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Constitutional Law: Race as a Factor in Interracial Adoptions

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CONSTITUTIONAL LAW: RACE AS A FACTOR IN INTERRACIAL ADOPTIONS

Race has long been regarded an appropriate factor in child adoption placement. District of Columbia courts, as in most jurisdictions, rule on interracial adoption petitions in view of the child's "best interest."[1] Until *In re R.M.G. and E.M.G.*,[2] however, the District of Columbia Court of Appeals had never addressed the constitutional validity of the District of Columbia adoption statute.[3]

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1. *See, e.g.*, L. GROW & D. SHAPIRO, BLACK CHILDREN—WHITE PARENTS 239 (1974); M. SHAPIRO, A STUDY OF ADOPTION PRACTICE 9 (1957); Herzog & Berstein, *Why So Few Negro Adoptions?*, 12 CHILDREN 14 (1967). "Interracial" adoptions occur where the adopted child's race differs from that of the adopting parents' race. In contrast, an "intraracial" adoption occurs where the adopting parents' race is similar to that of the child. Under the "best interest of the child" test, the court is free to consider a number of factors including: the moral fitness of the two parties; home environment proffered by the parties; child's emotional ties to the parties; the parties' emotional ties to the child; the age, sex, race, and health of the child; desirability of continuing an existing third party relationship; and preferences of the child. *See* Turner v. Pannick, 540 P.2d 1051, 1053 (Alaska 1975).

2. 454 A.2d 776 (D.C. 1982). In an adoption proceeding similar to the instant case, where neither prospective adopting parent is a natural parent of the child, the adopting parents must petition the court. D.C. CODE ANN. § 16:302 (1981). The court then refers the petition for investigation and recommendation to the supervising adoption-placement agency. Within 90 days after investigating the veracity of the petition statements, familial environment, assets, and other related factors, the agency provides a recommendation to the court. Considering the child's best interests, the court may grant the petition in the form of an interlocutory decree awarding the petitioner temporary custody. D.C. CODE ANN. §§ 16:307-16:309 (1981 & Supp. 1983).

3. D.C. CODE ANN. § 16:307 (1981). This section states:

(a) Except as provided by section 16-308, upon the filing of a petition the court shall refer the petition for investigation, report, and recommendation to:
  (1) the licensed child-placing agency by which the case is supervised; or
  (2) the Commissioner [Mayor], if the case is not supervised by a licensed child-placing agency.
(b) The investigation, report, and recommendation shall include:
  (1) an investigation of:
    (A) the truth of the allegations of the petition;
    (B) the environment, antecendents [antecedents], and assets, if any of the prospective adoptee, to determine whether he is a proper subject of adoption;
    (C) the home of the petitioner, to determine whether the home is a suitable one for the prospective adoptee; and
    (D) any other circumstances and conditions that may have a bearing on the proposed adoption and of which the court should have knowledge, including the existence and terms of a tentative adoption subsidy

This statute requires a statement in the adoption petition indicating the racial background of the parties involved. Considering an equal protection challenge to the adoption statute, the *R.M.G.* court upheld the statute's validity but remanded the case, directing the trial court to "precisely tailor" the race factor to the best interest of the child.[4] The District of Columbia Court of Appeals was the first court to establish a three-prong test to determine whether the use of race is precisely tailored to the best interest of the particular child, thus satisfying constitutional requirements.

Recent state statutory amendments eliminating racial matching requirements suggest a legislative trend away from the race-as-a-factor statute.[5] At least two states expressly prohibit discrimination in adoption proceedings.[6] Several other states, however, consider race a relevant consideration.[7] The District of Columbia mandates adoption petition information regarding the race of the prospective adoptee as well as the adopting parents, unless the prospective adoptee is an adult or the petitioner is the nat-

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agreement entered into prior to the filing of the adoption petition under section 3 of the Act of July 26, 1892 (D.C. CODE, sec. 3-115).

(2) a written report to the court of the findings of the investigation; and

(3) a recommendation to the court whether a final decree declaring the adoption prayed for in the petition should be immediately granted, or whether the court should grant an interlocutory decree granting temporary custody of the prospective adoptee to the petitioner, as hereinafter set forth.

(c) The written report submitted to the court shall be filed with, and become part of, the records in the case.

4. *R.M.G.*, 454 A.2d at 794.

5. *See* Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. LAW 333, 343 (1978).

6. *See, e.g.*, KY. REV. STAT. § 199.471 (1982); CONN. GEN. STAT. ANN. §§ 45-63(c)(3) (West 1981).

7. At least six states require a statement showing the race of the child, his or her natural parents, and, in some cases, the petitioners. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-105.C.1, D.4 (1974 & Supp. 1982-83) (pre-adoption review must consider the "social history" of the prospective parents and "heritage" of child); COLO. REV. STAT. § 19-4-110(2)(a) (1973 & Supp. 1982) (adoption petition must indicate each petitioner's race); OKLA. STAT. ANN. tit. 10, § 60.12(1)(c) (West 1966) (adoption petition must specify child's race); PA. STAT. ANN. tit. 1, § 1 (Purdon Supp. 1982-83) (requires racial background information on adopters and natural parents); S.D. CODIFIED LAWS ANN. § 25-6-13 (1976) (adoption order must state race of adopter and child); WASH. REV. CODE ANN. § 26.32.060 (1961 & Supp. 1983) (petition for adoption must indicate race of adopter and adoptee).

