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# Casenote

## ***In the Interest of R.E.W.: Visitation Rights of Homosexual Parents in Georgia***

In a 1996 case, *In the Interest of R.E.W.*,<sup>1</sup> the Georgia Court of Appeals addressed an issue of first impression concerning the visitation rights of a noncustodial homosexual parent.<sup>2</sup> The court set a tolerant precedent when it awarded the noncustodial homosexual father unsupervised visitation rights with his child.<sup>3</sup>

### I. FACTUAL BACKGROUND

R.E.W.'s parents were divorced in 1988 after R.E.W.'s mother discovered R.E.W.'s father engaging in sexual acts with another man in the marital bed.<sup>4</sup> Pursuant to the divorce agreement, custody of their three-year-old daughter was awarded to the mother, and the father was allowed only supervised visitation in the paternal grandmother's home.<sup>5</sup> In November 1993, the father filed a petition in superior court to modify the final divorce decree. He sought visitation privileges that included

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1. 220 Ga. App. 861, 471 S.E.2d 6 (1996), *cert. denied*, 472 S.E.2d 295 (1996).

2. 220 Ga. App. at 862-63, 471 S.E.2d at 8-9.

3. *Id.* at 864-65, 471 S.E.2d at 9.

4. *Id.* at 861-62, 471 S.E.2d at 8.

5. *Id.* at 861, 471 S.E.2d at 7.

unsupervised visitation with his daughter.<sup>6</sup> The matter was referred to the juvenile court pursuant to section 15-11-5(c) of the Official Code of Georgia Annotated ("O.C.G.A.").<sup>7</sup> The juvenile court entered an order extending the weekend visitation period, but refused to allow unsupervised visitation.<sup>8</sup> The juvenile court based the denial of the father's request for unsupervised visitation on the finding that the father was currently engaged in an immoral, homosexual relationship and that the father could not be trusted to keep his sexuality from his daughter.<sup>9</sup> The father had been engaged in a four year monogamous homosexual relationship, and he and his partner owned a home together in which they lived.<sup>10</sup> The court concluded that the father was untrustworthy because he engaged in a homosexual act while he was married.<sup>11</sup>

The Georgia Court of Appeals granted the father's application for a discretionary appeal.<sup>12</sup> The court of appeals found that unsupervised visitation with the noncustodial, homosexual parent was in the best interest of the child.<sup>13</sup> The court reversed the order of the juvenile court and remanded with a direction that the court grant unsupervised visitation between the homosexual father and his daughter.<sup>14</sup> The Supreme Court of Georgia denied the mother's petition for a writ of certiorari.<sup>15</sup> Justice Carley wrote a strong dissent, however, claiming that certiorari should have been granted and that the court of appeals erred in its resolution of the case.<sup>16</sup>

## II. LEGAL BACKGROUND

In Georgia, the best interest of the child is the standard for deciding visitation rights of a noncustodial parent.<sup>17</sup> Although the courts recognize that parents have a natural right of access to their children, the best interest of the child standard requires that the court only

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6. *Id.*

7. *Id.* (citing O.C.G.A. § 15-11-5(c) (1994) (providing that the juvenile court should have concurrent jurisdiction to hear and determine the issue of custody and support when the issue is transferred by proper order of the superior court)).

8. *Id.*

9. *Id.* at 862, 471 S.E.2d at 8.

10. *Id.*, 471 S.E.2d at 7-8.

11. *Id.*, 471 S.E.2d at 8.

12. *Id.* at 861, 471 S.E.2d at 7.

13. *Id.* at 863-64, 471 S.E.2d at 9.

14. *Id.*

15. *In re R.E.W.*, 267 Ga. 62, 472 S.E.2d 295 (1996).

16. *In re R.E.W.*, 267 Ga. 62, 472 S.E.2d 295 (1996) (Carley, J., dissenting).

