

# GEORGIA: “LET JUSTICE BE DONE, THOUGH THE HEAVENS FALL.”

William B. Hollberg & Jeffrey A. Shaw<sup>1</sup>

Georgia has traditionally been viewed as a pro-life state with generally conservative courts. But in recent years, the Georgia Supreme Court has evinced more expansionist tendencies that have threatened to erode long-established principles of marriage and family, and life and its origin. These tendencies, however, have been met with opposition by the general public. In 2004, for instance, 76.2 % of voters supported the “Defense of Marriage Amendment” to the Georgia Constitution.<sup>2</sup> The amendment made it unconstitutional for the state to perform or recognize same-sex marriages.<sup>3</sup>

In addition, some pro-life legislators and lobbyists are attempting to secure the adoption of a “Human Life Amendment.” If passed, H.R. 536 would read:

*Paramount right to life.*

(a) The rights of every person shall be recognized, among which in the first place is the inviolable right of every innocent human being to life. The right to life is the paramount and most fundamental right of a person.

(b) With respect to the fundamental and inalienable rights of all persons guaranteed in this Constitution, the word 'person' applies to all human beings,

---

<sup>1</sup> William B. Hollberg is a partner with the law firm of Hollberg & Weaver, LLP in Atlanta. He received his B.A. degree from Wheaton College in 1968, and his J.D. degree from the University of Georgia School of Law in 1971. In 1987, he earned his M.A. degree from Georgia State University.

Jeffrey A. Shaw is an associate with the law firm of Hollberg & Weaver, LLP in Atlanta. He received his B.A. from Berry College in 2004, and his J.D. degree from the University of Georgia School of Law in 2007.

<sup>2</sup> “Official Results of the November 2, 2004 General Election,” Georgia Secretary of State website, *available at* [http://sos.georgia.gov/elections/election\\_results/2004\\_1102/judicial.htm](http://sos.georgia.gov/elections/election_results/2004_1102/judicial.htm) (last viewed December 3, 2007).

<sup>3</sup> “Paragraph I. *Recognition of marriage.* (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.” Constitution of the State of Georgia, Article I, section IV.

irrespective of age, race, sex, health, function, or condition of dependency, including unborn children at every state of their biological development, including fertilization.<sup>4</sup>

This amendment would likely carry the support of 2/3 of the Georgia Senate, but would be a closer call in the Georgia House of Representatives. In fact, debate exists within the pro-life community itself as to the wisdom of a Human Life Amendment.<sup>5</sup> With the current climate of the pro-life movement in mind, this paper endeavors to provide a profile of the Supreme Court of Georgia, including the individual justices and the judicial philosophy of the Court.

## I. LIFE ISSUES

This section provides a summary of how courts in Georgia have dealt with issues of acknowledging the existence and value of life and those issues of protecting and preserving life.

### **Abortion**

Since the U.S. Supreme Court holdings in *Roe v. Wade*,<sup>6</sup> *Doe v. Bolton*,<sup>7</sup> and *Planned Parenthood v. Casey*,<sup>8</sup> the Georgia Supreme Court has taken very few cases dealing with the issue of abortion. The current Georgia Code states in O.C.G.A. § 16-12-141(a) that abortion is permitted only if performed by a physician duly licensed to practice medicine and surgery, and it must be based upon his or her best clinical judgment that an abortion is necessary. This

---

<sup>4</sup> Available at [http://www.legis.ga.gov/legis/2007\\_08/search/hr536.htm](http://www.legis.ga.gov/legis/2007_08/search/hr536.htm) (last viewed December 3, 2007).

<sup>5</sup> A national pro-life strategy debate over the merits of a Human Life Amendment is available at <http://www.personhood.net/legalconsiderations.html> (last viewed December 3, 2007).

<sup>6</sup> 410 U.S. 113 (1973) (holding that a woman's choice to have an abortion prior to viability falls within the constitutionally-protected right to privacy under the Due Process Clause of the Fourteenth Amendment).

<sup>7</sup> 410 U.S. 179 (1973). This case was decided on the same day as *Roe v. Wade*. Georgia law proscribed an abortion except as performed by a duly licensed Georgia physician when necessary in "his best clinical judgment" because continued pregnancy would endanger a pregnant woman's life or injure her health; the fetus would likely be born with a serious defect; or the pregnancy resulted from rape. The Supreme Court upheld that code section while invalidating the procedural conditions of the law that required: (1) that abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals; (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians.

<sup>8</sup> 505 U.S. 833 (1992) (upholding the Due Process right to an abortion and holding further that state regulations cannot unduly burden a woman's right to obtain an abortion).

necessity requirement, however, is subject to the U.S. Supreme Court's qualification in *Doe v. Bolton* that maternal health considerations include "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient."<sup>9</sup>

The language of the Georgia Code prohibits abortions after the first trimester except when performed in a hospital or health facility licensed as an abortion facility by the Department of Human Resources.<sup>10</sup> Abortions after the second trimester are permitted only if the attending physician and two consulting physicians certify that, in their best clinical judgment, the abortion is necessary to preserve the life or health of the mother.<sup>11</sup> The Georgia Code also prohibits partial-birth abortions.<sup>12</sup>

In 1998, the Court of Appeals of Georgia heard the case of *Hillman v. State*.<sup>13</sup> In *Hillman*, an 18-year old woman who was approximately 8-months pregnant was indicted on a charge of violating the criminal abortion statute by using a handgun to shoot herself in the abdomen, causing the death of her near-term fetus. The Court of Appeals held that (1) the criminal abortion statute does not criminalize a pregnant woman's actions in securing an abortion, regardless of the means used; (2) the statute would not be extended to cover a pregnant woman's act of intentionally inflicting a gunshot wound to her near-term fetus in order to cause an abortion; and (3) regardless of whether the pregnant woman acts alone or with assistance in causing an abortion, she cannot be charged under the statute because it is directed at preventing the conduct of persons other than the pregnant woman. This case did not go before the Supreme Court of Georgia.