In 1972, Kentucky passed a statute precluding adoption denial on the basis of the "religious, ethnic, racial, or interfaith background of the adoptive applicant." Courts are allowed, however, to deny adoptions on religious or racial rationale if "contrary to the expressed wishes of the natural parent[s]." KY. REV. STAT. § 199.471 (1982). Connecticut has enacted a statute providing that an adoption shall not be disapproved "solely because of a difference in race, color or religion" between the prospective parents and the child. CONN. GEN. STAT. ANN. § 45-63(c)(3) (West 1981).

ural parent's spouse.[8] In the District of Columbia, as in nearly all jurisdictions, courts decide interracial adoption petitions in accordance with their view of the "best interest" of the child.[9]

Courts have grappled with the relevance of race in adoption proceedings for some time.[10] In 1955, the United States Court of Appeals for the District of Columbia Circuit decided the landmark case of *In re Adoption of a Minor.*[11] There, the court permitted a black stepfather to adopt his white wife's illegitimate white child. Taking into consideration the District of Columbia's requirement that the determination be made in the child's

8. D.C. CODE ANN. § 16:308 (1981). Unknown at common law, adoption first existed legally only in those states where the civil law prevailed. Massachusetts, recognized as the first state to enact adoption legislation, did so in 1851. Adoption statutes now prevail in all states. *See* M. SHAPIRO, *supra* note 1, at 9-12; Herzog & Bernstein, *supra* note 1, at 12. *See also In re* Adoption of Adult Anonymous II, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (1981) (adoption is created and regulated solely by statutory law). Although no states have statutes which bar interracial adoption, several, including the District of Columbia, expressly recognize race as a relevant factor. The removal of the prohibition of interracial adoption is a recent occurrence in many states. *See, e.g.*, LA. REV. STAT. ANN. § 9:422 (West Supp. 1983); S.C. CODE ANN. § 16-17-460 (Law. Coop. 1977 & Supp. 1981) (repealed by 1981 Act No. 71, § e, eff. May 19, 1981); TEX. LAWS 302, ch. 177, § 8 (1931) (repealed 1973). For example, the Texas law provided "[n]o white child can be adopted by a negro person, nor can a negro child be adopted by a white person."

9. *See* Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 749 (1956); Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. LAW 7, 9 (1964). *See, e.g., In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955). *See also, e.g.,* Scarpetta v. Spence-Chapin Adoption Serv. 28 N.Y.S.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1975); *In re* St. John, 51 Misc. 2d 976, 272 N.Y.S.2d 817 (Fam. Ct. 1966); Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956); *In re* Buss, 234 App. Div. 299, 254 N.Y.S. 852 (1932).

10. *See* Note, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. ILL. L.F. 256, 257; Annot., 54 A.L.R.2d 909 (1957). Some early case law dealing with the interracial issue considered race as a determinative factor. Thirty-three years ago, in Ward v. Ward, 36 Wash. 2d 143, 216 P.2d 755 (1950), the Washington State Supreme Court awarded custody of the children of a black father and white mother to the father because they resembled him.

Ward has never been overruled, but the decision received significant criticism in the Washington Court of Appeals decision Tucker v. Tucker, 14 Wash. App. 454, 542 P.2d 789 (Wash. Ct. App. 1975). The *Tucker* court indicated: "We believe that [the Washington Supreme Court] would specifically overrule the unfortunate language . . . if the issue was again before the court." *Id.* at 456, 542 P.2d at 791.

By the mid-1950's, however, *Ward*-type decisions barring interracial adoption became increasingly suspect. Many cases relevant to interracial adoption concern the use of race in custody, as opposed to adoption, proceedings. *See generally* Annot., 57 A.L.R.2d 678 (1958). In the absence of contrary statutory or case law, the courts traditionally frowned upon the mixing of races. *See In re* R.M.G. and E.M.G., 454 A.2d at 78 n.25 (D.C. App. 1982) (citing Grossman, *A Child of a Different Color: Race as Factor in Adoption and Custody Proceedings*, 17 BUFFALO L. REV. 303, 309-10 (1968); Note, *Adoption in Iowa*, 40 IOWA L. REV. 228, 234-35 & n.32 (1955); Note, *supra* note 5, at 341 n.43).

11. 228 F.2d 446 (D.C. Cir. 1955). *See also* Grossman, *supra* note 10, at 310.

"best interest,"[12] the court held that race, although relevant, could not be determinative of the action.[13]

Although jurisdictions have followed, nearly unanimously, the relevant-but-not-decisive *Minor* standard,[14] courts have found the standard imprecise. This has made application of the standard difficult and has often resulted in inconsistent interpretations.