17. *Hughes v. Browne*, 217 Ga. App. 567, 569, 459 S.E.2d 170, 172 (1995).

consider the child's welfare.<sup>18</sup> The best interest of the child standard gives the trial court broad discretion in deciding parental visitation rights.<sup>19</sup>

With this broad discretion, Georgia courts have sought to achieve the best interest of the child by instituting certain restrictions and limitations on visitation.<sup>20</sup> Restrictive visitation rights have been instituted in Georgia when there is a concern that the noncustodial parent may abduct the child,<sup>21</sup> when there is evidence that a noncustodial parent may have sexually abused the child,<sup>22</sup> or when the child voices anxiety and apprehension about visits with the noncustodial parent.<sup>23</sup>

The court in *Hayes v. Hayes*<sup>24</sup> stated that a parent's immoral conduct may warrant limitations on parent-child contact only if the child was exposed to the undesirable conduct and that conduct would likely adversely affect the child.<sup>25</sup> Thus, the Georgia Court of Appeals refused to change custody of the children from the mother to the father on the basis that the mother was living with her boyfriend.<sup>26</sup>

Although Georgia courts had dealt with some types of undesirable conduct, until the decision in *R.E.W.*, the Georgia courts had not addressed visitation rights of a noncustodial, homosexual parent.

Other state courts that have addressed homosexual parents' visitation rights have taken different approaches in assessing the relevance of a parent's homosexuality in determining visitation.<sup>27</sup> Although applica-

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18. *Griffin v. Griffin*, 226 Ga. 781, 783-84, 177 S.E.2d 696, 698 (1970); *Gunnells v. Gunnells*, 225 Ga. 188, 189, 167 S.E.2d 138, 139 (1969).

19. *Jones v. Jones*, 220 Ga. 753, 756, 141 S.E.2d 457, 460 (1965).

20. *Griffin*, 226 Ga. at 783-84, 177 S.E.2d at 698.

21. *Schowe v. Amster*, 236 Ga. 720, 722, 225 S.E.2d 289, 292 (1976); *Chandler v. Chandler*, 261 Ga. 598, 599, 409 S.E.2d 203, 204 (1991).

22. *Moore v. Moore*, 217 Ga. App. 148, 149, 456 S.E.2d 742, 743 (1995) (requiring supervised visitation when the oldest child accused the noncustodial father of sexual molestation); *Beckham v. O'Brien*, 176 Ga. App. 518, 336 S.E.2d 375 (1985) (ruling that the trial court abused its discretion in allowing the father to exercise supervised visitation rights when he had been indicted by the grand jury for molesting his daughter); *Ledford v. Bowers*, 248 Ga. 804, 804-05, 286 S.E.2d 293, 294 (1982) (holding it was an abuse of discretion to increase father's visitation rights when there was evidence that the father was sexually attracted to his daughter).

23. *Hughes*, 217 Ga. App. at 569, 459 S.E.2d at 172.

24. *Hayes v. Hayes*, 199 Ga. App. 132, 404 S.E.2d 276 (1991) (concerning a modification in custody).

25. *Id.* at 133, 404 S.E.2d at 277.

26. *Id.*

27. See generally *Hertzler v. Hertzler*, 908 P.2d 946, 952-55 (Wyo. 1995); *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993); *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990).

tion of the best interest of the child standard requires courts to look at the particular facts in each case, there are generally three positions courts have taken to decide the extent parents' homosexuality affects their entitlement to visitation.

The most liberal courts allow limited or restricted visitation only when there is evidence that the parent's homosexuality adversely affects the child.<sup>28</sup> These courts permit unrestricted visitation, even if the parent openly engages in a homosexual relationship in the child's presence.<sup>29</sup>

More moderate courts allow restrictions and limitations on visitation, such as supervised visitation, if the homosexual parent refuses to shield the child from the parent's homosexual practices.<sup>30</sup> The moderate view finds homosexuality to be an objectionable character flaw in the parents, but does not restrict visitation as long as homosexuality is not practiced in the presence of the child.<sup>31</sup>

The most conservative courts assume that exposure to a homosexual parent is not in the child's best interest, and they allow broad restric-

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28. *Pleasant*, 628 N.E.2d 633, 640-42 (ruling that the fact that the mother had an open lesbian relationship was not grounds on which to restrict visitation in the absence of the parent's homosexuality harming the child); *In re Marriage of Birdsall*, 243 Cal. Rptr. 287, 290-91 (Cal. Ct. App. 1988) (holding that prohibiting homosexual father from overnight visitations with his son in the presence of another homosexual was not in the child's best interest when there was no affirmative showing of harm or likelihood of harm to the child); *Conkel v. Conkel*, 509 N.E.2d 983, 985-87 (Ohio Ct. App. 1987) (ruling that homosexual father could not be denied overnight visitation with his two sons on the basis of his homosexuality, absent evidence that visitation would be harmful to the children).

29. *See Pleasant*, 628 N.E.2d at 642.