A case recently brought before the Georgia Supreme Court was that of *Feminist Women's Health et al. v. Burgess, Commissioner et al.*<sup>14</sup> Feminist Women's Health Center is a clinic that performs abortions. The Center brought suit, along with a Medicaid recipient who received an

---

<sup>9</sup> 410 U.S. 179 at 192.

<sup>10</sup> O.C.G.A. § 16-12-141(b).

<sup>11</sup> O.C.G.A. § 16-12-141(c).

<sup>12</sup> O.C.G.A. § 16-12-144. The statute defines partial-birth abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before ending the life of the fetus and completing the delivery.

<sup>13</sup> 232 Ga.App. 741 (1998).

<sup>14</sup> 282 Ga. 433 (2007).

abortion, against the Department of Community Health and its Commissioner in Fulton County, alleging that the Department's denial of Medicaid coverage for “medically necessary” abortions violates Georgia's constitutional right to privacy and guarantee of equal protection.

The trial court dismissed the action, holding that the Health Center lacked standing and that the Medicaid recipient must first pursue administrative remedies before filing suit. At issue in this appeal was whether healthcare providers have standing to challenge abortion restrictions that affect the rights of their patients, and whether a patient must first challenge the rule through administrative procedures.<sup>15</sup> Oral arguments were held on June 4, 2007, and the Georgia Supreme Court issued its ruling on September 24, 2007. The Court held that the medical providers had third-party standing to assert the constitutional rights of their Medicaid-eligible patients,<sup>16</sup> and that the Medicaid-eligible woman was not barred from bringing suit for failing to exhaust administrative remedies because no adequate administrative remedy was available.<sup>17</sup> This case will return to the trial court to be decided on its merits.

Another issue that is very important with regard to abortion laws is that of parental notification and consent. Currently, Georgia does not require a child's parent to consent before his/her daughter undergoes an abortion. However, there are certain notice requirements. Georgia law requires, before an abortion provider can perform the procedure on an unemancipated minor under the age of 18 years, that the minor sign a consent form and that: (1) the minor be accompanied by a parent or guardian who states that he/she received notice of the abortion; (2) the physician or his/her agent give actual notice by phone or in person to a parent or guardian of the pending abortion and the name and address of the location that it is to occur; or (3) the physician or his/her agent give written notice of the pending abortion and the name and address of the location where it is to occur, sent by certified mail with return receipt requested with delivery, to a parent or guardian.<sup>18</sup>

---

<sup>15</sup> Oral Argument Summaries, Supreme Court of Georgia website, June 2007 Calendar, *available at* <http://www.gasupreme.us/oas/oas0607.php#s07a1039> (last viewed on September 6, 2007).

<sup>16</sup> 282 Ga. 433 at 435 (2007).

<sup>17</sup> *Id.* at 436.

<sup>18</sup> O.C.G.A. § 15-11-112 (a).

If the minor or the physician refuses to comply with the notice requirements, or if the parent or legal guardian cannot be located, the minor may petition any juvenile court in the state for waiver of the requirement.<sup>19</sup> While no Georgia courts have been faced with parental notification cases, the constitutionality of the requirement was challenged in federal court. The Court of Appeals for the 11<sup>th</sup> Circuit held that while legislation that significantly burdens a woman's abortion decision is subject to strict scrutiny, for minors the state may burden the abortion decision to further its significant and important interests in family integrity and the protection of adolescents.<sup>20</sup>

In 2005, the Georgia legislature passed the Woman's Right to Know Act. This law requires a physician, before performing an abortion, to ensure that the woman provided her informed consent. To be informed: (1) the woman must be told by phone or in writing, at least 24 hours before the procedure, the particular medical risks to the individual patient related to the procedure to be performed, the probable gestational age of the child at the time the abortion would be performed, and the medical risks associated with carrying the child to term; (2) the woman must be told by phone or in writing, at least 24 hours before the procedure, that medical assistance may be available for prenatal care and childbirth and neonatal care, that the father will be liable to assist in the support of the child, how to obtain a list of healthcare providers and facilities that offer free ultrasounds, and that she has the right to review printed materials describing the unborn child, listing agencies that offer alternatives to abortion, and containing information on fetal pain; (3) the woman must certify in writing that the information described above was provided to her and that she had the opportunity to review the printed materials.<sup>21</sup> For all cases in which an ultrasound is performed prior to the abortion, the woman must be offered the opportunity to view the fetal image and hear the fetal heartbeat. She must then certify in writing that she was provided such an opportunity, that she did or did not elect to view the sonogram, and that she did or did not elect to listen to the fetal heartbeat.<sup>22</sup>

---

<sup>19</sup> O.C.G.A. § 15-11-112 (b).

<sup>20</sup> *Planned Parenthood Association of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462 (1991).

