Mongerson v. Mongerson: Georgia Employs Evidence-Based Test and Avoids Discrimination Against Noncustodial Homosexual Parents in Visitation Determinations

I. INTRODUCTION

A divorce judgment prevented Eric Mongerson from associating with his partner and any of his homosexual friends while in the presence of his children solely because of his homosexuality.[1] Eric Mongerson and Sandy Mongerson were divorced by a judgment, which incorporated the parties' settlement agreement.[2] The agreement granted custody to Mrs. Mongerson and allowed Mr. Mongerson limited visitation until the children's therapist determined whether more visitation was appropriate.[3] The agreement disallowed the children contact with their paternal grandparents, Mr. Mongerson's parents.[4] A portion of the judgment also prohibited Mr. Mongerson from exercising his visitation rights in the presence of his partner or his homosexual friends.[5] On appeal, Mr. Mongerson alleged that the visitation restrictions against the children's grandparents, as well as his partner and friends, constituted an abuse of the trial court's discretion.[6] The Supreme Court of Georgia *held* that the trial court abused its discretion when it restricted the father's visitation rights in a blanket prohibition preventing him from exposing his children to his partner or his homosexual friends. *Mongerson v. Mongerson*, 678 S.E.2d 891, 897 (Ga. 2009).

1. Mongerson v. Mongerson, 678 S.E.2d 891, 893-94 (Ga. 2009).
2. *Id.* at 893.
3. *Id.*
4. *Id.* at 894.
5. *Id.*
6. *Id.*

II. BACKGROUND

State law traditionally controls family law; therefore, state statutes and state jurisprudence are the primary sources of law governing visitation.[7] Parents have a basic right to raise their children;[8] however, this right is not unlimited.[9] Because states have an interest in protecting the health, safety, and welfare of their citizens, they act as *parens patriae* to resolve family law matters.[10]

In custody and visitation disputes, the primary consideration of courts is the "best interest of the child,"[11] which, among other factors, includes the child's physical health, safety, and emotional development.[12] Through statutes or case law, most states express a public policy, which encourages the noncustodial parent to have regular visitation and interaction with the child, absent countervailing considerations.[13] Some states even have a presumption of liberal visitation.[14] Generally, the trial court judge has broad discretion to grant or restrict visitation.[15] A reviewing court will disturb the trial court's determination of visitation only when there is no substantial evidence to support the judgment or the judgment constituted manifest error or an abuse of the trial judge's discretion.[16]

When a noncustodial parent is homosexual, states are divided as to how much weight should be accorded to this factor in determining the

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7. The domestic relations exception to the subject matter jurisdiction of federal courts "divests the federal courts of power to issue divorce, alimony, and child custody decrees." Akenbrandt v. Richards, 504 U.S. 689, 703 (1992). Because child custody awards involve consideration of visitation rights, the domestic relations exception extends to visitation as well. Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980) ("[D]istrict courts have no original diversity jurisdiction to grant a divorce, to award alimony, to determine child custody, or to decree visitation.").

8. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972).

9. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

10. *See, e.g.*, *Prince*, 321 U.S. at 166.

11. Weigand v. Houghton, 730 So. 2d 581, 587 (Miss. 1999); *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

12. *See* Buschardt v. Jones, 998 S.W.2d 791, 799 (Mo. Ct. App. 1999).

13. *See, e.g.*, GA. CODE ANN. § 19-9-3(d) (2009); Boswell v. Boswell, 721 A.2d 662, 670 (Md. 1998) ("In situations where there is evidence that visitation may be harmful to the child, the presumption that liberal unrestricted visitation with a non-custodial parent is in the best interests of the child may be overcome.").

14. *See, e.g.*, *Boswell*, 721 A.2d at 669-70.

15. *See, e.g.*, *Weigand*, 730 So. 2d at 587.