30. *Hertzler v. Hertzler*, 908 P.2d 946, 952-55 (Wyo. 1995) (holding that the limitation of the mother's visitation with her children was reasonable when the homosexual mother insisted upon exposing the children to her lifestyle); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990) (ruling that lower court improperly restricted visitation of husband with children to times when no unrelated adult was present because there was no reason to doubt husband's testimony that the children would not be exposed to his private life); *North v. North*, 648 A.2d 1025, 1030 (Md. Ct. Spec. App. 1994) (ruling that the child's visitation with noncustodial HIV infected homosexual parent may not be restricted when the parent agreed not to discuss or display his sexuality to the child); *see also P.L.W. v. T.R.W.*, 890 S.W.2d 688, 691 (Mo. Ct. App. 1994) (refusing to restrict visitation when there was no evidence that the homosexual father engaged in homosexual activities in the presence of the child); *In re Marriage of Ashling*, 599 P.2d 475, 476 (Or. Ct. App. 1979) (concluding that the mother's visitation rights could not be limited by requiring that she not allow any lesbians to be in her home or around the children during their visits when the mother's sexual practices were discreet); *Chicoine v. Chicoine*, 479 N.W.2d 891, 892-94 (S.D. 1992) (holding that trial court abused its discretion in awarding unsupervised overnight visitation to a lesbian mother when there was evidence that the mother exhibited sexual behavior with her female lover in front of the children).

31. *See Hertzler*, 908 P.2d at 952-55; *In re Walsh*, 451 N.W.2d at 493; *North*, 648 A.2d at 1030; *P.L.W. v. T.R.W.*, 890 S.W.2d at 69; *In re Ashling*, 599 P.2d at 476; *Chicoine*, 479 N.W.2d at 892-94.

tions and limitations to be imposed upon the visitation rights of a homosexual parent.<sup>32</sup> These conservative courts employ preventative measures and allow restrictions even where there has been no evidence of harm to the child, and where the harm, if any, is unlikely because there is no evidence that the child has been exposed, or may be exposed, to the homosexual conduct of the parent.<sup>33</sup> Restrictions have included requiring visitations to occur outside the presence of a parent's lover,<sup>34</sup> forbidding overnight visitation,<sup>35</sup> and forbidding homosexual contact in the child's presence.<sup>36</sup>

### III. RATIONALE OF THE COURT

*In re Interest of R.E.W.* raised the question of unsupervised visitation with a noncustodial, homosexual parent.<sup>37</sup> The Georgia Court of Appeals granted the homosexual father unsupervised visitation with the child, holding that unsupervised visitation was in the best interest of the child.<sup>38</sup>

In its application of the best interest of the child standard, the court recognized Georgia's express policy to encourage a relationship between a child and the noncustodial parent.<sup>39</sup> The court cited their opinion of *Hayes*,<sup>40</sup> which held that a parent's immoral conduct may warrant limitations on the contact between parent and child only if the child is exposed to the undesirable conduct and the conduct has, or would likely

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32. *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990) (holding that restrictions placed upon mother's visitation, requiring visitations to occur outside the presence of mother's lesbian lover, was not an abuse of discretion); *Miller v. Hawkins*, 549 So. 2d 102, 103 (Ala. Civ. App. 1989) (ruling that overnight visitations with lesbian mother were properly denied in order to reduce the children's exposure to the living arrangements of their mother); *Irish v. Irish*, 300 N.W.2d 739 (Mich. App. 1980) (affirming trial court's restrictions on visitation rights by forbidding sexual contact in the children's presence and refusing to allow overnight visitation if the lover was present in an effort to limit the children's exposure to their mother's lesbian relationship); *Woodruff v. Woodruff*, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979) (holding that trial court did not abuse its discretion by forbidding homosexual father from visiting with the child in the presence of his boyfriends).

33. See cases cited *supra* note 32.

34. *White*, 569 So. 2d at 1181; *Woodruff*, 260 S.E.2d at 777.

35. *Miller*, 549 So. 2d at 103; *Irish*, 300 N.W.2d at 739.

36. *Irish*, 300 N.W.2d at 739.

37. *In the Interest of R.E.W.*, 220 Ga. App. 861, 862, 471 S.E.2d 6, 8 (1996). The case dealt with the modification of the original divorce degree. In Georgia, visitation rights of noncustodial parents are subject to review and modification upon the motion of either parent every two years without the necessity of showing a material change in circumstances. *Id.* (citing O.C.G.A. §§ 19-9-1(b), 19-9-3(b) (1994 & Supp. 1996)).