<sup>21</sup> O.C.G.A. § 31-9A-3.

<sup>22</sup> O.C.G.A. § 31-9A-3(4).

## Wrongful Birth/Life Claims

In the area of tort law, the Supreme Court of Georgia has been very clear regarding its stance on life issues. In 1990, the case of *Atlanta Obstetrics & Gynecologists Group v. Abelson*<sup>23</sup> gave the court the opportunity to address “wrongful birth” claims. The Abelsons, as parents of a Down’s Syndrome child, alleged that the defendants failed to properly counsel Mrs. Abelson concerning the risks of her pregnancy associated with her increased maternal age (37-years old), and failed to inform her of the availability of a post-conception diagnostic test that would have ascertained whether the fetus was afflicted with Down’s Syndrome. The Abelsons, in their individual capacity, sought damages for expenses related to pregnancy and delivery, pain and suffering, mental and emotional anguish, lost wages, loss of consortium, and the reasonable and necessary costs of rearing, education, and otherwise providing for their child. In their capacity as representatives of their daughter, the Abelsons sought damages for her pain and suffering, her lost capacity to earn wages, and the reasonable and necessary costs of rearing, educating, and otherwise providing for herself.

Citing *Fulton-DeKalb Hospital Authorities v. Graves*,<sup>24</sup> the trial court dismissed the portion of the Abelsons’ complaint filed in their capacity as the representatives of the child, on the ground that a “wrongful life” action is not maintainable under Georgia law. However, the trial court and the Court of Appeals held that a “wrongful birth” action is maintainable. The Georgia Supreme Court began its review of the case by distinguishing between a “wrongful pregnancy” action, a “wrongful life” action, and a “wrongful birth” action.

“A ‘wrongful pregnancy’ action,” the court stated, “is typically brought by the parents of a child whose conception or birth is due to a physician’s negligent performance of a sterilization or of an abortion.”<sup>25</sup> Such action may be brought as no more than a species of malpractice. The court cited its unwillingness in *Graves* to award damages for the ordinary cost of raising a child,

---

<sup>23</sup> 260 Ga. 711 (1990).

<sup>24</sup> 252 Ga. 441 (1984).

<sup>25</sup> 260 Ga. 711 at 713 (1990).

emphasizing, “[w]e instinctively recoil from the notion that parents may suffer a compensable injury on the birth of a child.”<sup>26</sup>

An action for “wrongful life” is brought on behalf of an impaired child, basically alleging that had it not been for the treatment or advice of the defendant to the child’s parents, the child would never have been born.<sup>27</sup> Similarly, a “wrongful birth” action is brought by the parents of an impaired child, alleging that had it not been for the treatment or advice of the defendant, the parents would have aborted the fetus.<sup>28</sup> The court noted that almost universally, claims of “wrongful life” are not recognized. With regard to “wrongful birth” actions, the court held that they will not be recognized in Georgia absent a clear mandate for such recognition by the legislature. The court quoted the Supreme Court of North Carolina, stating that “we are unwilling to take any such step because we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.”<sup>29</sup>

Refusing to exercise judicial activism, the court noted that the realm of “wrongful birth” actions is one more properly suited to legislative action because the legislature offers a forum wherein all of the issues, policy consideration, and long-range consequences can be thoroughly and openly debated, and ultimately decided.<sup>30</sup>

In 1999, the court was asked to revisit the question of “wrongful birth” claims in *Etkind v. Suarez*.<sup>31</sup> Jennifer Etkind had given birth to a child with Down’s Syndrome, and along with her husband, she sued Dr. Suarez and his partnership for wrongful birth. The trial court granted the defendants’ motion for judgment on the pleadings, and the Court of Appeals affirmed on the grounds that *Abelson* remained controlling precedent for the proposition that wrongful birth claims would only be recognized in Georgia if authorized by the General Assembly.

The Supreme Court of Georgia, in its opinion, noted that the lack of a legislative response to the holding in *Abelson* indicated that the General Assembly had not been persuaded “by any

---

<sup>26</sup> *Id.* (citing *Graves*, 252 Ga. 441 at 443 (1984)).

<sup>27</sup> 260 Ga. 711 at 713 (1990).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 715 (citing *Azzolino v. Dingfelder*, 315 N.C. 103 (1985)).

<sup>30</sup> 260 Ga. 711 at 718 (1990).

<sup>31</sup> 271 Ga. 352 (1999).

reason, including subsequent medical advances, to exercise its constitutional power to amend the malpractice act so as to permit a recovery for wrongful birth claims.”<sup>32</sup> The court also denied Etkind’s “undue burden” claim under *Planned Parenthood v. Casey*, stating that nothing in *Casey* holds that the Federal Constitution requires that a state recognize a women’s right to bring a civil suit against her obstetrician for the negligent failure to assist her in making an informed abortion decision.<sup>33</sup>

### **Protection of the Unborn from Criminal Violence**

The Georgia Code criminalizes feticide, which is defined as the willful killing of an unborn child so far developed as to be called “quick,” by any injury to the mother of such child that would be murder if it resulted in the death of the mother.<sup>34</sup> In *Brinkley v. State*,<sup>35</sup> the Georgia Supreme Court traced the origins of the feticide statute to determine the meaning of the word “quick” as it relates to the fetus.