16. *See id.*

visitation suitable to the best interest of the child.[17] While most states do not consider the parent's homosexuality, a few still consider homosexuality in and of itself to be harmful to the child.[18]

A. Homosexuality Not Considered

States that do not consider parental homosexuality as a factor relevant to visitation determinations require a showing of actual or potential harm before restricting a parent's visitation, regardless of the parent's sexual orientation.[19] For example, in *Boswell v. Boswell*, the Supreme Court of Maryland chided the trial court for restricting visitation on its own initiative because it assumed that a father's homosexual relationship was "inappropriate."[20] Neither party had requested visitation restrictions, and moreover, no evidence existed of actual or potential harm from the presence of the father's partner during visitation.[21] Because of the unrequested visitation restriction and lack of evidence of harm, the court determined that the lower court had based its decision primarily on the father's homosexual relationship.[22] As a result, it vacated the trial court's visitation order.[23]

Likewise, the Supreme Court of Iowa overturned a trial court's restriction of a father's visitation to times when no unrelated adult was present.[24] The court recognized that an Iowa statute encouraged contact with both parents unless there was a compelling reason to the contrary and stated, "This unusual provision was obviously imposed on account of

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17. *Compare Boswell*, 721 A.2d at 671-72, *and In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983), *with Ex parte* D.W.W., 717 So. 2d 793, 796-97 (Ala. 1998), *and* Marlow v. Marlow, 702 N.E.2d 733, 735-38 (Ind. Ct. App. 1998).

18. *See* cases cited *supra* note 17.

19. *E.g.*, Buschardt v. Jones, 998 S.W.2d 791, 799-801 (Mo. Ct. App. 1999) (rejecting a trial court judge's "policy" of imposing visitation restrictions upon parents who are unmarried and cohabitating, and holding that the trial judge abused his discretion because he based his determination exclusively on cohabitation without considering any other factors); *accord*, J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) (holding that restrictions against a mother exercising her visitation rights in the presence of a person she knew to be a lesbian were too broad and that the restrictions should be modified to include only the people whose presence could be harmful to the child).

20. 721 A.2d at 678-79. Ms. Boswell never requested that the visitation exclude Mr. Boswell's partner, and she never testified that the partner's presence would harm the children. *Id.* at 665. The trial court's order "prohibited any overnight visitation and visitation with the children in the presence of [Mr. Boswell's partner] or 'anyone having homosexual tendencies or such persuasions, male or female, or with anyone that the father may be living with in a non-marital relationship.'" *Id.*

21. *Id.* at 678-79.

22. *Id.*

23. *Id.*

24. *In re* Marriage of Walsh, 451 N.W.2d 492, 492-93 (Iowa 1990).

[the father's] homosexual lifestyle."[25] Similarly, in *In re Marriage of Cabalquinto*, the Supreme Court of Washington affirmed that "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation."[26] The court remanded the case after it was unable to determine whether the trial court judge abused his discretion by focusing on the father's homosexuality instead of the best interest of the child.[27]

Courts that do not consider parental homosexuality to be harmful to a child require that actual or potential harm amount to more than a child's general discomfort with the parent's sexuality and/or relationships.[28] In *Weigand v. Houghton*, the Supreme Court of Mississippi reversed the trial court's restriction on visitation after finding that there was no evidence of harm to a child resulting from his father's exercise of his visitation rights in the presence of his homosexual life partner.[29] Relying on precedent, the court determined that, like confusion, embarrassment of a child is not a type of harm that justifies a visitation restriction.[30]

If evidence of harm beyond mere uneasiness exists, courts may restrict visitation.[31] The Court of Appeals of Mississippi in *Lacey v. Lacey* upheld the trial court's restriction of a mother's visitation after

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25. *Id.* at 493.

26. 669 P.2d 886, 888 (Wash. 1983).

27. *Id.*

28. *See, e.g.*, Harrington v. Harrington, 648 So. 2d 543, 545-47 (Miss. 1994). The court recognized that confusion over a parent's nonmarital relationship involving cohabitation is "not the type of harm that rises to the level necessary to overcome the presumption that a non-custodial parent is entitled to overnight visitation," and concluded that a father's nonmarital cohabitation did not justify a restriction on his visitation rights. *Id.* at 547.

29. 730 So. 2d 581, 587 (Miss. 1999). However, the court did not find that the trial court was manifestly wrong when it refused the father's request to modify the existing custody arrangement (in which the mother had sole physical custody) based on an alleged change of circumstances, namely, domestic violence in the home. *Id.* at 586-87. The court noted that "although the morality of [the father's] lifestyle was one important factor to consider," the lower court had considered other factors as well and did not err in determining that the existing arrangement was in the best interest of the child. *Id.* at 586.