38. *Id.* at 864, 471 S.E.2d at 9.

39. *Id.* at 862, 471 S.E.2d at 8.

40. *Hayes*, 199 Ga. App. 132, 404 S.E.2d 276.

have, an adverse effect on the child.<sup>41</sup> In both *Hayes* and *R.E.W.* there was no evidence that either party committed sexual acts in the child's presence.<sup>42</sup> The court noted that R.E.W.'s father testified that he did not believe that his daughter's best interest would be served by informing her of the sexual nature of his relationship with his partner and that he would actively conceal his homosexuality from her.<sup>43</sup> The father's mother also testified that she did not know of her son's sexuality until the initiation of the present proceeding, and she had never observed any displays of affection between her son and his live-in lover.<sup>44</sup>

The court then looked to other jurisdictions that had addressed visitation rights of homosexual parents and agreed to follow the jurisdictions that looked to whether the conduct of the parent would somehow harm the child.<sup>45</sup> The court held that "[v]isitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent. The best interests of the child remain paramount."<sup>46</sup>

Influenced by their own decision in *Hayes* and persuaded by the analysis used in other jurisdictions, the court found that unsupervised visitation with the homosexual parent would be in the best interest of the child.<sup>47</sup> The court was also concerned that supervised visitation would raise suspicions in the mind of the child and that the child may begin to question the restricted nature of her visits with her father.<sup>48</sup>

R.E.W.'s mother filed a writ of certiorari, which was denied by the Georgia Supreme Court.<sup>49</sup> Justices Hunstein, Carley, and Hines dissented in the denial of the certiorari, with Justice Carley writing a fierce dissent to the denial.<sup>50</sup>

Justice Carley first argued that certiorari should have been granted because the case was one of first impression and involved important public concerns.<sup>51</sup> In addition, the dissent stated that the court of appeals erred in reversing the trial court's denial of the father's

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41. *In the Interest of R.E.W.*, 220 Ga. App. at 862, 471 S.E.2d at 9 (citing *Hayes v. Hayes*, 199 Ga. App. 132, 404 S.E.2d 276 (1991)).

42. *Id.* at 862-63, 471 S.E.2d at 8-9.

43. *Id.* at 862, 471 S.E.2d 2d at 8-9.

44. *Id.*

45. *Id.* at 863, 471 S.E.2d at 9.

46. *Id.*

47. *Id.* at 864, 471 S.E.2d at 9.

48. *Id.*

49. *In re R.E.W.*, 267 Ga. 62, 472 S.E.2d 295 (1996).

50. *Id.* at 62, 472 S.E.2d at 295.

51. *Id.*

modification petition because the reversal usurped the trial court's authority to determine credibility and to exercise its discretion when determining parental visitation rights.<sup>52</sup>

Moreover, the dissent reasoned that the Georgia Court of Appeals decision should be reversed because it adopted the minority rule and that only the majority rule was compatible with "this state's jurisprudence."<sup>53</sup> The dissent claimed that the majority of courts hold that restrictive visitation rights are appropriate when the parent is homosexual and also currently engages in a homosexual relationship.<sup>54</sup> The dissent further asserted that the majority rule was compatible with Georgia criminal law which reflects a public policy against homosexuality.<sup>55</sup>

#### IV. IMPLICATIONS

The holding in *R.E.W.* may indicate that the courts in Georgia are taking a more permissive view regarding homosexuality. This view would seem to directly contradict well established and newly invoked Georgia statutory law. As Justice Carley recognized in his dissenting opinion, Georgia's sodomy statute<sup>56</sup> has been upheld as constitutional by the United States Supreme Court in *Bowers v. Hardwick*.<sup>57</sup> In that case, the Court stated that homosexuals do not have a fundamental right to engage in acts of consensual sodomy.<sup>58</sup> More recently, the legislature adopted O.C.G.A. § 19-3-3.1 which prohibits marriages between persons of the same sex. The statute reads in part, "[i]t is declared to be the

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52. *Id.*, 472 S.E.2d at 296.

53. *Id.*, 472 S.E.2d at 295.

54. *Id.*, 472 S.E.2d at 296 (citing Carroll J. Miller, Annotation, *Visitation Rights of Homosexual or Lesbian Parent*, 36 A.L.R. 4th 997 (1985); *White v. Thompson*, 569 So. 2d 1181, 1185 (Miss. 1990) (Under the "majority rule," a requirement that visitation be conducted outside the presence of the parent's homosexual partner "is reasonable exercise of the court's power and discretion.")).