In *In re Baker*,[15] an Ohio trial court denied the petition of a Caucasian husband and his Oriental wife seeking the adoption of an illegitimate child of English and Puerto Rican heritage. Claiming "[t]he good Lord created five races . . . [and] never intended that the races should be mixed," the trial judge denied the petition.[16] Granting the petition for adoption on appeal, the *Baker* court posited that a child should be placed in a family of similar racial, religious, and cultural backgrounds, but interracial adoptions were not precluded.[17]

New York courts have applied the *Minor* standard in various ways. In *Rockefeller v. Nickerson*,[18] the New York Supreme Court denied a white couple's petition to adopt a black child. The petitioners sought an order to compel acceptance of their adoption petition after the welfare commissioner had refused it. Despite the petitioners' allegation that the petition was denied because of an unwritten policy "not to accept white foster parents for a Negro child,"[19] the *Rockefeller* court declared the evidence insufficient to prove that this was the department's policy.[20] By finding the denial of the petition within the exercise of the Welfare Department's discretion, the court avoided deciding whether an adoption may be refused

12. D.C. CODE ANN. § 16:203 (1951) (repealed after suit filed, but substantially reenacted; *see* D.C. CODE ANN. § 16:307(b) (1981 & Supp. 1982)).

13. *Minor*, 228 F.2d at 447-48. Some courts have held that race may not be a relevant factor in a custody or adoption proceeding. *See* Beazley v. Davis, 92 Nev. 81, 83, 545 P.2d 206, 208 (1976) (per curiam) (racial considerations in custody proceedings ruled "impermissible discrimination" violative of the fourteenth amendment); Commonwealth *ex rel* Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243 (1973) (problems related to racial identity are inapplicable in custody proceedings); *cf.* Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978) (presumption based upon sex of parent has no place in custody proceedings).

14. *See* Note, *supra* note 5, at 344.

15. 117 Ohio App. 26, 185 N.E.2d 51 (1962).

16. *See* C. LARSON, MARRIAGE ACROSS THE COLOR LINE 67 (1965) (quoting trial court record).

17. *Baker*, 117 Ohio App. at 28, 185 N.E.2d at 53.

18. 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962).

19. *Rockefeller*, 36 Misc. 2d at 870, 233 N.Y.S.2d at 315.

20. *Id.* Indeed, the court found that "the evidence establishe[d] that there [was] no departmental policy against interracial adoption." *Id.*

exclusively on a racial ground.[21]

New York cases decided after *Rockefeller* continued the development of the *Minor* relevant-but-not-determinative standard. Four years later, in *In re Bonez*,[22] the court faced endless requests for time extensions as the agency searched for families similar to the adoptive child's "coloring and cultural descent."[23] The deleterious effects of lengthy placement periods and the concomitant irreparable injury to the child prompted the court to remove the child to another agency that assured prompt placement.[24] In a further step, the court in *In re Bess P.*[25] declared that adoption agencies must provide services regardless of race or religion because racial and religious obstacles to equal services would continually deny adoptive children equal protection.[26]

Texas, Louisiana, Ohio, and the United States Court of Appeals for the Fifth Circuit have also applied the *Minor* relevant-but-not-determinative standard. In *In re Gomez*,[27] the Texas Appellate Court invalidated two Texas statutes prohibiting interracial adoption. Finding the statutes violative of the fourteenth amendment, the court granted a black stepfather's petition to adopt his wife's two illegitimate white children.[28] Similarly, in *Compos v. McKeithen*,[29] a Louisiana federal district court ruled the state's statute prohibiting interracial adoption unconstitutional. The Supreme Court of Ohio, in *State ex rel Portage County Welfare Dep't v. Summers*,[30] granted an interracial adoption after the welfare department had denied, partly on the basis of race, repeated petitions made by the foster parents over a period of three years. Placing heavy weight upon a "judicially approved home environment" and the need to avoid relegating the child to a parentless "life of transcience [sic]," the *Summers* court considered the child's best interests and allowed the interracial adoption.[31]

A major interracial adoption ruling after the *Minor* decision came from the United States Court of Appeals for the Fifth Circuit in *Drummond v.*

21. For an analysis of the *Rockefeller* decision, see Alexander, *Family Law, 1963 Survey of N.Y. Law*, 15 SYRACUSE L. REV. 369, 378 (1964).

22. 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Fam. Ct. 1966).

23. *Id.* at 1086-88, 272 N.Y.S.2d at 595.

24. *Id.* at 1089-90, 272 N.Y.S.2d at 596.

25. 52 Misc. 2d 528, 276 N.Y.S.2d 257 (Fam. Ct. 1966).

26. *Id.* at 533, 276 N.Y.S.2d at 262.

27. 424 S.W.2d 656 (Tex. Civ. App. 1967) (per curiam).

28. *Id.* at 659.

29. 341 F. Supp. 264 (E.D. La. 1972). The *Compos* court considered race a relevant-but-not-determinative factor. *Id.* at 266.

30. 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974).

31. *Id.* at 150, 311 N.E.2d at 13.