30. *Id.* at 587-88. The court also noted that the child, age fifteen, wished to keep the visitation arrangement. *Id.* A dissenting opinion by Justice McRae rebuked the majority's refusal to award sole custody to the father, despite overwhelming evidence that the father would provide a stable and loving home for the child and that the mother and stepfather's physically and emotionally abusive relationship seriously harmed the child. *Id.* at 588-93. Justice McRae wrote:

> From the facts of this case, it is disturbingly clear that the majority, like the chancellor, has based its opinion neither on what is in the best interest of the child nor the law of child custody but on its own moral perceptions of human sexuality. The morality of homosexuality, however, should not be at issue before this Court or the lower court.

Id. at 588.

31. *See, e.g.*, Robison v. Robison, 722 So. 2d 601, 605 (Miss. 1998) (holding that evidence showed that visitation with a noncustodial father and his live-in girlfriend traumatized the child, and determining that the chancery court judge acted within his discretion when he disallowed the father overnight visitation).

considering both the daughter's confusion over her mother's homosexual relationship and evidence of harm posed by the mother's conduct in the presence of her other children.[32]

B. Homosexuality Considered Relevant

Some jurisdictions consider a noncustodial parent's homosexuality relevant to determinations of visitation.[33] For example, in *Roe v. Roe*, the Supreme Court of Virginia found a homosexual father to be an unfit custodian as a matter of law because he exposed his daughter to his "immoral and illicit" partnership.[34] Even though the court found no evidence that the father's conduct had adversely affected his daughter, it nonetheless reversed the trial court's custody award to the father and awarded sole physical custody to the mother.[35] Further, the court restricted the father to visitation outside of his home until he ceased living with his homosexual partner and remanded the case for consideration of other appropriate restrictions on his visitation.[36]

Other courts ostensibly reject the consideration of homosexuality in and of itself as harmful but still reference the conduct, behavior, manifestations, or lifestyle presumed to be attendant to a parent's sexual orientation.[37] In *Marlow v. Marlow*, the Court of Appeals of Indiana affirmed a trial court's restriction of a father's visitation, which prohibited the father from having unrelated friends stay overnight during visitation and prevented him from involving his children in any "social, religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle."[38] The court justified the overnight restriction as part of Indiana jurisprudence that restricted overnight visitation to shield children from adult sexual practices, "'whether those practices are

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32. 822 So. 2d 1132, 1138 (Miss. Ct. App. 2002). The court noted that the mother used marijuana in front of the children, was often naked in their presence, and exposed them to her sex life when the children saw her naked in bed with her partner.

33. *See, e.g.*, Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980) (referring to precedent in holding that "[a]lthough a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights").

34. 324 S.E.2d 691, 694 (Va. 1985).

35. *Id.* at 691-94 (Va. 1985); *accord* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (condoning the consideration of conduct inherent in lesbianism as a factor in custody determination).

36. *Roe*, 324 S.E.2d at 694.

37. *See, e.g.* Marlow v. Marlow, 702 N.E.2d 733, 735-38 (Ind. Ct. App. 1998).

38. *Id.* at 734-35.

homosexual . . . or heterosexual.'"[39] In upholding the trial court's restriction against homosexual events, the court denied that it based its decision on private bias, despite its agreement with the trial court's statement that "[t]he Court finds clear evidence that Petitioner-father is over-emphasizing the issue of homosexuality with the children."[40]

Even when evidence of actual or potential harm exists, courts that consider homosexuality in custody determinations often reference sexual orientation as a potentially harmful factor in their opinions.[41] In *Ex parte D.W.W.*, the Supreme Court of Alabama upheld a trial court's visitation order to a mother, which included supervision by her children's maternal grandparents in the grandparents' home, excluded her lesbian partner from being present, and prohibited nonfamilial adults as overnight guests.[42] The court determined that the trial court did not abuse its discretion in restricting the visitation from occurring in the partner's presence because it had relied on evidence that the mother's partner disciplined the children harshly.[43] The court also stated that the trial court had not abused its discretion in considering the effects of the mother's homosexuality on the children.[44] The court stated, "Even without this evidence that the children have been adversely affected by their mother's relationship, the trial court would have been justified in restricting [the mother's] visitation, in order to limit the children's exposure to their mother's lesbian lifestyle."[45] The dissent opined that the majority relied not upon evidence but upon its own prejudice.[46]

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39. *Id.* at 735 (quoting Pennington v. Pennington, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992)).

