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Rainey v. Chever: Expanding a Natural Father's Right to Inherit from His Illegitimate Child

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Casenotes

Rainey v. Chever: Expanding a Natural Father's Right to Inherit from His Illegitimate Child

In *Rainey v. Chever*,[1] the Georgia Supreme Court held unconstitutional section 53-2-4(b)(2) of the Official Code of Georgia Annotated ("O.C.G.A."),[2] which required that before a natural father could inherit through his illegitimate child, the natural father had to either openly treat the child as his own or provide support for the child.[3] Coming up only one vote short, the United States Supreme Court denied plaintiff's petition for writ of certiorari.[4] The three dissenting Justices declared their belief that Georgia's statute addressed the "alarming trend" of out-of-wedlock births.[5] Furthermore, the dissenting Justices asserted that because of the "substantial tension" between Georgia's decision and the United States Supreme Court's decisions, certiorari should have been granted.[6]

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1. 270 Ga. 519, 510 S.E.2d 823, *cert. denied*, 119 S. Ct. 2411 (1999).
2. 270 Ga. at 519, 510 S.E.2d at 824.
3. O.C.G.A. § 53-2-4(b)(2) (Supp. 1999).
4. 119 S. Ct. at 2411.
5. *Id.*
6. *Id.* at 2414.

I. FACTUAL BACKGROUND

Zenobia Hamilton Rainey gave birth to DeAndre Bernard Hamilton, but was not married to DeAndre's biological father, Robert Lee Chever. When DeAndre was about two years old, Chever established his paternity through a judicial proceeding.[7] However, this judicial proceeding did not legitimate DeAndre.[8] Although Chever lived less than one mile from DeAndre, Chever had no contact with DeAndre. In fact, DeAndre instigated the first contact with Chever when DeAndre was fifteen years old. Even after this contact, Chever did not take an active role in DeAndre's life. Chever did not visit DeAndre or pay Rainey any child support. Furthermore, Chever did not know when or if DeAndre graduated from high school or if he attended college. In August 1997, at age twenty, DeAndre was killed in an automobile accident that was allegedly caused by a manufacturing defect.[9] Despite having so little contact with DeAndre, Chever was "the first person—of all the parents whose children were injured or killed—to file a suit seeking monetary damages for his death."[10]

Believing that Chever had no right to inherit from DeAndre and attempting to stop Chever from pursuing his wrongful death action, Rainey filed a Petition to Determine Interests of Heirs pursuant to section 53-2-4(b)(2) of the O.C.G.A.[11] Rainey then moved for summary judgment on the ground that Chever failed to meet the requirements of section 53-2-4(b)(2). Reasoning that Rainey relied upon a statute that was unconstitutional under the constitutions of both Georgia and the United States, Chever replied with a cross-motion for summary judgment. The trial court granted Chever's motion and held that section 53-2-4(b)(2) violated the constitutions of Georgia and the United States. The trial court found that section 53-2-4(b)(2) used an unconstitutional gender-based classification because it placed additional requirements upon a father of an illegitimate child before that father could inherit from his child.[12] However, the mother of the same child had no such

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7. 270 Ga. at 519, 510 S.E.2d at 823.

8. Establishing the paternity of a child does not give the father the same parental rights as does legitimating a child. One example of that principle is found in O.C.G.A. § 19-7-25 (1999), which gives exclusive paternal control of a child born out of wedlock to the mother unless the child is legitimated by the father.

9. 119 S. Ct. at 2411.

10. *Id.*

11. Telephone interview with Kenneth Shigley, counsel for Rainey (Oct. 29, 1999).

12. 270 Ga. at 519, 510 S.E.2d at 823. Those additional requirements are that "the father must not have failed or refused openly to treat the child as his own or failed or refused to provide support for the child." *Id.*, 510 S.E.2d at 824.

additional requirements to inherit from her child.[13] The trial court further stated that "there is no legitimate state interest achieved by not subjecting mothers of illegitimate children to the same standards of conduct."[14]

The Georgia Supreme Court affirmed in a unanimous decision.[15] Rainey petitioned the United States Supreme Court for certiorari, but the Court narrowly denied the petition, with three Justices dissenting.[16]