Fulton County Dep't of Family & Children's Services.[32] In *Drummond*, white foster parents, after caring for a nonwhite child for over two years, repeatedly sought agency consent for adoption. At trial, the couple alleged arbitrary agency action based upon the racial differences between the child and the couple.[33] The district court dismissed the case.[34] On appeal, however, the Fifth Circuit held that the petitioners and their foster child had proven protectable liberty interests under the due process clause of the fourteenth amendment.[35]

Following the Fifth Circuit's reversal of the district court, defendant petitioned successfully for a rehearing en banc.[36] The Fifth Circuit, en banc, reversed the initial appellate decision, and affirmed the district court's dismissal of the complaint.[37]

The *Drummond* court framed the issue as whether race may be a relevant, perhaps decisive, factor in adoption decisions. Although the "automatic" or sole use of race violated the Constitution, the court held that the use of race as one of the factors in making the adoption decision met constitutional guarantees.[38]

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32. 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978). Plaintiffs initially filed a federal claim, 408 F. Supp. 382 (N.D. Ga. 1976). The court denied plaintiffs' claim as they had failed to assert a prima facie case. *Id.* at 383. Following denial of their claim in federal court, the plaintiffs filed an appeal with the Fifth Circuit, and concurrently filed suit in the Superior Court of Fulton County, Georgia. Later, the Georgia Supreme Court held that plaintiffs lacked the requisite standing. Drummond v. Fulton County Dep't of Family and Children's Servs., 237 Ga. 449, 228 S.E.2d 839 (1976), *cert. denied*, 432 U.S. 905 (1977). For an analysis of the *Drummond* decision, see Comment, *The Interracial Adoption Implications of Drummond v. Fulton County Dep't of Family & Children's Servs.*, 17 J. FAM. L. 117 (1978-79).

33. *Drummond*, 408 F. Supp. 382, 383 (N.D. Ga. 1976).

34. *Id.* at 384.

35. *Drummond*, 547 F.2d 835, 857 (5th Cir. 1977).

36. *Drummond*, 563 F.2d 1200 (5th Cir. 1977) (en banc).

37. *Id.* at 1210-11.

38. *Id.* at 1205 (citing *In re* Minor, 228 F.2d 446, 448 (D.C. Cir. 1955); Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972)).

The *Drummond* court cited two recent Supreme Court cases suggesting that a racially disproportionate impact caused by government activity is insufficient, by itself, to sustain an equal protection claim founded upon allegations of racial discrimination. *Id.* In Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977), the Supreme Court held that "proof of racial discriminatory intent or purpose is required to show a violation of" fourteenth amendment rights. *Id.* at 265. United Jewish Org. v. Carey, 430 U.S. 144 (1977), held that where race is a nondiscriminatory consideration void of "slur or stigma," no fourteenth amendment violation occurs. *Id.* at 165. The Fifth Circuit then found that the state's placement process failed to constitute a "racial slur or stigma" since "[i]t is a natural thing for children to be raised by parents of their same ethnic background." 563 F.2d at 1205.

The application of *Arlington Heights* and *Carey*, however, appears questionable. Even where suspect classifications or basic rights are not at issue, the Supreme Court has held that a racial classification must be "reasonable, not arbitrary, and must rest upon some ground of

Notwithstanding other jurisdictions' cases, the District of Columbia last dealt with race as an adoption factor in *In re DeF.*[39] There, a mixed-race couple, seeking to adopt a child of mixed race, refused to indicate their racial or religious background on the adoption petition. They alleged that the statute "violates the equal protection clause of the fifth amendment."[40] Declining to address the constitutional issues, the District of Columbia Court of Appeals approved the adoption as if the petition had been amended with the statutorily required information.[41]

Therefore, prior to *R.M.G.*, the *Minor* relevant-but-not-decisive standard prevailed in reviewing interracial adoption petitions. Concern with the application of this standard arose from the need to tailor race precisely to the individual needs of the child. The three-prong test advanced by the *R.M.G.* court gives more structure to the *Minor* standard. This structure will facilitate judicial resolution of complicated interracial adoption decisions.

In *R.M.G.*, the adopted child was born to unwed, teenage black parents. In early January 1978, the child's mother decided to offer the child for adoption. Without the natural father's knowledge, the mother signed papers relinquishing parental rights.[42] Subsequently, the Department of Human Resources placed the child with white foster parents.

Three months after placement in the foster home, the foster parents filed

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difference having a fair and substantial relationship to . . . [its] object so that all persons similarly circumstanced shall be treated alike." Johnson v. Robison, 415 U.S. 361, 374-75 (1974) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). Indeed, racial classifications are inherently suspect, Bolling v. Sharpe, 347 U.S. 497, 499 (1954), and are unconstitutional unless the state demonstrates that such actions are necessary to promote a "compelling governmental interest." Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (quoting Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969)). It would appear that cases allowing racial classifications to "banish" racial discrimination, *Carey*, 430 U.S. at 156 (quoting South Carolina v. Katzenbach, 338 U.S. 301, 308 (1966)), to support "the attainment of a diverse student body," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978) or to remedy "disadvantages cast on minorities by past racial prejudice," are irrelevant. *Id.* at 325.

39. 307 A.2d 737 (D.C. 1973).

40. *Id.* at 738. For discussions of the relevance of religion and adoption decisions, see Annot., 48 A.L.R.3d 383 (1973 & Supp. 1982); Note, *Court Refuses Adoption for Disbelief in a Supreme Being—In re Adoption of E.*, 2 SETON HALL L. REV. 460 (1971); Comment, *A Reconsideration of the Religious Element In Adoption*, 56 CORNELL L. REV. 780 (1971); Note, *Religion as a Factor in Adoption, Guardianship, and Custody*, 54 COLUM. L. REV. 376 (1954).

41. *In re DeF.*, 307 A.2d at 739-40; *cf.* Pedersen v. Burton, 400 F. Supp. 960, 963 (D.D.C. 1975) (per curiam) (statute mandating marriage license applicants to identify their race held unconstitutional).