40. *Id.* at 737-38. The court did note that the visitation restrictions were not permanent, and said that the restrictions were meant only to delay the father from teaching his children about his lifestyle until the children, who were five and eight, could understand. *Id.* at 734, 738.

41. *See Ex parte* D.W.W., 717 So. 2d 793, 795-96 (Ala. 1998); *accord* Kallas v. Kallas, 614 P.2d 641, 642-43, 645-46 (Utah 1980).

42. 717 So. 2d at 794.

43. *Id.* at 795.

44. *Id.* at 796.

45. *Id.* Evidence existed that the children used foul language after the partner moved into the home, they needed psychiatric counseling, and one child manipulated, lied, and had anger issues. *Id.* The court also noted that the mother and her partner were "active in the homosexual community" because they "frequent[ed] gay bars" and considered taking the children to a homosexual church; the court thought the restriction proper to shield the children from their mother's lesbian conduct, which was illegal in the state. *Id.* The court found the restriction on overnight visitors appropriate for and applicable to both parents. *Id.* at 796 n.2.

46. *Id.* at 797 (Kennedy, J., dissenting) (reproaching the majority's willingness to ignore dangerous conduct by the father and focus primarily on the mother's homosexuality, despite the fact that the father had a history of alcoholism, drunk and reckless driving, and physical and emotional abuse directed at the mother and the children).

Similarly, in *Kallas v. Kallas*, the Utah Supreme Court remanded the case to the trial court to reconsider a modification of visitation after hearing evidence of the mother's drug use and lesbian lifestyle, evidence which the trial court originally excluded.[47] Although evidence of danger to the child existed in the case,[48] the court declared that "[a]lthough a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights."[49]

C. Homosexuality Not Considered in Georgia

Georgia public policy and the state's statute, O.C.G.A. § 19-9-3(d), promote the participation of both divorced parents in child rearing.[50] To effect this participation, the Georgia Supreme Court has held that a trial court abuses its discretion if it unnecessarily burdens a parent's visitation rights.[51] To the extent that the state encourages both parents' involvement in child rearing, its courts require evidence of actual or potential harm before restricting visitation.[52] Despite the trial court's discretion, the reviewing court cannot affirm the decision unless reasonable evidence supports it.[53]

Georgia jurisprudence does not consider the mere existence of a parent's extramarital relationship to be harmful to his or her children, unless there is evidence that the parent's nonmarital partner behaves inappropriately in the children's presence or that the relationship has been or is likely to be harmful to the children.[54] Georgia aligns itself with the jurisprudence of other states, which take into account the potential

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47. 614 P.2d 641, 642, 646 (Utah 1980).

48. *Id.* at 642-43. In addition to declining to hear evidence of the mother's homosexuality, the trial court also excluded evidence of her drug use, sexual advances toward a young neighbor, and testimony of a child development psychologist. *Id.*

49. *Id.* at 645.

50. GA. CODE ANN. § 19-9-3(d) (2009) provides:

> It is the express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship.

51. *See, e.g.*, Brandenburg v. Brandenburg, 551 S.E.2d 721, 722 (Ga. 2001).

52. *See, e.g.*, Turman v. Boleman, 510 S.E.2d 532, 534 (Ga. Ct. App. 1998).

53. *See, e.g.*, Hayes v. Hayes, 404 S.E.2d 276, 277 (Ga. Ct. App. 1991).

54. *E.g.*, *Brandenburg*, 551 S.E.2d at 722 (holding that without evidence that the presence of the father's girlfriend during visitation harmed or would possibly harm the child, the trial court abused its discretion in restricting the father's visitation to times when the girlfriend was not present).

adverse effects that the parent's conduct will have on the child, not the perceived morality of the parent's behavior.[55] In *In re R.E.W.*, the Court of Appeals of Georgia found no evidence of actual or potential harm to justify a trial court's restriction of a father's visitation, which required grandparental supervision.[56] Although the court recognized that some parental conduct may justify visitation restrictions, it opposed the trial court's focus on the father's "immoral" lifestyle and determined that the facts of the case did not suggest that the father's relationship would adversely affect the child.[57]