II. LEGAL BACKGROUND

A. *Statutory History*

Prior to April 1991, the biological father of a child born out-of-wedlock could inherit from that child if the child had been legitimated or if paternity had been judicially established, and the mother of the child could inherit as if the child were legitimate.[17] Georgia House Bill 251, which was approved on April 10, 1991, amended this provision.[18] This amendment renumbered section 53-2-4 and added subsection (b)(2), which sets forth requirements that a biological father must meet to inherit from his out-of-wedlock child.[19] New subsection (b)(2) requires not only that the child be legitimated or paternity established, but also that the biological father prove by a preponderance of the evidence that while the father was living and following the child's birth, he "openly

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13. *Id.*
14. *Id.*
15. *Id.* at 521, 510 S.E.2d at 825.
16. 119 S. Ct. at 2411.
17. The predecessor of section 53-2-4(b)(2), O.C.G.A. § 53-4-5, stated,

> (a) The mother of a child born out of wedlock . . . may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate.
>
> (b) The father of a child born out of wedlock . . . may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate if a court of competent jurisdiction, during the lifetime of the father and after the conception of the child, has entered an order declaring the child to be legitimate under the authority of Code Section 19-7-22 or such other authority as may be provided by law, or has otherwise entered a court order establishing the father of the child born out of wedlock. If no such order has been entered, neither the father nor any paternal kin may inherit from the child born out of wedlock by reason of the paternal kinship.

1988 Ga. Laws 1720, 1732.

18. 1991 Ga. Laws 660, 662.
19. *Id.* at 663.

treat[ed] the child as his own" and "provide[d] support for the child."[20] Subsection (b)(2) was further amended in 1996 with the deletion of the phrases "while the father was living" and "following the child's birth."[21]

After the Georgia Supreme Court decided *Rainey*, Georgia House Bill 366 was introduced in an effort to amend section 53-2-4(b).[22] The latest version of House Bill 366 would reduce the requirements for a biological father to inherit from his out-of-wedlock child by deleting the obligation of the father to treat the child openly as his own or to provide support for the child.[23] If approved by the Senate, the new version of section 53-2-4(b) would allow the father of a child born out of wedlock to inherit through that child if the father does only one of the following: legiti-

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20. *Id.* Paragraph (b)(2) stated in full:

> Paragraph (1) of this subsection notwithstanding, neither the father nor any paternal kin shall inherit from or through a child born out of wedlock if it shall be established, by a preponderance of evidence, that the father, during his lifetime and after the birth of the child, failed or refused to openly treat the child as his own or failed or refused to provide support for the child.

Id.

21. 1996 Ga. Laws 504, 532. Subsection (b)(2) now reads,

> Paragraph (1) of this subsection notwithstanding, neither the father nor any child of the father nor any other paternal kin shall inherit from or through a child born out of wedlock if it shall be established by a preponderance of evidence that the father failed or refused openly to treat the child as his own or failed or refused to provide support for the child.

Id.

22. *See* H.R. 366, Reg. Sess. (Ga. 1999), *available at* <http://www2.state.ga.us/Legis/-1999_00/leg/fulltext/hb366.htm>.

23. *See id.* § 1. If the bill is approved, O.C.G.A. § 53-2-4(b) would read:

> The father of a child born out of wedlock . . . may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate if:
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> (1) A court of competent jurisdiction has entered an order declaring the child to be legitimate under the authority of Code Section 19-7-22 or such other authority as may be provided by law;
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> (2) A court of competent jurisdiction has otherwise entered a court order establishing paternity;
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> (3) The father has, during the lifetime of the child, executed a sworn statement signed by the father attesting to the parent-child relationship;
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> (4) The father has, during the lifetime of the child, signed the birth certificate of the child; or
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> (5) The presumption of paternity described in division (2)(B)(ii) of Code Section 53-2-3 has been established and has not been rebutted by clear and convincing evidence.