In *Brinkley*, two men robbed a club in Atlanta, and one of them shot a woman who was sixteen weeks pregnant in the abdomen with a shotgun. The woman was severely injured and the unborn child was killed. The defendants were convicted of feticide and multiple counts of armed robbery, and they appealed on the grounds that the feticide statute was vague and thus violative of their constitutional due process rights. Their primary contention was that the word “quick” is so uncertain and inexact a term that it made enforcement arbitrary.<sup>36</sup>

The *Brinkley* court found that the first enactment of a feticide provision in Georgia came in 1876, stemming in part from Lord Ellenborough’s Act (1803).<sup>37</sup> That Act imposed penalties for anyone who, by administering substances or by using instruments, caused or intended to cause a woman to miscarry, the penalties being more severe if the woman was “quick with child.” A defendant indicted in 1811 under the Act argued that he should receive the lesser penalty because the woman testified that she had not felt the child move within her before the

---

<sup>32</sup> *Id.* at 353.

<sup>33</sup> *Id.* at 354.

<sup>34</sup> O.C.G.A. § 16-5-80.

<sup>35</sup> 253 Ga. 541 (1984).

<sup>36</sup> *Id.* at 541.

<sup>37</sup> *Id.* at 543.

defendant's actions, and therefore the child was not "quick."<sup>38</sup> Medical professionals agreed that the common understanding of the term referred to the point at which the woman had "herself felt the child alive and quick within her..."<sup>39</sup> The court adopted that meaning, and the defendant prevailed.

The *Brinkley* court went on to note that Lord Ellenborough's Act and *Rex v. Phillips*<sup>40</sup> were considered by the Georgia Supreme Court in the 1904 case of *Sullivan v. State*.<sup>41</sup> The court in *Sullivan* held that "child" as used in the 1876 Act "means an unborn child so far developed as to move or stir in the mother's womb..."<sup>42</sup> This same definition was applied sixteen years later in the case of *Summerlin v. State*.<sup>43</sup> The meaning of the term "quick" was further modified by the Georgia Appellate Court's decision in *Shirley v. Bacon*,<sup>44</sup> where it was held that a child may be quick even before movement is felt by the mother so long as it is capable of movement.

The *Brinkley* court concluded its historical analysis by noting that the 1982 Act containing the feticide statute was merely a continuation of a long-existing criminal provision in Georgia that rested on English law going back to 1803.<sup>45</sup> The court found no unconstitutional vagueness, and held that the trial court had correctly charged the jury that "quick" is that "...time when the fetus is able to move in its mother's womb."<sup>46</sup>

### **Assisted Suicide**

Assisted suicide is prohibited by the Georgia Code, and anyone violating the act is guilty of a felony punishable by imprisonment for at least one year.<sup>47</sup> The Georgia Code does, however, provide for durable powers of attorney for health care, do not resuscitate orders, and the creation of living wills in Title 31, Chapter 32. The provisions of these statutes recognize "the right of a competent adult person to make a directive, known as a living will, instructing his

---

<sup>38</sup> This was in the case of *Rex v. Phillips*, 3 Campbell 73, 170 Eng. Rep. 1310 (1811), cited in *Brinkley* at 543.

<sup>39</sup> 253 Ga. 541 at 543 (1984).

<sup>40</sup> 3 Campbell 73, 170 Eng. Rep. 1310 (1811).

<sup>41</sup> 121 Ga. 183 (1904).

<sup>42</sup> *Id.* at 187.

<sup>43</sup> 150 Ga. 173 at 176 (1920).

<sup>44</sup> 154 Ga.App. 203 (1980).

<sup>45</sup> 253 Ga. 541 at 544 (1984).

<sup>46</sup> *Id.*

<sup>47</sup> O.C.G.A. § 16-5-5.

physician to withdraw life-sustaining procedures in the event of a terminal condition, a coma, or a persistent vegetative state.”<sup>48</sup> However, it is important to note that the Georgia Code later emphasizes that nothing contained within these chapters shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than to permit the process of dying.<sup>49</sup>

The Supreme Court of Georgia has excused criminal and civil liability even where the Living Will Act did not apply because the petitioner did not have a “terminal condition.” In *State v. McAfee*,<sup>50</sup> the court heard a petition from McAfee, who had suffered a severe injury to his spinal cord in a motorcycle accident that left him quadriplegic. McAfee was incapable of spontaneous respiration and required a ventilator to breathe. The petition requested that McAfee be allowed to turn off his ventilator, and that it not be restarted once it was disconnected. With the help of an engineer, he had devised a means of turning off the ventilator himself by way of a timer. McAfee requested that he be provided a sedative to alleviate the pain upon disconnection of the ventilator.

The parties to the lawsuit identified four generally recognized interests of the state that must be balanced against a competent adult’s right to refuse medical treatment: (1) the state’s interest in preserving life; (2) its interest in preventing suicide; (3) preservation of the integrity of the medical profession; and (4) protection of innocent third parties.<sup>51</sup> The Georgia Supreme Court held that McAfee’s right to refuse medical treatment outweighed the State’s interest in preserving life, and that the right to be free from pain at the time that the ventilator was disconnected was inseparable from the right to refuse medical treatment. Thus, no civil or criminal liability would attach to any medical professional administering a sedative to McAfee.

---

<sup>48</sup> O.C.G.A. § 31-32-1(d).

<sup>49</sup> O.C.G.A. § 31-32-10.

<sup>50</sup> 259 Ga. 579 (1989).