III. COURT'S DECISION

In the noted case, the Supreme Court of Georgia reaffirmed the state's jurisprudence, which does not consider homosexuality itself to be an indicia of harm, and instead requires evidence of actual or potential harm.[58] The court distinguished between the two visitation restrictions: prohibition of contact with the children's paternal grandparents and prohibition of contact with the father's partner or homosexual friends.[59] Because evidence existed of prior physical and emotional abuse of the children by their grandparents, the court determined that contact with the grandparents would be against the children's best interests.[60] Therefore, the court determined that the trial court's visitation restriction, prohibiting contact with the grandparents, was not an abuse of discretion and upheld the restriction.[61]

To the contrary, there was no evidence that the father's homosexual partners or friends inappropriately conducted themselves in the children's presence.[62] Furthermore, no evidence existed that exposure to the father's homosexual partners or friends would harm the children.[63] The court concluded that the trial court's decision to prohibit such interactions rested not upon evidence, but upon an "arbitrary classification based on sexual orientation," which assumed the interactions would cause the

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55. *See, e.g.*, *In re* R.E.W., 471 S.E.2d 6, 8-9 (Ga. Ct. App. 1996).
56. *Id.*
57. *Id.* The father lived with his homosexual partner, though they had separate bedrooms. *Id.* at 8. The court stated, "in some instances a parent's 'immoral conduct' might warrant limitations on the contact between parent and child; but only if it is shown that the child is exposed to the parent's undesirable conduct in such a way that it has or would likely adversely affect the child." *Id.* at 9.
58. Mongerson v. Mongerson, 678 S.E.2d 891, 894-95 (Ga. 2009).
59. *Id.*
60. *Id.* at 894.
61. *Id.*
62. *Id.*
63. *Id.* at 894-95.

children harm.[64] The court found the classification to be contrary to the state's public policy as articulated in prior case law and O.C.G.A. § 19-9-3(d), which "encourages divorced parents to participate in the raising of their children."[65] The court determined that no evidence other than the arbitrary classification existed to show that contact with the father's partner or any of his homosexual friends would adversely affect the best interests of the children.[66] Finding no justification for the restriction, the Supreme Court of Georgia vacated the trial court's restriction concerning Mr. Mongerson's partner and homosexual friends.[67]

Justice Melton concurred specially in the court's judgment.[68] Although he agreed with the majority's decision, he emphasized that the decision to vacate the trial court's restriction against Mr. Mongerson exposing his children to his homosexual partners and friends

> should only be read to stand for the well-settled proposition that, absent *evidence* of harm to the best interests of the children through their exposure to certain individuals, a trial court abuses its discretion by prohibiting a parent from exercising their (sic) visitation rights while in the presence of such individuals.[69]

Justice Melton distinguished between the trial court's decision, inappropriately based on the potential exposure of the children to the father's friends, and the trial court's failure to examine whether or not the father's friends "exhibited any harmful behavior that could affect the children."[70]

IV. ANALYSIS

The Supreme Court of the United States has held that though private biases exist outside of the law's reach, the law cannot give them effect;[71] yet, many states still allow a perceived societal condemnation of

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64. *Id.* at 895.

65. *Id.* (citing precedent including *In re* R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996), and Turman v. Boleman, 510 S.E.2d 532 (Ga. Ct. App. 1998)).

66. *Id.* at 894-95.

67. *Id.* at 895.

68. *Id.* at 897 (Melton, J., concurring).

69. *Id.*

70. *Id.* at 897 (Ga. 2009).

71. Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984) (holding that private bias surrounding a mother's interracial relationship is an impermissible consideration to justify taking custody away from a natural mother); *accord* Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) ("This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.").

homosexuality to evidence potential harm to the child.[72] Commentators suggest that state custody and visitation determinations concerning homosexual, biological parents typically fall into three categories of rules: (1) per se, in which homosexuality in and of itself is considered harmful to the child; (2) burden shifting, which places the burden on the homosexual parent to show that there is no adverse impact; and (3) nexus, which creates a presumption that custody or visitation for the homosexual parent is proper, rebuttable by evidence of harm stemming from the parent's homosexual relationships.[73] One commentator also observes that even in the states using the nexus rule, "[g]ay parents are subtly discriminated against" because courts often assume that open exposure to a homosexual lifestyle is a factor to consider in assessing potential harm to a child.[74] Another commentator suggests that the per se rule is disappearing, though more conservative jurisdictions may still consider homosexuality as part of a parent's moral fitness.[75] Even so, she finds that the majority of state court judgments rely on evidence-based tests and make determinations of custody and visitation based on the parent's conduct, even if the trial judges refer to sexual orientation in the process.[76]