42. *R.M.G.*, 454 A.2d at 780. In Lehr v. Robertson, 103 S. Ct. 985 (1983), the Supreme Court held that the mere existence of a biological link does not merit an unwed father's due process right to have personal knowledge of an adoption proceeding. *See infra* note 67.

a petition for adoption. Upon notification, however, the child's natural father objected to the proposed adoption. The natural father's own mother and stepfather then filed a competing petition for adoption. The trial court granted the petition of the child's black grandparents. Considering all the relevant factors, the trial court found both families suitable to adopt the child, but concluded that the race factor "tipped the scales" in favor of the black grandparents.[43] The District of Columbia Court of Appeals reversed the trial court's judgment, and remanded the case for further proceedings.[44]

On appeal, the *R.M.G.* court considered whether the adoption statute, permitting the court to take race into account, withstood strict scrutiny and whether the application of race in the adoption proceeding was "precisely tailored" to the individual needs of the child.[45]

Holding the District of Columbia adoption statute constitutionally suspect because of the statutory racial classifications, the court of appeals subjected the adoption statute to "strict scrutiny."[46] The use of race in adoption, therefore, would have been invalid unless its use was necessary to promote a "compelling" or "overriding" state interest.

In evaluating the statute in light of a compelling state interest test, the court found no cases expressly declaring that a child's best interest was a compelling government interest.[47] The court concluded, however, that prior court decisions implicitly treated a child's best interest as one.[48] Reiterating the common tenet that statutes prohibiting interracial adoptions violated constitutional guarantees, the *R.M.G.* court ruled this statute con-

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43. *R.M.G.*, 454 A.2d at 792-93.

44. *Id.* at 794.

45. *Id.* at 786, 791.

46. *Id.* at 786. The Court has recognized that racial classifications meet constitutional requirements provided they advance a "compelling" or "overriding" governmental interest and that interest necessitates the specific use of race. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978); *In re* Griffiths, 413 U.S. 717, 721-22 (1973); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Graham v. Richardson, 403 U.S. 365, 375 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). Such racial classifications, moreover, can be necessary to serve a compelling state interest only when "precisely tailored" to achieve a legitimate purpose. *See* Plyler v. Doe, 102 S. Ct. 2382, 2395 (1982); *accord* Zablocki v. Redhail, 434 U.S. 374, 388 (1978); *Dunn*, 405 U.S. at 343.

The court rejected the intermediate standard of review, found usually in "benign" racial classifications like affirmative action cases because: (1) a Supreme Court majority finds the intermediate standard unacceptable; and (2) the court of appeals found the intermediate test inapplicable in the family law context. 454 A.2d at 786. The court posited that "particularly vivid examples of invidious discrimination" developed as a result of racial classifications in the family law context. *Id.*

47. *R.M.G.*, 454 A.2d at 786.

48. *Id.*

stitutional since race is only one of several factors considered in an adoption proceeding.[49]

Rejecting plaintiffs' equal protection claim that the Constitution prohibits race as a relevant issue, the court emphasized its relevance[50] noting that without considering race, those responsible for an adoption recommendation and decision would be unable to evaluate fully a child's best interests.[51] The adoption statute contained the presumptively invalid racial classification necessary to advance a compelling government interest[52] and the *R.M.G.* court concluded that it survived a strict scrutiny challenge.[53]

Although on its face the statute survived the constitutional challenge, its application to the individual parties did not. The court framed the issue as whether the racial classification, as applied, was precisely tailored to the child's best interests to survive strict scrutiny.[54]

In reviewing the trial court decision toward using the abuse of discretion

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49. *Id.* at 794. The court emphasized the caveat, however, that a court may not consider race as a factor either presumptively or automatically. *See also* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 at 272 (1979); *Compos*, 341 F. Supp. at 266; *cf. In re* Marriage of Kramer, 297 N.W.2d 359, 361 (Iowa 1980) (no assumptions automatically warranted by racial identity; race only a factor where there is "demonstrated relevancy").

The *R.M.G.* court also emphasized that the party seeking to sustain the racial classification, in this case the grandparents, had the burden of proving it survives strict scrutiny. This contrasts with ostensibly race-neutral statutes having a disproportionate adverse impact on a racial minority. The Constitution mandates that the party seeking invalidation of these statutes must prove a discriminatory purpose. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3275-76 (1982); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 240 (1976).

50. The court maintained that adoptees, regardless of any racial difference from their parents, often find it difficult to establish a sense of identity. Identity, the court indicated, consists of three elements: (1) a sense of "belonging" in a stable family and community; (2) a feeling of self-esteem and confidence; and (3) "survival skills" providing the child with the ability to cope with the world outside the family. *R.M.G.*, 454 A.2d at 787 (citing J. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES 284 (1977)). The court concluded: "[I]n a significant number of instances where prospects for adoption are evaluated, those who are responsible for a recommendation and decision . . . will not be able to focus adequately on an adoptive child's sense of identity, and thus on the child's best interests, without considering race." *R.M.G.*, 454 A.2d at at 787-88; *see also* R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION 81-85 (1977); L. GROW & D. SHAPIRO, TRANSRACIAL ADOPTION TODAY: VIEWS OF ADOPTIVE PARENTS AND SOCIAL WORKERS (1975); Silverman & Feigelman, *Some Factors Affecting the Adoption of Minority Children*, 58 SOC. CASEWORK 554 (1977).