Id. This bill passed the House on March 4, 1999 and was sent to the Senate Judiciary Committee on March 8, 1999. Because the General Assembly's 1999 Regular Session adjourned with no action taken on the bill, the bill was carried over to the 2000 Regular Session. As of April 10, 2000, the Senate Judiciary Committee had not acted on the bill. Telephone Interview with Senator Kemp's Office (Apr. 10, 2000).

mates the child, establishes paternity, signs an affidavit acknowledging that he is the father of the child, or signs the child's birth certificate.[24]

The pre-1990 version of the Uniform Probate Code mirrored section 53-2-4; however, the Uniform Probate Code was revised and now provides that "[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child."[25]

B. Caselaw History

Although it is now firmly established that an intestacy statute cannot discriminate on the basis of legitimacy and, therefore, that an illegitimate child has the right to inherit from his or her natural parents, this has not always been so. In *Johnstone v. Taliaferro*,[26] the Georgia Supreme Court discussed the rights and status of illegitimate children and stated that "[t]he most important disability of an illegitimate child at common law is that he has no inheritable blood; that he is incapable of becoming [an] heir . . .; [and] that he can have no heirs but those of his own body."[27] The court stated that several statutes passed in the 1800s had upgraded the rights and status of illegitimate children so that by the turn of the century an illegitimate child had inheritable blood and could inherit from his or her mother and vice versa.[28] However, as at common law, an illegitimate child was still not able to inherit from the biological father, and the child had no paternal heirs unless the child was legitimated.[29]

In 1970 the Georgia Supreme Court stated in *Pettiford v. Frazier*[30] that the legislature had the authority to determine whether and how an illegitimate child could inherit from the mother and father.[31] In reaching this decision, the court reasoned that inheritance rights are not "natural and inalienable right[s], guaranteed by the Constitution of the United States."[32] Therefore, "'the legislature may change, condition, or abrogate the law of succession, subject to certain constitutional limitations which are restricted in their scope.'"[33] The court cautioned

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24. *See supra* note 23, § 1.
25. UNIF. PROBATE CODE § 2-114(c) (amended 1990), 8 pt. I U.L.A. 91 (1998).
26. 107 Ga. 6, 32 S.E. 931 (1899).
27. *Id.* at 13, 32 S.E. at 934.
28. *Id.* at 16, 32 S.E. at 935.
29. *Id.*
30. 226 Ga. 438, 175 S.E.2d 549 (1970).
31. *Id.* at 439, 175 S.E.2d at 550.
32. *Id.*
33. *Id.* (quoting 23 AM. JUR. 2D *Descent & Distribution* § 13, at 759-61).

that although the United States Constitution does not limit the power of state legislatures to establish and amend inheritance laws, the Fourteenth Amendment would suppress the legislature's power if such power "'would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.'"[34] Therefore, the court concluded that while the common law gave no right to the illegitimate child to inherit, the legislatures of each state have the power and discretion to decide under what circumstances an illegitimate child could inherit from his or her mother and father.[35]

In *Poulos v. McMahan*,[36] the Georgia Supreme Court reviewed Georgia's intestacy laws as they pertained to the right of an illegitimate child to inherit from the father. In *Poulos* an illegitimate child, Michael, was attempting to inherit from his father. The probate court found that Michael was indeed the decedent's child; however, the superior court granted the opposing side's motion for summary judgment.[37] The superior court found that because Michael was an illegitimate child, he "could not inherit from the decedent under the intestacy laws in effect at the time of the decedent's death."[38] Michael appealed, arguing that Georgia's intestacy statutes were unconstitutional because they discriminated against illegitimate children, and the supreme court agreed that the pre-1980 intestacy scheme "granted illegitimate children no inheritance rights against their fathers' estates."[39] The court further stated that the intestacy scheme was subsequently revised to allow an illegitimate child to inherit from the father if paternity had been established during the lifetime of the father and after the conception of the child.[40] But because Michael had not met the requirements of the amended intestacy statute during the lifetime of his father, the court did not allow him to inherit from his father.[41]

When a putative father attempted to inherit from his illegitimate daughter who had died intestate, the Georgia Court of Appeals prohibited the father from inheriting because the requirements of section 53-4-5(b) (now section 53-2-4) had not been met during the child's lifetime.[42] Although the court based its decision on the father's not

34. *Id.*, 175 S.E.2d at 551 (quoting 23 AM. JUR. 2D *Descent & Distribution* § 13, at 759-61).
35. *Id.*
36. 250 Ga. 354, 297 S.E.2d 451 (1982).
37. *Id.* at 354, 297 S.E.2d at 452.
38. *Id.*
39. *Id.* at 359, 297 S.E.2d at 455.
40. *Id.* at 360, 297 S.E.2d at 456.
41. *Id.* at 364, 297 S.E.2d at 458.
42. Dunlap v. Moody, 224 Ga. App. 38, 40, 479 S.E.2d 456, 458 (1996).