<sup>51</sup> *Id.* at 580.

## **Healthcare Rights of Conscience**

According to the Georgia Code, no hospital, medical facility, or physician is required to admit a patient for the purposes of performing an abortion.<sup>52</sup> Furthermore, anyone providing a written objection to any or all abortions on moral or religious grounds is not required to participate in such procedures.<sup>53</sup> Additionally, under Georgia Admin. Code § 480-5-.03(n), a pharmacist may refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs.

In the United States Supreme Court case of *Doe v. Bolton*,<sup>54</sup> Georgia statutory provisions requiring hospitals to have an abortion committee were found unconstitutional in part because Georgia already had laws protecting hospitals by allowing them to deny admittance of patients for abortions. Apart from this, no other case law could be found addressing healthcare rights of conscience in Georgia.

## **Cloning and Destructive Embryo Research**

No jurisprudence or laws exist in Georgia that deal with cloning or destructive embryo research. This subject matter has been left to federal law and jurisprudence. However, in 2003 the Georgia Senate passed a resolution urging the United States Senate to pass and the President to sign the Human Cloning Prohibition Act.<sup>55</sup> The bill passed in the United States House of Representatives, but not in the United States Senate.

In May 2007, the Georgia legislature passed and the governor signed into law the “Saving the Cure Act.” Enacted as Title 31, Chapter 46, the Act created the *Georgia Commission for Saving the Cure*. The Commission is charged with developing a “network of postnatal tissue and fluid banks in partnership with one or more public or private colleges or universities, public or private hospitals, nonprofit organizations, or private firms in this state for the purpose of collecting and storing postnatal tissue and fluid.” Such tissue is to then be made available for medical research and treatment. Pregnant patients are to be educated on the full

---

<sup>52</sup> O.C.G.A. § 16-12-142.

<sup>53</sup> *Id.*

<sup>54</sup> *Supra*, note 7.

<sup>55</sup> S.R. 266 (April 8, 2003), available at [http://www.legis.ga.gov/legis/2003\\_04/search/sr266.htm](http://www.legis.ga.gov/legis/2003_04/search/sr266.htm) (last viewed on December 18, 2007).

range of options for donation of postnatal tissue and fluids, but physicians who object to the transfusion or transplantation of blood on the basis of *bona fide* religious beliefs will not be required to participate in such consultations.

While Georgia maintains a strong pro-life tradition, the Supreme Court of Georgia threatens the vitality of these principles with its expansionist tendencies, which will be analyzed in greater detail in the following section.

## II. JUDICIAL RESTRAINT

At times, the Supreme Court of Georgia appears to adhere closely to the doctrine of judicial restraint and strict interpretation. This was evident in the aforementioned cases of *Abelson* and *Etkind*, where the crux of the court's refusal to recognize actions for "wrongful birth" lay in the fact that "the authority of the court extends only to construction of the provisions for whatever statute the General Assembly may choose to enact in that regard."<sup>56</sup> However, it is important to note other trends suggesting judicial activism.

In 2001, the Georgia Supreme Court decided *Dawson v. State*,<sup>57</sup> in which it held unconstitutional Georgia's use of the electric chair as a means of capital punishment. A majority of the court held that the electric chair "violates the prohibition against cruel and unusual punishment in Art. I, Sec. I, Par. XVII of the Georgia Constitution."<sup>58</sup> Many have seen the *Dawson* decision as highly activist.

Evaluating the justices individually, it is clear that Chief Justice Leah Ward Sears has a track record of judicial activism. When a trial court judge on the Fulton County (Georgia) Superior Court, Sears was assigned a case involving the statutory rape of 11 and 12-year-old girls by a 20-year-old man. Sears reportedly raised on her own initiative the constitutionality of the Georgia statutory rape law on equal protection grounds and on privacy grounds.<sup>59</sup> Sears

---

<sup>56</sup> *Etkind v. Suarez*, 271 Ga. 352 (1999).

<sup>57</sup> 274 Ga. 327 (2001).

<sup>58</sup> *Id.* at 335.

<sup>59</sup> Trisha Renaud, *Minor Problem with Rape Law*, FULTON COUNTY DAILY REPORT, August 22, 1991, at 1,2; Paul Kvinta, *Lawyers Fault Her on Criminal Cases but Praise Her Conscientiousness*, FULTON COUNTY DAILY REPORT, April 3, 1992, at 1,4.

said: “ ‘What kind of sense does it make to have a law allowing a 14-year-old to get an abortion but not to engage in sex?’ ”<sup>60</sup>

In an interview the year following her appointment to the Georgia Supreme Court, Sears called the electric chair “silly.”<sup>61</sup> Commenting in this manner on a policy issue can be seen as an activist maneuver.

The same year as her comment about the electric chair, Sears filed a concurring opinion in *Van Dyck v. Van Dyck*,<sup>62</sup> a case in which a former husband argued that his alimony obligation should be terminated due to his ex-wife’s subsequent lesbian affair. The court held that under Georgia law there was no basis to terminate the alimony. In her concurrence, Sears said:

In a perfect world it ought to be the financial reality that counts.

But this is not yet a perfect world.

