IN THE SUPERIOR COURT OF WILKINSON COUNTY

STATE OF GEORGIA

IN RE: Petition of ELIZABETH HADAWAY to adopt

Civil Action No. 0609-187

# ORDER DENYING ADOPTION PETITION

The Court has considered carefully the evidence produced at the hearing on November 20, 2006, including the testimony, the home evaluation, and the brief subsequently submitted by Petitioner's counsel.

In the instant case, should the Court approve the adoption of a six-year old girl which the petition claimed was by a single-person, third party (non-relative) but which the facts have shown is by a homosexual petitioner living in a continuing homosexual relationship with her partner in the partner's house where all three will live? Moreover, in a marked departure from the allegations in the petition, the Petitioner has factually based her suitability for the care and custody of the young child upon the suitability of the homosexual couple and has requested this same sex couple be treated legally, in effect, the same as a marriage.

As just stated, the petition for adoption did not disclose that the Petitioner was cohabiting in a homosexual relationship with another woman, but this was unequivocally admitted by the Petitioner at the hearing and shown by the home evaluation filed with the

Court at the hearing. This case is a subterfuge, whereby a *de jure* homosexual, single adult seeks to accomplish an adoption by a *de facto* homosexual couple. Factually Petitioner and her private home evaluator based all the factors relevant to the adoption decision, such as the financial and home environment, from the viewpoint of the couple and not just from the single Petitioner. If the Petitioner and her same sex partner consider themselves a couple and are presenting this adoption from the perspective of a couple, why is the Petitioner resorting to the subterfuge of acting as if the adoption is by an unmarried individual?

While it is true that an unmarried individual or a married couple may petition to adopt a child in Georgia,[1] the Georgia adoption code, which should be strictly construed, does not provide for adoption by an unmarried couple.[2] Still, there is no Georgia statute that specifically states whether an adoption by homosexual individuals or couples is permitted, as there is in the state of Florida.[3] However, Art. I, Sec. IV, Par. I, of the

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[1]OCGA § 19-8-3(a): "Any adult person may petition to adopt a child if the person is at least 25 years of age, if single, or married and living with his spouse; is at least 10 years older than the child; has been a bona fide resident of this state for at least six months immediately preceding the filing of the petition; and is financially, physically, and mentally able to have permanent custody of the child."

[2]OCGA Chapter 19-8, Adoptions. "[A]doption laws must be strictly construed." *Johnson v. Eidson*, 235 Ga. 820, 821 (221 S.E.2d 813) (1976); *McCollum v. Jones*, 274 Ga. App. 815, 820 (619 SE2d 313) (2005). Unfortunately, there is a lack of reported cases addressing an adoption petition filed by one partner in a cohabiting, unmarried couple, whether heterosexual or homosexual.

[3]Fla. Stat. § 63.042(3). Florida is currently the only state which statutorily prohibits adoption by individuals openly engaged in a homosexual lifestyle. The

Georgia Constitution, which was approved by 76% of the qualified voters in a referendum in November, 2004,[4] provides as follows:

> (a) ***This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.***
> (b) ***No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.*** This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. ***The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.***[5]

So the motive for the subterfuge is unstated but clear: the constitutional amendment prohibits the Petitioner and her same sex partner from having a legal marriage, and the Georgia adoption code does not provide for adoption by an unmarried couple.[6] Consequentially, the instant case attempts to circumvent the problems with adoption by a homosexual couple by having adoption by one member of this couple.

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constitutionality of this statute has withstood an equal protection challenge. *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. (Fla.) 2004). It also should be noted that the natural mother is agreeing in the instant case to an adoption that would be illegal in Florida, where she resides.

[4]Percentage of voter approval is according to the official website of the Secretary of State of Georgia. Same results are reported by the Cable News Network at its official website.

[5]Emphasis added.

[6]See footnote 2, supra.

Although the pleadings apparently intentionally did not reveal this purpose, the testimony, home evaluation by the retained private home evaluator, and the brief of Petitioner's counsel elucidate that the adopted child will be cared for and supported by this couple, their implicitly but unambiguously claimed equivalent of a "marriage." Clearly, then, the unmarried homosexual union in this case would be getting a direct benefit of marriage under Georgia adoption law: the ability to adopt.[7]

In other words, viewing the instant case on its substance and not its form, the Petitioner seeks to have her and her same sex partner treated as a family union or unit, the same as a married couple for the purposes of the adoption. However, the policy considerations of the constitutional provision and the adoption code should subsume the "end run" procedurally attempted in the instant case.