meeting the requirements of subsection (b)(1) of the statute (establishing paternity), the court stated that subsection (b)(2) also had not been met.[43] The father argued that he "occasionally exchanged gifts with [the child]," but the court found that "occasional gifts do not constitute support."[44] Furthermore, the evidence showed the father's lack of monetary support, his failure to be present at the child's birth, and his lack of contact with the mother and child during the first two to three years of the child's life.[45] Therefore, the father was not permitted to inherit from his out-of-wedlock child because the father did not establish by a preponderance of the evidence that he had supported the child and had openly treated the child as his own.[46]

III. RATIONALE OF THE COURT

The Georgia Supreme Court unanimously held in *Rainey* that section 53-2-4(b)(2) is unconstitutional under both the Fourteenth Amendment of the United States Constitution and Article I, Section I, Paragraph II of the Georgia Constitution of 1983.[47] The court reasoned that because there is "no 'exceedingly persuasive' justification for treating the inheritance rights of mothers and fathers of children born out of wedlock differently," the statute creates an unconstitutional gender-based classification.[48]

Although the State (through amicus curiae) and the mother argued that this statutory provision "distinguishes not between mothers and fathers but between fathers who treat their illegitimate child as their own and those who do not," the court dismissed this argument and found that the statute creates a "gender-based classification."[49] The court seemed concerned that subsection (b)(2) imposed an additional obligation upon fathers but not upon mothers—that obligation being that the father must not have failed or refused to treat the child openly as his own or failed or refused to provide support for his child.[50] Therefore, because a mother of a child born out of wedlock could inherit from or through that child without having to prove that she had openly treated the child as her own and had provided support for the child, and because of the

43. *Id.* at 40-41, 479 S.E.2d at 458-59.
44. *Id.* at 40, 41, 479 S.E.2d at 459.
45. *Id.* at 40-41, 479 S.E.2d at 458-59.
46. *Id.*
47. 270 Ga. at 519, 510 S.E.2d at 824.
48. *Id.* at 520-21, 510 S.E.2d at 824-25.
49. *Id.* at 519, 510 S.E.2d at 824.
50. *Id.* at 519-20, 510 S.E.2d at 824.

plain language of subsection (b)(2), the court found that the statute created a gender-based classification.[51]

The court then turned to the issue of whether this gender-based classification was constitutional. Relying on prior decisions of the United States Supreme Court, the court first noted that "[g]ender-based classifications are subject to a strong presumption of constitutional invalidity" and that such a classification would be unconstitutional "unless the classification furthers important governmental objectives, and the discriminatory means employed are 'substantially related' to the achievement of those governmental objectives."[52] The court further explained that the "justification for making a gender-based classification proffered by the State must be 'exceedingly persuasive,' genuine, and not hypothesized, and it 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'"[53]

Relying on guidance from the United States Supreme Court, the court agreed with the mother's and State's contention that Georgia has an important interest in "encouraging fathers to take responsibility for their children born out of wedlock and encouraging parental responsibility by precluding an uninvolved father from profiting from the death of a child born out of wedlock."[54] However, the court also found that such an interest was not enough to validate the gender-based classification because "the State has an equally important interest in encouraging the identical behavior in mothers."[55] Furthermore, the court rejected the justification that "mothers are less likely than fathers to abandon children born out of wedlock" because that argument relied on "stereotypes and overbroad generalizations."[56]

Attempting to support the constitutionality of the statute, the State relied on *Parham v. Hughes*,[57] a five-to-four United States Supreme Court decision that affirmed a Georgia Supreme Court decision that a Georgia statute precluding a father from suing for the wrongful death of his illegitimate child was constitutional.[58] The State argued that in *Parham* the Court distinguished between statutes that classify based on

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51. *Id.*

52. *Id.* at 520, 510 S.E.2d at 824 (citing United States v. Virginia, 518 U.S. 515, 531-34 (1996); Reed v. Reed, 404 U.S. 71, 76 (1971); Franklin v. Hill, 264 Ga. 302, 303, 404 S.E.2d 778, 780 (1994)).