While the relationships of married couples are clearly defined by law, lesbian and gay couples in America today cannot legally marry, no matter how deep their love and how firm their commitment. Thus, unlike those couples of the opposite sex who live together but are not married, they are *forever* denied the numerous legal rights that come with marriage.<sup>63</sup>

Sears then listed 13 legal rights denied to lesbian and gay couples.<sup>64</sup> Sears lifted her list almost verbatim from H. Curry and D. Clifford, *A Legal Guide for Lesbian and Gay Couples*.<sup>65</sup> This treatise explicitly advocates legal same-sex marriage and provides same-sex commitment or marriage forms.

Further evidence of Sears’ views comes from her speech at a 1996 awards dinner of the Stonewall Bar Association (“Stonewall”) honoring Robin Shahr, who was suing then-Georgia Attorney General Michael Bowers for withdrawing a job offer after learning of her “purported ‘marriage’ to another woman.”<sup>66</sup> At the dinner, Stonewall awarded Shahr its “Plaintiff’s Award

---

<sup>60</sup> Trisha Renaud, *supra*, note 52, at 4.

<sup>61</sup> Mark Curriden, *A Jurist of First Impression*, THE NATIONAL LAW JOURNAL, September 6, 1993, at 27.

<sup>62</sup> 262 Ga. 720 (1993).

<sup>63</sup> *Id.* at 722 (emphasis original).

<sup>64</sup> *Id.* at 722-23.

<sup>65</sup> *Id.* at 722 n.1.

<sup>66</sup> *Shahr v. Bowers*, 114 F.3d 1097, 1099 (11<sup>th</sup> Cir. 1997).

for courage in utilizing the court system to end discrimination.” Sears gave the “keynote” address which was described by a gay newspaper as follows:

Sears’ escort for the evening was Daniel Todd of Atlanta, a gay man....

Sears apologized that she would not be able to comment on specific lesbian and gay issues on which she might be called to rule. Instead, her speech championed progressive values in the battle against bigotry. She recited a roll call of leaders including Harvey Milk, Nelson Mandela, Martin Luther King, Jr., Benjamin E. Mays, Harriet Tubman and others whom she described as “the fire carriers, on fire with the truths they bear.”

She urged all present to “renew your commitment to work for the aims of Stonewall and its sister organizations,” and she said, “I wish for all of you—but especially for you younger attorneys—passion, obsession, joy, even a little craziness—a taste of the fire.”<sup>67</sup>

In the 1996 case of *Christensen v. State*,<sup>68</sup> the court held in a five-to-two decision that the Georgia criminal statute against sodomy is “a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public.”<sup>69</sup> Sears authored an angry dissent that espoused an expansive view of the constitutional right to privacy, stating that she would read John Stuart Mill’s absolute libertarianism into the Georgia constitution and constitutionally protect all private consensual adult activity:

Insofar as Georgia’s citizens keep their conduct to themselves and do not interfere with the rights of others, the State has no legitimate concern. What some construe as immorality in private, that does not operate to the detriment of others, is beyond the reach of state action under the guarantees accorded Georgia’s citizens by their Constitution, regardless of whether a majority believes such conduct to be “foolish, perverse, or wrong.”<sup>70</sup>

Sears has said that she would not strike laws regarding “drug offenses and seatbelt requirements,” “incest, the sexual exploitation of children, [and] prostitution,” because those

---

<sup>67</sup> David Goldman, *State Supreme Court Justice Lauds Lesbian and Gay Lawyers*, SOUTHERN VOICE, November 7, 1996, at 3 (emphasis added).

<sup>68</sup> 266 Ga. 474 (1996).

<sup>69</sup> *Id.* at 476.

<sup>70</sup> *Id.* at 482 (Sears, J., dissenting) (*quoting* John Stuart Mill, ON LIBERTY).

laws are supported by “compelling State interests” other than the “enforce[ment] of conventional morality.”<sup>71</sup>

Shockingly, the court, with no change in membership, reversed itself two years later in *Powell v. State*,<sup>72</sup> and held that sodomy was protected by a non-textual right of privacy in the Georgia Constitution. The court ruled that “Georgian’s right of privacy puts beyond the bounds of government regulation” “private sexual conduct of consenting adults.”<sup>73</sup> In a concurrence, Sears applauded the decision as “inspired” and “clearheaded and courageous.”<sup>74</sup>

Sears indicated in *Morrison v. State*<sup>75</sup> that she would consider extending the Georgia constitutional right of privacy enunciated in *Powell* to protect the distribution of obscene materials. Sears, along with Justice Hunstein and former Chief Justice Norman Fletcher, pointedly declined to concur with the majority’s holding that *Powell* did not protect the distribution of obscene materials.

Shortly after the 1998 election, Sears replied to a charge that her acceptance of campaign contributions from pro-abortion groups proved she had committed herself on the issue of abortion. In a media interview, Sears “insisted” she had never made such a commitment.<sup>76</sup>

Despite these earmarks of judicial activism, Sears has, since becoming chief justice, been much more cautious. It is possible that she has actually moderated her views. As chief justice, Sears has been vocal in discouraging the passage of laws that subvert the traditional family to promote a “family diversity model.” In an article that she authored entitled, *A Case for Strengthening Marriage*, she stated: “As a judge I am often frustrated that I must work within a system designed only to pick up the pieces after families have already fallen apart or failed to

---

<sup>71</sup> *Id.* at 485-86.

<sup>72</sup> 270 Ga. 327 (1998).

<sup>73</sup> 270 Ga. at 334.

<sup>74</sup> *Id.* at 336-37.

<sup>75</sup> 272 Ga. 129 (2000).