51. *R.M.G.*, 454 A.2d at 787-88.

52. *Id.* at 788. The court also maintained that no "racial slur" was suggested by the District of Columbia's criterion. *Id.* (citing United Jewish Org. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion) and *Drummond*, 563 F.2d at 1205)).

53. *Id.* at 788.

54. *Id.*

standard,[55] the court found the lower court decision within its "range of permissible alternatives." The major concern with the lower court decision, however, arose regarding the ambiguous analysis substantiating the decision.[56]

Maintaining that detailed, written findings and conclusions by the trial court must be available to assure effective review,[57] the court of appeals found the trial court's findings inadequate.[58] To ensure that proper analytical steps are taken and relevant racial questions are asked, the *R.M.G.* court established a three-prong evaluation whether race affects an adoption contest: (1) what effect each family's race will have upon the child's development of a sense of identity, including racial identity;[59] (2) how the families compare in this regard;[60] and (3) how significant the racial differences between the families are in light of all of the other adoption factors.[61]

Applying these questions to assure a precisely tailored use of race as a

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55. As there was no prior demonstrable pattern or practice, the court framed the abuse of discretion standard in this manner:

> [W]e check to be sure that the trial court has exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor. . . . We then evaluate whether the decision is supported by 'substantial' reasoning . . . 'drawn from a firm factual foundation' in the record.

Id. at 790 (quoting Johnson v. United States, 398 A.2d 354, 364 (D.C. 1979)). Realizing that the trial circumstances may not allow "much elaboration in support of a discretionary ruling," the appellate court may "infer the reasoning upon which the trial court made its decision." *Id.* (quoting Johnson v. United States, 398 A.2d at 365).

56. *R.M.G.*, 454 A.2d at 791. Ambiguous trial court reasoning frustrates the appellate review of the decision. Such ambiguity may force the appellate court to infer trial court reasoning. This practice, the court maintained, would "invite appellate court creation, and approval, of a racial analysis that may—or may not—have taken place." *Id.*

57. *Id.* at 791.

58. *Id.* at 794.

59. *Id.* at 791. The court must evaluate the possible effects of each family's race and racial attitudes upon the child's sense of family and community belonging, confidence, self-esteem and ability to cope with extrafamilial problems. *Id.* at 791-92. Such relevant questions, according to the court, may be:

> To what extent would the family expose the child to others of her own race through the immediate family? Through family friendships? Through the neighborhood? Through school? What other efforts will the family most likely make to foster the child's sense of identity—including racial and cultural identity—and self-esteem? To what extent has the family associated itself with efforts to enhance respect for the child's race and culture? To what extent has the family reflected any prejudice against the race of the child it proposes to adopt?

Id. at 792.

60. The court posited that the second prong favored prospective parents of the same race but that prospective parents of a different race may also receive positive rating. *Id.*

61. This prong offsets the advantages of prospective parents of the same race, since it brings in all other relevant factors. *Id.*

factor in adoption, the *R.M.G.* court concluded that the trial court did not articulate its analysis of the race factor in sufficient detail.[62] While correctly focusing on the development of the child's sense of identity, the lower court made no specific findings regarding the likely impact of race upon this particular black child under the circumstances. Second, the court failed to detail the comparative analysis required by prongs two and three.[63] The *R.M.G.* court found the lower court's reasoning and attention to detail inadequate, particularly since race determined the outcome. The appellate court reversed and remanded the case for further proceedings.[64]

Associate Judge Mack, viewing the majority's decision to reach the constitutional issue of equal protection unnecessary, concurred that the statute satisfied constitutional requirements.[65] Judge Mack recommended reversal because the trial court employed race as an impermissible presumption.[66] Judge Mack also criticized the other judges for "quibbling" over constitutional issues while a young child's status remained in limbo.[67]

62. *Id.* at 794. The appeals court recognized that the trial court's "conscientious and thorough" decision properly treated race as but one of several relevant considerations. After a three-day hearing of witnesses and expert testimony, the trial court found both families equally stable and loving toward the child. The differences occurred where the court found the grandparents preferable with respect to paternal relationship, but the white foster parents were preferable with respect to financial resources. The trial court determined that another family structural change in the child's life could predictably cause some injury and concluded that the grandparents' claim finished somewhat less than or at best equal to the foster parents' claim. *Id.* at 793 n.40.

Although race, therefore, became the trial court's determinative factor, the appeals court declared that the tipping of a decision in the grandparents' favor by the race factor does not, in itself suggest a discriminatory result. *Id.; see also Drummond*, 563 F.2d at 1205.

63. *R.M.G.*, 454 A.2d at 791, 794.

64. *Id.* at 794.

65. *Id.* Judge Mack contended that although the District of Columbia adoption statute mentions race and religion as factors, the court need not give consideration to these factors. *See In re* DeF, 307 A.2d 737 (D.C. 1973) (court avoided constitutional issue); *see* text accompanying notes 37-39.