53. *Id.* (quoting *Virginia*, 518 U.S. at 533) (citation omitted).

54. *Id.*

55. *Id.*

56. *Id.*

57. 441 U.S. 347 (1979).

58. *Id.* at 348, 350, 359.

action and statutes that classify based on status.[59] Because section 53-2-4 "singles out those fathers who have taken no action during the life of their children," the State urged that the statute does not discriminate against fathers because of "gender, which is immutable," but rather is "based on [their] action" or lack thereof.[60] The court dismissed the State's arguments in *Rainey* and stated that *Parham* was concerned with "avoiding problems in proving paternity," a problem that is not present under the Georgia statutes because section 53-2-4(b)(1) sets forth the requirement "that the father judicially establish paternity prior to the death of the child."[61]

Although the United States Supreme Court denied plaintiff's petition for writ of certiorari on June 24, 1999, Chief Justice Rehnquist and Justices Scalia and Thomas dissented.[62] Justice Thomas wrote the dissenting opinion and stated that "[t]he facts of this case poignantly illustrate the problem that Georgia sought to address" when it amended section 53-2-4(b)(2) to add requirements for a natural father to inherit from or through his out-of-wedlock child.[63] Justice Thomas noted the affidavits of Patrick Fagan, former Deputy Assistant Secretary for Family and Social Services Policy of the United States Department of Health and Human Services, and State Representative William C. Randall, Chairman of the Special Judiciary Committee of the Georgia House of Representatives and sponsor of section 53-4-5(b)(2) (now section 53-2-4(b)(2)).[64] Justice Thomas stated that those affidavits illustrated Georgia's "alarming trend" of "out-of-wedlock births and delinquent fathers" and the "dire social consequences" that result.[65] The dissenting Justices believed that Georgia was attempting to prevent the situation in which a child is born out of wedlock, the father does not form a "substantial parental relationship" with the child or support the child, but then "seek[s] to profit from the death of the child."[66]

Justice Thomas stated that the Georgia Supreme Court's decision "arguably is inconsistent with this Court's prior decisions and, at a minimum, resolves an important question warranting this Court's review."[67] The dissent was first concerned with the Georgia Supreme

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59. Amicus Curiae Brief for the State of Georgia at 5, Rainey v. Chever, 270 Ga. 519 (1999) (No. 98-1478).

60. *Id.* at 6.

61. 270 Ga. at 520-21, 510 S.E.2d at 825.

62. 119 S. Ct. at 2411.

63. *Id.* (Thomas, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 2412.

Court's apparent application of intermediate scrutiny.[68] Relying on *Quilloin v. Walcott*,[69] *Parham*, and *Lehr v. Robertson*,[70] the dissent declared that "the lower court's choice of heightened scrutiny, particularly in this case, appears to be in error."[71]

The dissent proceeded on the assumption that the Georgia Supreme Court "correctly chose heightened scrutiny," but noted that even under that assumption, "its application of that standard is equally dubious."[72] The dissent stated that the Georgia Supreme Court's reliance upon only one page from one case, *Miller v. Albright*,[73] to "conclu[de] that § 53-2-4(b)(2) was not substantially related to important governmental interests" was "misplaced for several reasons."[74] First, "[t]here was no opinion for the Court in *Miller*; rather six justices, in three different opinions, affirmed a lower court judgment."[75] Furthermore, "the plurality opinion ... actually concluded that the statute at issue was *not* based on impermissible stereotypes, reasoning that '[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands.'"[76] Therefore, Justice Thomas declared that *Miller* "does not stand for the proposition that all generalizations based on gender are constitutionally infirm."[77]

The dissenting Justices were also "at a loss to understand how the Georgia Supreme Court's decision can be squared with [the Supreme] Court's decisions recognizing women's unique role in childbirth."[78] The dissent examined *Planned Parenthood of Central Missouri v. Danforth*[79] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[80] both of which stated that courts should not ignore a woman's unique ability to conceive, carry, and give birth to a child.[81] However, the dissent stated that the logic of *Danforth* and *Casey* "flatly contradicts the Georgia Supreme Court's reasoning that the State must ignore these