<sup>76</sup> Ann Woolner, *Abortion Mailer on Sears Shows Folly of Election Rules*, FULTON COUNTY DAILY REPORT, 7/27/98, p.7.

come together. We must work to prevent family fragmentation, because the consequences for children and society are severe.”<sup>77</sup>

Despite earlier skepticism, Sears even voted with the court in a unanimous decision in 2006 to uphold the Georgia constitutional amendment preserving marriage as between one man and one woman.<sup>78</sup> Chief Justice Sears’ term expires in 2010.

Justice Carol Hunstein has stated with regard to the role of the Court:

It is the province of the Georgia General Assembly to enact the laws of Georgia, and a judge should not take any action to make any law or to express his or her opinion as to the wisdom of any laws. A judge’s role is to interpret those laws based upon the Constitution and the legal precedent binding upon that judge in conjunction with the facts presented in an actual case or controversy.”<sup>79</sup>

Justice Hunstein’s term expires in 2012.

Justice Robert Benham dissented in the “wrongful birth” cases of *Abelson* and *Etkind*, arguing that such a cause of action exists within the framework of Georgia’s traditional law of torts.<sup>80</sup> In response to the majority’s position that this is a matter best left to the legislature, Justice Benham took a more activist approach in stating, “I do not agree that the legislative route is the only route available or that it is the appropriate route in this case.”<sup>81</sup> He went on to argue: “We must remain willing to answer the age-old questions: If not us, then who; if not now, then when; if not here, then where? With regard to this case, I believe the answer is that the critical issues should be decided by this court, here and now.”<sup>82</sup> Justice Benham’s term expires in 2008.

Justice George Carley is largely recognized as the Court’s most conservative member, in the sense that the opinions authored by him tend to take a traditional approach to concepts of life

---

<sup>77</sup> Leah Ward Sears, *A Case for Strengthening Marriage*, THE WASHINGTON POST, October 30, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900548.html> (last viewed September 10, 2007).

<sup>78</sup> *Perdue v. O’Kelley*, 280 Ga. 732 (2006).

<sup>79</sup> *Judicial Philosophy*, Re-Elect Justice Carol Hunstein website, available at <http://www.hunsteinforjustice.com/index.php> (last viewed September 10, 2007).

<sup>80</sup> *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711 (1990).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

and family.<sup>83</sup> In criminal matters, a study found his opinions to follow a philosophy of strict constructionism,<sup>84</sup> as indicated when he stated: “The purpose of the judiciary is not to construe the law. . . but to ensure that the law as it exists is applied correctly and enforced uniformly.”<sup>85</sup> Justice Carley’s term expires in 2012.

Justice Melton has only been with the Court for a short time and has not written any notable opinions on life issues.

Today’s Georgia Supreme Court should not be viewed as a model of the lost art of judicial restraint. Although some of its justices are more restrained than others in interpreting and applying the law, the Georgia Supreme Court as a body often reaches decisions that are not based on the fair meaning of any constitutional or statutory text, and can only be described as activist.

### III. THE COURT

The Supreme Court of Georgia consists of seven justices who, according to the Georgia Constitution, are to be selected through a popular election.<sup>86</sup> In practice, however, justices

---

<sup>83</sup> See Justice Carley’s majority opinion in *Etkind v. Suarez*, 271 Ga. 352 (1999) (refusing to recognize an action for “wrongful birth”); his dissenting opinion in *Powell v. State*, 270 Ga. 327 (1998) (contesting the majority’s decision to strike down a criminal sodomy statute because the state has the right to criminalize conduct deemed immoral by the majority); and his dissenting opinion in *Wheeler v. Wheeler*, 281 Ga. 838 (2007) cert. denied. In *Wheeler*, a woman gave birth to a child in 2000 using artificial insemination. Her lesbian partner adopted the child based on the consent of the mother. By 2004, the relationship between the women had dissolved, and the child’s birth mother petitioned the courts to set aside the adoption decree. The case was appealed up to the Supreme Court of Georgia, which denied cert. Justice Carley, who was joined by Justices Thompson and Melton, wrote the dissent and argued that the Court should have taken the case because it was a matter of gravity and public concern, and because it presented an issue of first impression. Addressing the merits of the case itself, Justice Carley noted, “Under certain conditions, a child who has only one living parent ‘may be adopted by the spouse of that parent ....’ However, Melody Wheeler is not the spouse of Sara Wheeler, as ‘[m]arriages between persons of the same sex are prohibited in this state.’ [A] third party who is not a stepparent, such as Melody Wheeler, may adopt the child only if the parent’s rights are surrendered, or are terminated.... However, neither the surrender nor termination of Sara Wheeler’s parental rights was ever sought or ordered.”

<sup>84</sup> Laura Deitz, *High Court Studies: The Shifting of the Supreme Court of Georgia’s Death Penalty Decisions from 1998-2003*, ALBANY LAW REVIEW (2005), available at <http://www.albanylawreview.org/archives/68/2/THE SHIFTING OF THE SUPREME COURT OF GEORGIA’S DEATH PENALTY DECISIONS FROM 1998-2003.pdf> (last viewed September 10, 2007).

<sup>85</sup> *Rogers v. State*, 575 S.E.2d 879, 883 (Ga. 2003) (Carley, J., dissenting).