Another constitutional aspect should be considered. As presented in this case, the financial ability of the Petitioner to support and care for the child is closely intertwined with the financial ability of the Petitioner's partner. Consequently, if the Court were to approve the adoption based on the showing made in the instant case, the support of the child would presumptively be based on their shared responsibility.[8] But the question

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[7]Of course, this violates Art. I, Sec. IV, Par. I (b), of the Georgia Constitution, which states in pertinent part, "(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."

[8]The Court has no testimony or pleading in which the Petitioner's partner makes a clear statement that she approves of this adoption and will satisfy the financial commitment by her painted in the home evaluation. This is a major deficiency of the home evaluation: it relies on the partner's financial and physical commitment without

becomes, what legal procedures are available to determine who will provide the support lost to the child if the relationship ends, through death or the decision, mutual or unilateral, to end the relationship?[9] Any legal remedy shaped along the lines of a pseudo-divorce would run into the constitutional prohibition: "***The courts of this state shall have no jurisdiction*** to grant a divorce or separate maintenance with respect to any such [same sex] relationship or otherwise ***to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.***"[10]

Recent history clearly demonstrates that in our society many domestic relationships are fraught with difficulties and dangers, but in the instant case any remedy that Petitioner should seek if her partner does not provide the claimed or expected help is foreclosed by the above stated constitutional provision. Thus, if approved, the requested adoption would place the child in a markedly less secure legal environment than a child adopted by a legally married couple.[11]

Turning from the constitutional to the statutory dimension, OCGA § 19-8-18 (b)

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there being any clear legal commitment by this partner to do so.

[9]One problem, shown but unanalyzed in the home evaluation, is that the home in which the Petitioner, her partner, and the child will live is being paid for by both the Petitioner and her partner but is titled only in the name of the partner. Any attorney with experience in domestic law can see the potential litigation that looms ahead due to this.

[10]Art. I, Sec. IV, Par. I (b), of the Georgia Constitution. Emphasis added.

[11]Of course, a married couple is used by the Petitioner as the model for comparison in this adoption.

and (d) provide, in pertinent part:

> (b) If the court is satisfied that each living parent or guardian of the child has surrendered or had terminated all his rights to the child in the manner provided by law prior to the filing of the petition for adoption or that each petitioner has satisfied his burden of proof under Code Section 19-8-10, ***that such petitioner is capable of assuming responsibility for the care, supervision, training, and education of the child***, that the child is suitable for adoption in a private family home, and ***that the adoption requested is for the best interest of the child***, it shall enter a decree of adoption, . . .
>
> (d) ***If the court is not satisfied that the adoption is in the best interest of the child, it shall deny the petition . . .*** [12]

Courts have held that a trial judge in an adoption case sits as both the judge and jury, is vested with a broad range of legal discretion, and decides the weight and credibility of evidence.[13] This broad discretion given to trial courts in matters of adoption will not be set aside by appellate courts unless manifestly abused.[14] The Georgia Court of Appeals has repeatedly held that: "The only questions before a court in an adoption proceeding are whether parents consent, whether adopting parents are worthy and able to care for a child, and whether adoption is for the child's best interest, and ***the court is not required to declare adoption unless all three facts unequivocally appear.***"[15]

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[12]Emphasis added.

[13]*Madison v Barnett*, 268 Ga. App. 348 (601 S.E.2d 704) (2004).

[14]*McCall v VanPopering*, 124 Ga. App. 149 (183 S.E.2d 411) (1971); *Ritchie v Dillon*, 103 Ga. App. 7 (118 S.E.2d 115) (1961).

[15]*Allen v Morgan*, 75 Ga. App. 738 (44 S.E.2d 500) (1947); *Hester v. Mathis*, 147 Ga. App. 257, 258 (2) (248 S.E.2d 538) (1978); *Madison v Barnett*, supra, at 350 (2004). Emphasis added.

Additionally, "when even ***slight evidence*** supports a trial court's denial of a petition to adopt, it cannot be held that the discretion residing in that court was abused, particularly if that slight evidence indicates best interest of the child will be served by denying the petition to adopt."[16] That is so because the Court's duty to consider the best interest of the child in making adoption decisions "incorporates ***the overriding concern*** of the adoption statutes."[17]

Petitioner has interwoven her and her partner's financial situation and failed to show a clear financial commitment by her partner to the adoption and its financial duties. These financial problems are coupled with a legal, even constitutional, inability to enforce the commitment of the partner reflected in the home evaluation. Thus, the Petitioner does not show that she is financially capable of assuming responsibility for the child and that the adoption is for the best interest of the child.[18]

This is not a custody case where the Petitioner denies homosexuality and it is proved impermissibly by hearsay.[19] This is not a visitation case where a parent admits homosexual activity but states that he will not discuss his sexual relationship around the

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[16]*Madison v Barnett*, supra. Emphasis added.