55. 267 Ga. at 62, 472 S.E.2d at 296. The dissent argued that the court of appeals, in deciding visitation, should not have ignored the fact that the homosexual father was engaging in a criminal act under the sodomy law of Georgia. The dissent reasoned that the criminalization of sodomy in Georgia indicated that the father's current homosexual relationship may be harmful to the child. "The father's acknowledgment that he currently is engaged in a homosexual relationship which the citizens of this state, through their elective legislative representatives, have criminalized 'certainly augurs for potential harm to the child that the trial court was perfectly competent to assess.'" *Id.* (quoting J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 871 (Mo. Ct. App. 1982)).

56. O.C.G.A. § 16-6-2 (1994).

57. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

58. *Id.* at 192.

public policy of this state to recognize the union of only men and women.<sup>59</sup>

In addition, a few days after the court of appeals opinion in *R.E.W.*, and a few months before the supreme court denied certiorari in *R.E.W.*, the Georgia Supreme Court declined an opportunity to revoke the state's sodomy laws<sup>60</sup> in *Christensen v. State*.<sup>61</sup> Ruling five to two, the court held that the prohibition of sodomy is a legitimate and valid exercise of state power in furtherance of the moral welfare of the public.<sup>62</sup> Clearly, the public policy against homosexuality has been promulgated and protected by both Georgia statutory and case law.

The court of appeals in *R.E.W.* seemed to balance the public policy promoting the development of the parent-child relationship against the public policy opposing homosexuality. In an attempt to promote both conflicting interests, the court granted the homosexual father unrestricted visitation on the condition that he conceal his sexuality from his daughter.<sup>63</sup> The court's decision relied on the father's promise not to divulge his sexuality to his daughter because the father believed that concealing his sexuality would be in his daughter's best interest.<sup>64</sup> The court, therefore, sent a message of tolerance of homosexuality on the condition that the parent's homosexuality be concealed from the children.

Although the court in *R.E.W.* cited to the holdings of liberal courts,<sup>65</sup> the court actually followed the more moderate line of cases which have found homosexuality to be an objectionable character flaw, but did not restrict visitation so long as homosexuality was not practiced in the child's presence.<sup>66</sup> In effect, the courts in these moderate cases,<sup>67</sup> including *R.E.W.*, reasoned that there is no harm if the child is unaware of the parent's sexuality.<sup>68</sup> Justice Carley argued that this is the minority view and should not be followed.<sup>69</sup> However, recent cases

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59. O.C.G.A. § 19-3-3.1 (1996).

60. *Id.* §§ 16-6-2, 16-6-15 (1994).

61. 266 Ga. 474, 475-77, 468 S.E.2d 188, 189-90 (1996).

62. *Id.* at 476, 468 S.E.2d at 190.

63. *In the Interest of R.E.W.*, 220 Ga. App. 861, 862-64, 471 S.E.2d 6, 7-9 (1996).

64. *Id.* at 863, 471 S.E.2d at 8.

65. *Id.* at 862-64, 471 S.E.2d at 8 (citing *Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993), *In re Birdsall*, 243 Cal. Rptr. 28 (Cal. Ct. App. 1988), and *Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987)).

66. *In re Walsh*, 451 N.W.2d 492 (Iowa 1990); *In re Ashling*, 599 P.2d 475, 476 (Or. Ct. App. 1979).

67. See *supra* notes 30 and 31.

68. *In the Interest of R.E.W.*, 220 Ga. App. at 863-64, 471 S.E.2d at 9.

69. *In re R.E.W.*, 267 Ga. 62, 472 S.E.2d 295, 296 (1996).

indicate that the courts are moving in this moderate direction,<sup>70</sup> and now it is uncertain if the view Justice Carley advocates is still the majority view within the states. As of the date of this note, no new cases dealing with this subject matter have reached the courts. It is questionable whether the tolerant standard set forth in *R.E.W.* will be followed by the Georgia courts when determining visitation rights of a homosexual parent.

ALLISON STRAZZELLA BRANTLEY

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70. See *North v. North*, 648 A.2d 1025 (Md. Ct. Spec. App. 1994); *P.L.W. v. T.R.W.*, 890 S.W.2d 688 (Mo. Ct. App. 1994); *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992); *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995).