66. Judge Mack analogized the case to Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978) (en banc), where the District of Columbia Court of Appeals held a presumption based upon a parent's gender irrelevant in custody proceedings. According to the concurring opinion, a presumption is "nothing more than a guess based upon probabilities . . . ." *R.M.G.*, 454 A.2d at 795 (Mack, J., concurring) (citing *Bazemore*, 394 A.2d at 1382 n.7). Those "probabilities" were not conclusively established in the instant case. *R.M.G.*, 454 A.2d at 795 (Mack, J., concurring). Judge Mack thought that the lower court's ruling in favor of the grandparents, where all relevant factors except race were in equipoise, constituted an impermissible presumption. *Id.*

67. *Id.* at 795. Judge Mack emphasized that more consideration of "a family unit already in existence" must be made and the emphasis of race should be downgraded. *Id.* (citing Quillon v. Walcott, 434 U.S. 246, 255 (1978)).

The Supreme Court recently provided some insight into the significance of a psychological relationship. In Lehr v. Robertson, 103 S. Ct. 2985 (1983), the Court held that the puta-

Noting the need to address the specific interests of the individual child, Judge Mack concurred with the majority that the lower court's analysis failed to express precisely its findings.

In a well-articulated dissent, Chief Judge Newman disagreed with the majority finding that the trial court's consideration of race may have been "insubstantial."[68] Chief Judge Newman argued that the trial court properly considered race, that the appellate majority employed an improper standard of review, and that the application of the three-prong approach developed by the majority failed to justify reversal. The dissent first contested the majority's application of the law to the case facts.[69] Although the majority maintained that intraracial adoptions should not be regarded as generally preferable with respect to a child's identity and socialization, the dissent advanced the notion that the "*possibility* of an adverse effect . . . would suffice to permit the trial judge to tip the balance in the direction of the intraracial alternative . . . ."[70] While the hazards of interracial adoption must not be exaggerated, the dissent maintained, such hazards must not be ignored.[71]

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tive father never established a substantial relationship with his child, while the mother had a continuous custodial responsibility for the child. Therefore, the equal protection clause does not prevent a state from affording the two parents different legal rights. *Id.* at 2996.

Although *Lehr* deals with a natural father's right to personally know of his child's adoption proceeding, and not an interracial adoption proceeding, it does indicate that the Supreme Court will give some weight to a family unit already in existence.

68. *R.M.G.*, 454 A.2d at 796 (Newman, C.J., dissenting).

69. *Id.* at 796-97. According to the dissent, the majority assumed that the trial court had ignored the evidence regarding a healthy racial and cultural identity in considering the love and care offered by each family. *Id.* at 797 n.4.

70. *Id.* at 799 (emphasis added). The dissent later indicated certain potential hardships to the child that develop in interracial adoptions. First, a child may not perceive herself as black or develop an identity as a black person (citing J. LADNER, MIXED FAMILIES 104 (1977)). Second, the child may experience a "conflict of loyalties" as she grows older—caught between two cultures yet accepted by neither. Third, the black child may be unable to develop certain survival skills. "She will be identified as a black person and will inevitably experience racism. Blacks . . . develop survival skills by coping with such problems, which they can pass to their children expressly, or more importantly, by unconscious example." 454 A.2d at 802-03. Citing several additional authorities, the dissent contended that interracial parents are an inferior substitute to teach these lessons regarding survival skills. *Id.* (citing J. LADNER, *supra* at 115, 255; Chestang, *The Dilemma of Biracial Adoption*, 17 SOC. WORK 100, 102-04 (1972); R. SIMON & H. ALSTEIN, TRANSRACIAL ADOPTION 18 (1977) (a study where one-third of interracial parents did not make efforts to teach survival skills)). Fourth, the child and the adopting family may be subjected to greater racism as racist attitudes undoubtedly oppose interracial families. *Id.* at 803 (citing Jones, *On Transracial Adoption of Black Children*, 51 CHILD WELFARE 156, 163 (1972)). Finally, the interracial child may have a more difficult time coping with the fact that she is adopted if her or his status is evident to the world at large. *Id.* (citing B. JACKSON, FAMILY EXPERIENCES OF INTERRACIAL ADOPTION 13-14 (1976)).

71. *R.M.G.*, 454 A.2d at 799 (Newman, C.J., dissenting).

Concluding that the possibility of adverse effects from interracial adoption justified a trial court's decision to "tip the balance in the direction of the intraracial alternative," the dissent addressed whether the Constitution permitted the court to give weight to the adverse effects of interracial adoption.[72] Although the majority stated that the Supreme Court has rejected intermediate scrutiny for "benign" racial classifications, the dissent maintained that the standard should be intermediate rather than strict scrutiny.[73]

Nonetheless, the dissent agreed that the statute survived strict scrutiny because of the existence of a compelling state interest. Here the child's best interests necessitated the consideration of race,[74] and, as the dissent noted, it was only for this reason that the *R.M.G.* trial court considered race.

Finding race relevant, not only as to the particular family, but as to the outside world as well, the dissent viewed the majority's three-prong test as overly narrow. While the attitude and behavior of the parents and the environment must be considered, the dissent maintained that a difference in race between parent and child is of independent significance.[75] The

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72. *Id.*

73. *Id.* at 799-800. The dissent cited Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), for the proposition that at least four justices believe that racial classifications remedying past discriminatory effect must be subject to the intermediate rather than strict standard of review. *R.M.G.*, 454 A.2d at 800. *See also* Fullilove v. Klutznick, 448 U.S. 448, 517-19 (1980) (Marshall, Brennan, & Blackmun, J.J., concurring).

