trial judges are more likely under less public pressure than supreme court justices to deny an adoption to a same-sex couple because trial court decisions do not receive as much publicity.

In certain situations, adoption by a same-sex partner could potentially ensure a child monetary security. For example, when one parent inherits a large amount of money or wins a large settlement in a lawsuit, a legally recognized child will also benefit. Georgia requires child support to be paid by a legally recognized parent for the benefit of the child. Therefore, it does not make sense to allow a same-sex parent the ability to walk away from a relationship and not support a child if he or she has committed to do so as much as a heterosexual partner. Further, it is troubling that the child is the one caught in the crossfire. If both of a child's parents are not legally recognized, only the biological or legally recognized parent can sign forms that require the signature of a legal guardian, automatically provide health insurance, or allow emergency medical care. These outcomes seem hard to justify to a child who recognizes a person as their parent.

Additionally, same-sex marriage is not permitted in this state. Therefore, some courts may feel that allowing a same-sex couple to adopt a child is the same as legally recognizing the couple's relationship. However, in the context of same-sex adoptions, there is always a different variable present—a child. Therefore, any decisions about adoption should not turn on whether Georgia accepts or recognizes same-sex marriages, but whether a particular child will benefit or be harmed by a particular situation. As the court in *B.L.V.B.* stated, "[w]e are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not the fact remains that . . . [the

nonbiological mother] has acted as a parent of . . . [the children] from the moment they were born."[316]

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316. 628 A.2d at 1276.