<sup>86</sup> Ga. Const. art. 6, § 6, par. 1.

generally resign before their term expires, thus leaving it to the governor to appoint a justice to fill the vacancy until the next regular election. Justices are elected to six-year terms, and they select from among themselves a chief justice.<sup>87</sup>

### **Biographical information of the current members of the Georgia Supreme Court**

<b>Member</b>	<b>Year Appointed/ By</b>	<b>Term Expires</b>	<b>Miscellaneous<sup>88</sup></b>
Leah Ward Sears	1992/ Governor Z. Miller	2010	- Biographical Information: B.S. degree from Cornell University (1976); J.D. degree from Emory University School of Law (1980); LL.M. Degree from University of Virginia School of Law (1995); Attorney with Alston & Bird before getting on the court; - Political/Professional Affiliations: American Bar Association’s Board of Elections; Judicial Section of Atlanta Bar Association; Georgia Association of Black Women Attorneys; Board of Directors of the Morehouse School of Medicine Center for Child Abuse & Neglect; -Civic/Social Affiliations: Georgia Chapter of the National Council of Christians and Jews;
Carol W. Hunstein	1992/ Governor Z. Miller	2012	- Biographical Information: A.A. degree from Miami-Dade Junior College (1970); B.S. degree from Florida Atlantic University (1972); J.D. degree from Stetson University College of Law (1976); Superior Court Judge in DeKalb County prior to joining the Supreme court; - Political/ Professional Affiliations: DeKalb County Alimony and Support Committee; Georgia Commission on Gender Bias in the Judicial System; National Association of Women Judges; Georgia Campaign for Adolescent Pregnancy

<sup>87</sup> *Id.*

<sup>88</sup> All biographical information was found at The Supreme Court of Georgia website, *available at* [http://www.gasupreme.us/justices\\_bios.php](http://www.gasupreme.us/justices_bios.php) (last viewed September 10, 2007).

			Prevention; Georgia Commission on Access and Fairness;
Robert Benham	1989/ Governor J. F. Harris	2008	- Biographical Information: B.S. degree from Tuskegee University (1967); J.D. degree from University of Georgia School of Law (1970); LL.M. degree from University of Virginia (1989); U.S. Army Reserve; Trial attorney for Atlanta Legal Aid Society, Inc.; Private practice in Cartersville, GA; Special Assistant Attorney General; - Political/Professional Affiliations: Georgia Conference of Black Lawyers; State Bar Task Force on the Involvement of Women & Minorities in the Profession; Georgia Commission on Children & Youth; Society for Alternative Dispute Resolution;
George H. Carley	1993/ Governor Z. Miller	2012	- Biographical Information: A.B. degree from University of Georgia (1960); LL.B. degree from University of Georgia School of Law (1962) Prior to joining the Supreme Court he was in private practice in Decatur, GA; Georgia House of Representatives; Partner with McCurdy & Candler; Attorney for the Housing Authority of the City of Decatur; Special Assistant Attorney General; Georgia Court of Appeals; - Political/Professional Affiliations: Old Warhorse Lawyers Club; Joseph Henry Lumpkin American Inn of Court; Georgia Law Related Education Consortium; Georgia High School Mock Trial Competition; - Civic/Social Affiliations: Phythagoras Lodge No. 41; F.&A.M.; Atlanta Consistory of the Scottish Rite; Decatur Lodge 1602 B.P.O.E.; Decatur Rotary Club; Holy Trinity Episcopal Church;
Hugh P. Thompson	1994/ Governor Z. Miller	2012	- Biographical Information: Undergraduate training from Emory University and Oglethorpe University; J.D. degree from Mercer University School of Law (1969); Prior to joining the

			Supreme Court, he was Judge of the Milledgeville City Court; Judge of the Baldwin County Court; Superior Court Judge in Ocmulgee Judicial Circuit; General practice in Milledgeville, GA; - Civic/Social Affiliations: Eagle Scouts; St. Stephens Episcopal Church; Milledgeville Jaycees; Rotary Club;
P. Harris Hines	1995/ Governor Z. Miller	2008	- Biographical Information: Undergraduate degree from Emory University (1965); J.D. degree from Emory University School of Law (1968); Before joining the Supreme Court he was an associate and partner with Edwards, Bentley, Awtrey & Parker; Judge of State Court of Cobb County; Superior Court Judge of Cobb Judicial Circuit; - Political/ Professional Affiliations: Old War Horse Lawyers Club; Joseph Henry Lumpkin Inn of Court; Kiwanis Club of Marietta; - Civic/Social Affiliations: Cobb County Y.M.C.A.; First Presbyterian Church of Marietta;
Harold Melton	2005/ Governor S. Perdue	2012	- Biographical Information: B.S. degree from Auburn University; J.D. degree from University of Georgia School of Law (1991); Before joining the Supreme Court he worked with the Georgia Department of Labor; Executive Counsel to Governor Purdue; - Civic/Social Affiliations: Young Life Ministries; Atlanta Youth Academies; Southwest Christian Fellowship Church.

## CONCLUSION

In this survey of life issues and the Supreme Court of Georgia, we see the tensions that are typical in most states and in most courts. Georgia has a long and strong history of upholding traditional marriage and of promoting the value of human life. However, there are judges who appear to have predispositions to the implementation of “progressive” social agendas in their jurisprudence. Because virtually all appellate judges join these courts by gubernatorial

appointment rather than by election, the future direction of these courts will follow the political trends that produce statewide leaders.