68. *Id.*
69. 434 U.S. 246 (1978).
70. 463 U.S. 248 (1983).
71. 119 S. Ct. at 2413 (Thomas, J., dissenting).
72. *Id.*
73. 523 U.S. 420 (1998).
74. 119 S. Ct. at 2413 (Thomas, J., dissenting).
75. *Id.*
76. *Id.* (quoting *Miller*, 523 U.S. at 445) (citation omitted) (alteration by court).
77. *Id.*
78. *Id.*
79. 428 U.S. 52 (1976).
80. 505 U.S. 833 (1992).
81. 119 S. Ct. at 2413 (Thomas, J., dissenting).

efforts when deciding whether she, as opposed to the father, is entitled to inherit from the deceased child's estate."[82]

The dissenting opinion concluded with a final reason why the Court should have granted certiorari: besides the fact that "[t]his Court routinely reviews state courts' decisions invalidating state or local laws on federal constitutional grounds," the State "filed an amicus brief urging the Court to uphold the constitutionality of section 53-2-4(b)(2), and its views should affect our decision whether to exercise jurisdiction."[83] In addition, the dissenting Justices noted that the "importance of the issue cannot be gainsaid."[84] Because several states have the same or a similar statute, the Georgia Supreme Court's decision also "calls the continued validity of these statutes into doubt."[85]

IV. IMPLICATIONS

The Georgia Supreme Court's action, together with the United States Supreme Court's inactions, has at least two consequences. First, by not acknowledging the sociological studies that show fathers having illegitimate children are very likely to abandon their illegitimate children emotionally, if not financially, and by allowing those fathers to inherit from their children even if the father has not supported or openly treated the child as his own, the courts can be seen as encouraging wrongful parental behavior.[86] Without doing any more than establishing that he is the father of the child, a man can now reap the benefits of siring a child through the inheritance statutes even though the father did not voluntarily give his child the benefit of a true father. Second, the United States Supreme Court should have taken the opportunity to clarify the constitutionality of this statute because other states currently have the same or a similar statute in effect, and at least one other state supreme court has found its statute constitutional.[87]

Appellant's briefs to both the Georgia Supreme Court and the United States Supreme Court presented affidavits of Patrick Fagan, William H. G. Fitzgerald Fellow in Family and Cultural Issues at The Heritage Foundation, and State Representative William C. Randall, Chairman of the Special Judiciary Committee of the Georgia House of Representatives. Appellant asked Mr. Fagan to "render a public policy analysis as

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 2414.
86. *See* Affidavit of Patrick F. Fagan filed with Petition for a Writ of Certiorari, Rainey v. Chever, 119 S. Ct. 2411 (1999) (No. 98-1478).
87. *See* 119 S. Ct. at 2413-14.

to whether [the subject] statute is substantially related to achievement of important governmental objectives."[88] Appellant asked for Representative Randall's affidavit because he was a member of the committee that sponsored House Bill 251, which was later codified as section 53-2-4(b)(2).

Mr. Fagan's affidavit pointed to statistics showing a "steady upward trend in out-of-wedlock births" and noted that the number "of out-of-wedlock births among blacks exceeded 80% in 1995" in parts of the United States.[89] Mr. Fagan testified through his affidavit that "less than 10% of fathers of children born out of wedlock had consistently kept in touch with the mothers and children for even a few months after the birth out of wedlock, and that the fathers tended to provide financial support only as required by court order."[90] His affidavit also pointed to a "state-by-state analysis of statistics from the FBI Crime Index and from the National Center for Health Statistics" that "reveal[ed] that each 10% increase in out-of-wedlock births is associated with a 17% increase in violent teenage crime."[91] The affidavit highlighted some of the adverse social, educational, and economic effects to out-of-wedlock mothers, fathers, and children.[92]

Mr. Fagan concluded that men and women are not similarly situated and that the statute in question treats men and women differently based upon the "real biological differences between men and women with regard to child birth and child-rearing."[93] If the out-of-wedlock mother chose not to take responsibility for the child, she would be "much more likely than [the] father[] to be subjected to legal proceedings to place the [child] in foster care and to terminate [her] parental rights."[94] However, a father can walk away from his out-of-wedlock child with little or no legal ramifications. Mr. Fagan determined that the statute merely "distinguishes between two categories of men who sire children out of wedlock"—those who "voluntarily choose . . . to shoulder the other responsibilities of fatherhood" and those who choose to walk away.[95]

Representative Randall's affidavit provided the courts with the legislative intent and reasoning for placing the additional requirements on out-of-wedlock fathers and not on out-of-wedlock mothers. Represen-

88. Petition for a Writ of Certiorari at app. 10, Rainey v. Chever, 119 S. Ct. 2411 (1999) (No. 98-1478).

89. *Id.* at app. 11.