[17]*Madison v Barnett*, supra, at 350.

[18]The Court incorporates herein any of the above constitutional factors that also shed light on that this adoption is not in the best interest of the child.

[19]*Gay v. Gay*, 149 Ga. App. 173 (253 S.E.2d 846) (1979).

child and will actively conceal the nature of this relationship from his child.[20] [21] This is an adoption case in which the child will be living with her adoptive parent and her admitted homosexual partner on a permanent basis. Here the child will have a long-term exposure to the homosexual parent's lifestyle; according to the private home evaluation, Petitioner and her same sex partner will be daily sharing a bedroom in the same house where the child would reside.

In the instant case, the Court is not seeking to punish an adult for the sexual conduct of her and another consenting adult in private;[22] the Court here is fulfilling its historic duty to protect the best interest of a young child. If the instant adoption is approved, inevitability the child will witness both directly and circumstantially the homosexual activity of the Petitioner and her same sex partner; these homosexual activities in the confines of a home to which a child will be privy will not be private insofar as the child is concerned.

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[20] *In re R. E. W.*, 220 Ga. App. 861 (471 S.E.2d 6) (1996).

[21] However, it is important to remember that custody cases usually involve biological parents while adoptions do not. Biological parents are seen as having inherent rights to their children whereas adoption has been repeatedly held to be a statutory privilege, not a right. *Lofton v. Secretary of Dept. of Children and Family Services*, supra. Therefore, courts should be more cautious in denying custody to a biological parent than in denying an adoption petition.

[22] *Powell v. the State*, 270 Ga. 327 (510 S.E.2d 18) (1998); *Lawrence v. Texas*, 539 U.S. 558 (123 S.Ct. 2472) (2003).

In the instant case, it has been "shown that the child is exposed to the parent's undesirable conduct in such a way that it has or would likely adversely affect the child."[23] However, while satisfied, this is a criteria adjusted to a change of condition between natural parents.[24] Custody, and its subset visitation, concern already existing legal parent-child relationships, while adoption looks prospectively at the creation of the parent-child relationship. Custody and visitation have attendant presumptions on the rights of the existing parents while a person petitioning for adoption has the burden to prove that the adoption is in the best interest of the child.[25] That is why "even *slight evidence* supports a trial court's denial of a petition to adopt."[26]

It should be noted that Petitioner and her same sex partner reside in Danville, Georgia, in rural Wilkinson County. Even the private home evaluation states that they have "no close neighbors."[27] However, there has been no study conducted, through home evaluation or elsewhere, into the isolation and stigma that the child may face growing up in a small, rural town with two women, in whose care she was placed at the age of six, who openly engage in a homosexual relationship. The Court finds that the dangers of

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[23]*In re R. E. W.*, supra, at 863. Also see *Hayes v. Hayes*, 199 Ga. App. 132 (404 S.E.2d 276) (1991).

[24]OCGA §§ 19-9-1 (b) and 19-9-3 (b).

[25]See footnote 21, supra.

[26]*Madison v Barnett*, supra. Emphasis added.

[27]Hadaway Home Evaluation, page 2.

isolation and stigma in the circumstances of the instant case are highly probable and are not in the best interest of the child sought to be adopted.

Moreover, in *Lofton v. Secretary of Dept. of Children and Family Services*,[28] the Eleventh Circuit made the following points. First, a state's preference for marital adoptive families (with a mother and a father) is a "legitimate state interest."[29] Second, the right to engage in homosexual activity is not a fundamental liberty, nor are homosexuals a suspect class.[30] Third, the opportunity to adopt an unrelated child is not a fundamental right but a statutory privilege.[31] Finally, there is no privacy interest in adopting a child because the decision to adopt is a public act and any person wishing to adopt a child must open up their home, life, and background to the scrutiny of the state.[32]

Finally, if there is a category of cases in which the Court should insist from its beginning on a stringently scrupulous and forthright case by a petitioner, it should be adoption.[33] However, this case initiated in subterfuge and sham, which makes this Court doubt the credibility of any of the case shown by the Petitioner. Defects in credibility,

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[28]See footnote 3, supra. Of course, the case's primary focus was finding constitutional the Florida statute that prohibits an active homosexual from adopting

[29]*Id.*, at 820.

[30]*Id.*, at 815-16.

[31]*Id.*, at 809, 811.

[32]*Id.*, at 811.

[33]And, possibly, this is even more so in a non-relative adoption, such as in the instant case.

often have, not a rifle, but shotgun effect on the credibility of the whole case.