While some might characterize the Supreme Court of Georgia's decision in the noted case as an application of the traditional nexus test, the court's analysis strays from the nexus test and its search for harm stemming from the parent's homosexuality in favor of a general consideration of actual or potential harm from the individuals involved.[77]

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72. *See* Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (finding that the father's homosexual relationship and cohabitation with his partner "under which this child must live daily . . . impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large").

73. Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 943-44 (2006); *see* Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIMONIAL L. 95, 101 (2002) (referring to the "nexus" test as the "adverse impact," or "direct effects" test, which assumes homosexuality is neutral without evidence to the contrary); Allison S. Brantley, Note, "In the Interest of R.E.W.*: Visitation Rights of Homosexual Parents in Georgia*, 48 MERCER L. REV. 1751, 1754 (1997) (reviewing three approaches courts have taken in visitation determinations involving a noncustodial, homosexual parent: (1) restriction only with evidence of harm; (2) restriction when required to shield a child from homosexual practices; and (3) restrictions on overnight visits, homosexual contact, or a partner's presence in the child's presence, even without a showing of actual or potential harm).

74. Swift, *supra* note 73, at 946-47.

75. Logue, *supra* note 73, at 102.

76. *See id.* at 101-02.

77. Mongerson v. Mongerson, 678 S.E.2d 891, 895 (Ga. 2009) (pointing out that the trial court's blanket prohibition against the father's visitation was directed at any member of the gay and lesbian community, with whom the father happened to associate).

Central to the court's holding was the lack of any evidence to justify such a restriction on the father's visitation rights.[78] The court did not focus on a perceived, general effect of the gay population at large; rather, the court focused on the concrete, specific interactions among the children and Mr. Mongerson's partner and friends, which lacked any evidence of harm.[79]

Some may see the noted case as a progressive decision, even in light of Georgia precedent.[80] Although the court in *R.E.W.* found no basis for the restrictions imposed by the trial court on the father's visitation, it referred to the trial court's distrust of the father's intentions to protect his daughter from learning of his sexuality and relationship with his partner.[81] The court determined that the trial court erred in that there was no evidence to foster its conclusion that the father might not adhere to his intention to be discrete or secretive about his sexuality and relationship.[82] While the court in *R.E.W.* did not disclaim as irrelevant the father's intentions regarding the disclosure of his sexuality and relationship with his daughter, the court in the noted case expressed only silence as to the father's approach to inform his children of his sexual orientation.[83] If the decision in *R.E.W.* is an application of a nexus test,[84] then the decision in the noted case is a noticeable move toward an evidence-based approach.

A staff attorney for Lambda Legal states, "The court has done the right thing today by focusing on the needs of the children instead of perpetuating stigma on the basis of sexual orientation."[85] Future state case law and statutory enactments will show whether the trend seen in *Mongerson* toward an evidence-based analysis will continue or revert to the nexus or even per se tests.

Megan Snider*

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78. *Id.* at 895. The court stated, "In the absence of evidence that exposure to any member of the gay and lesbian community acquainted with Husband will have an adverse effect on the best interests of the children, the trial court abused its discretion when it imposed such a restriction on Husband's visitation rights." *Id.*

79. *Id.*

80. *See In re* R.E.W., 471 S.E.2d 6, 8-9 (Ga. Ct. App. 1996).

81. *See id.* at 8.

82. *See id.*

83. *See Mongerson*, 678 S.E.2d 891; *see R.E.W.*, 471 S.E.2d at 8.

84. *Mongerson*, 471 S.E.2d at 8.

85. Press Release, Lambda Legal, Georgia Supreme Court Rejects Antigay Restriction in Custody Arrangement: Lambda Legal Applauds Opinion (June 15, 2009), *available at* http://www.lambdalegal.org/news/pr/ga_20090615_ga-sc-rejects-antigay-restriction-in-custody-arrangement.html.

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