90. *Id.* at app. 12.

91. *Id.* at app. 12-13.

92. *Id.* at app. 12-15.

93. *Id.* at app. 15.

94. *Id.* at app. 16.

95. *Id.* at app. 17.

ative Randall stated that the Special Judiciary Committee "found no instances of mothers of children born out of wedlock having little or nothing to do with their children."[96]

> [The Special Judiciary Committee] found a widespread problem of fathers of children born out of wedlock failing or refusing to accept responsibility with regard to child-rearing, failing or refusing to develop of [sic] substantial family relationships with their children, and failing or refusing to provide support except as is compelled by the courts under threat of going to jail.[97]

Therefore, the legislation was drafted to prevent these fathers from "seeking to profit from the death[s] of the[se] child[ren]."[98] Noting that the legislature intended "to distinguish between two categories of fathers of children born out of wedlock, based upon their conduct," Representative Randall testified that "the state does have a [sic] strong an interest in discouraging irresponsible conduct by biological fathers."[99] Representative Randall concluded that a statute "remov[ing] the potential for men [to reap] a windfall profit from the death of [a] child born out of wedlock for whom the man accept[ed] no substantial responsibility" would discourage other men who might be inclined to "irresponsibly impregnate still more women and girls out of wedlock" because they knew of "men profiting from the death of a child for whom they had taken no substantial responsibility."[100] Appellant noted that this scheme is a "sexual lottery ticket."[101]

The State cited with approval and reprinted portions of the affidavits of Mr. Fagan and Representative Randall in the amicus curiae brief that the Georgia Supreme Court directed it to file.[102] However, the Georgia Supreme Court seemed to reject the affiants' findings.[103] Even the three dissenting Justices of the United States Supreme Court noted the importance of the State's amicus curiae brief when it stated that "its views should affect our decision whether to exercise jurisdiction."[104]

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96. *Id.* at app. 20.
97. *Id.*
98. *Id.*
99. *Id.* at app. 21-22.
100. *Id.* at app. 22.
101. Brief of Appellant at 21, Rainey v. Chever, 270 Ga. 519, 510 S.E.2d 823 (1999) (No. S98A1518).
102. *See* Amicus Brief for the State of Georgia, Rainey v. Chever, 119 S. Ct. 2411 (1999) (No. 98-1478).
103. 270 Ga. at 519-21, 510 S.E.2d at 824-25.
104. 119 S. Ct. at 2413 (Thomas, J., dissenting).

As to the second consequence of *Rainey*, the dissenting Justices of the United States Supreme Court aptly noted that several states have statutes similar to section 53-2-4.[105] They stated that the "decision of the Supreme Court of Georgia, resting on federal constitutional grounds, calls the continued validity of these statutes into doubt."[106] However, they did not point out that other states have found statutes with language similar to section 53-2-4 to be constitutional. For example, in *Estate of Scheller v. Pessetto*,[107] the court held that Utah's statute, which substantially mirrors section 53-2-4, is constitutional under both the state and federal constitutions because it "does not violate equal protection," is "not unconstitutionally vague," and "does not violate Utah's constitutional equal rights provision."[108] Relying on *Lehr* and *Parham*, the Utah court concluded that the statute "promotes legitimate state interests of providing efficient estate administration and promoting development of meaningful relationships between illegitimate children and their fathers and is based on situational differences between unmarried mothers and unmarried fathers."[109] Thus, a decision by the United States Supreme Court would have provided much needed guidance for the states when interpreting and applying past decisions of the United States Supreme Court to intestacy statutes dealing with illegitimate children.

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105. *Id.*
106. *Id.* at 2414.
107. 783 P.2d 70 (Utah Ct. App. 1989).
108. *Id.* at 74, 75, 77.
109. *Id.* at 74.