## CONCLUSION

The proposed adoption in the instant case conflicts with Art. I, Sec. IV, Par. I, of the Georgia Constitution and should, therefore, be denied. This constitutional provision also forecloses the ability of the Petitioner to have any legal remedy to protect or enforce the support and care claimed for the child from her same sex partner. Additionally, the Petitioner has failed to carry her statutory burden[34] that she "is capable of assuming responsibility for the care, supervision, training, and education of the child, . . . and that the adoption requested is for the best interest of the child."[35] Although not necessary, the Court affirmatively finds that the Petitioner is incapable of assuming responsibility for the care, supervision, training, and education of the child and the adoption requested is *not* for the best interest of the child.

The order granting custody of the child Emma to the Petitioner[36] was done preparatory and in anticipation of the Petitioner adopting the said child, and, with the Court's finding that the said adoption is not in the best interest of said child, the said custody order should be vacated and custody should revert to the natural mother

[34]See OCGA § 24-4-1.

[35]OCGA § 19-8-18 (b).

[36]*Elizabeth Hadaway v. Deborah Schultz*, Civil Action No. 2006-CV-0143, Wilkinson Superior Court, Georgia.

according to the terms of her surrender of parental rights, if she exercises this custody in a timely manner as stated hereinafter.[37]

On the question as to the proper disposition of the child on the denial of the adoption petition, the Court notes that there is an apparent direct conflict with, on the one hand, OCGA § 19-8-18(d), which directs that the Georgia Department of Family and Children Services should be granted custody, and, on the other hand, OCGA §§ 19-8-5(k), 19-8-26 (c) and the instant surrender of the parental rights executed by the natural mother, under which custody would revert to the natural mother pursuant to her election. Since OCGA §§ 19-8-5(k) and 19-8-26 (c) were revised at a later date than OCGA § 19-8-18(d) and the general rule in adoptions is that "while the statutes governing the surrender of parental rights and adoption must be strictly construed, such statutes are construed in favor of the surrendering biological parent,"[38] custody of the child should be returned to the legal and natural mother if she fulfills her duty to take the child back into her personal care in a timely fashion as stated below.

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[37]Although Petitioner's counsel argues in her brief that the natural mother is actively engaged in a homosexual relationship, the Court does not know any evidence, other than possible blatant hearsay, that supports this conclusion.

[38]*In re A.N.M*, 238 Ga. App. 21(517 S.E.2d 548) (1999).

THEREFORE, IT IS HEREBY ORDERED THAT:

(a) Pursuant to OCGA § 9-11-41(b), the Petitioner's instant petition for adoption is denied;

(b) In *Elizabeth Hadaway v. Deborah Schultz*,[39] the Order on a Petition for Change of Custody, dated June 19, 2006, in which the Petitioner was granted custody of the minor child Emma , is hereby vacated;[40] and

(c) Considering OCGA §§ 19-8-5(k), 19-8-18(d), and 19-8-26 (c), custody of the said minor child shall revert to the natural mother Deborah Schultz, if she picks up said minor child within ten (10) days from the date of the instant order and thereafter has the said child in her continuous care, custody, and control; the Wilkinson County Department of Family and Children Services and the Wilkinson County Sheriff shall inspect to see in the order is complied with in a timely, consistent, and good faith manner, and, if the said natural mother should fail to so pick up the said child or exercise continuous, good faith care, custody, and control of the said child, then the said child shall immediately be taken into shelter care and proceedings shall be initiated in Juvenile Court to determine the proper disposition of her as a deprived child under the Juvenile Code.

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[39] *Elizabeth Hadaway v. Deborah Schultz*, supra.

[40] The Judge, who presided in said custody case, has no objection to the instant Court exercising jurisdiction.

SO ORDERED, this 8th day of January, 2007.

John Lee Parrott
Judge of Superior Courts
Ocmulgee Judicial Circuit

## CERTIFICATE OF SERVICE

I, Joy D. Honeycutt, Secretary to Judge John Lee Parrott, do hereby certify that I have this day served the within order upon the individuals listed below by mailing a true copy of said order to them by U. S. Mail in envelopes having sufficient postage thereon to insure delivery and addressed as follows:

Ms. Dana P. Johnson, Ph. D.
Attorney at Law
401 Cherry Street, Suite 405
Macon, GA 31201

Ms. Deborah Kathryn Schultz
521 South Park Avenue # 9
Winter Garden, FL 34787-3344

Ms. Sandra W. Cox ← 478 —
Social Services Supervisor
Wilkinson County Department of Family and Children's Services
P.O. Box 526
Irwinton, GA 31042

Sheriff Richard L. Chatman
Wilkinson County Sheriff's Department
P.O. Box 178
Irwinton, GA 31042

This 8th day of January, 2007.

Joy D. Honeycutt

Joy D. Honeycutt
Judicial Secretary
P. O. Box 111
Monticello, GA 31064
(706) 468-4906