The court advanced the reasoning to hold the adoption statute as a benign use of racial classification. First, this particular use of the race factor does not presume that one race is inferior to another, nor does it place the court's rationale behind bigotry or separation. Second, although the race factor was not remedial in intent, seeking to improve the position of a particular racial group, it did protect the best interests of the child.

Chief Judge Newman distinguished the instant case from the majority's use of Loving v. Virginia, 388 U.S. 1 (1967). Where the *Loving* court recognized that the sole purpose and function of Virginia's antimiscegenation statute was to separate the races, the dissent maintained that the District of Columbia adoption statute did indeed have a compelling state interest: protection of the child's interest. Thus the "benign," rather than "invidious," status of the racial classification justified intermediate scrutiny. *R.M.G.*, 454 A.2d at 801.

Under the intermediate scrutiny approach, to justify an allegedly benign racial classification an "important and articulated purpose" must be shown to justify its use. *Bakke*, 438 U.S. at 361 (Brennan, J.). It must be an objective that serves an important governmental purpose to which the prescribed use of race is substantially related. In addition, the purpose must not stigmatize any group by reflecting a presumption that one race is inferior to another or by putting the weight of government behind racial hatred and separation. *Id.* at 357-58 (Brennan, J.).

74. *R.M.G.*, 454 A.2d at 801. *See, e.g., In re* Griffiths, 413 U.S. 717, 721-22 (1973). For the importance of the racial factor, see *supra* note 68.

75. *R.M.G.*, 454 A.2d at 804. According to the dissent, the majority's sole use of familial attitudes and concurrent environment may result in two paradoxical results. First, if the

dissent agreed with the majority's conclusion that "the court cannot properly weigh [the race factor], either automatically or presumptively." It may only do so if the majority intended that the courts must not be prejudicial.[76] If, however, the statement was intended to imply that the court cannot weigh evidence that intraracial, more than interracial, adoption may further a child's best interest, then the dissent could not agree.[77]

In view of the sociological evidence that documented unique concerns with interracial adoptions,[78] the dissent concluded that a "preference" for intraracial adoption may be entirely permissible.[79] Indeed, the dissent envisioned a further potentially paradoxical outcome. An exclusion of the dissent's intraracial "preference" may introduce a bias against the adoption of a black child by a black family.[80] Eliminating a legitimate consideration, the dissent concluded, is just as prejudicial as introducing an illegitimate one.

The dissent also disagreed with the majority's review procedure of discretionary trial court rulings. In *Johnson v. United States*,[81] the District of Columbia Court of Appeals drew a basic distinction between the ordinary degree of explanation required of a trial court and that expected of administrative agencies.[82] Although the majority cited *Johnson* for the contention that a court's consideration of review must be presumed to be limited only to the words contained in its order, the dissent disagreed, claiming *Johnson* never precluded record review to "flesh out" a court's reason-

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court need only address attitudes about race, without specific reference to the party's race in relation to the child, then strict scrutiny would be unnecessary. Second, an overly narrow view of the race factor would require attention to race's effect upon identity even where the parents' and the child's race are identical. *Id.* at 804. If attitudes and the extra-familial environment were to dominate, the dissent maintained, racial factors could not be overlooked in any adoption. *Id.*

76. *Id.* at 805. In accepting this interpetation, the dissent indicated: "If such language simply means that the court is not to rule out interracial adoption, inject a personal disapproval of interracial adoption, or give racial differences an undue weight as compared with other factors, it is unobjectionable." *Id.*

77. *Id.*

78. *See supra* note 70.

79. The dissent analogized a preference for intraracial adoption to a preference for a two parent family or for parents with adequate financial resources. 454 A.2d at 805.

80. *Id.*

81. 398 A.2d 354 (D.C. 1979).

82. Under D.C. CODE ANN. § 17-305 (1981 & Supp. 1983), agency review requires a rather detailed statement of findings and analysis. This more detailed analysis exists because agencies develop specialized expertise in narrow policy areas and the records kept are highly technical in nature and require detailed explanation. *See* Washington Pub. Interest Org. v. Public Serv. Comm'n, 393 A.2d 71 (D.C. 1978), *cert. denied sub nom.* Potomac Elec. Power Co. v. Public Serv. Comm'n, 444 U.S. 926 (1979). In contrast, trial courts need not make such lengthy expositions. *See Johnson*, 398 A.2d at 365.

ing.[83] The dissent found no authority substantiating the majority's ruling that the Constitution forbids courts from looking at the trial record to understand a lower court's reasoning.[84]

Finally, the dissent challenged the majority decision to reverse. While the majority conceded that the trial court applied the first prong,[85] the dissent contended that the trial court analysis considered the third prong.[86] Left with the second prong, that compares the effect of race on identity in each family, the dissent concluded that the lower court also satisfied this prong by inference.[87]

In re R.M.G.and E.M.G. supports the commonly held notion that racial factors may constitutionally be considered by the District of Columbia and the states in allowing or forbidding interracial adoption petitions. This case extends this principle, however, by establishing in more precise terms the degree to which courts may consider the race factor. By establishing the three-step process, the majority constructs a test that furthers the precise tailoring of race to the individual so as to comply with constitutional parameters.

The *In re R.M.G.* test may have a broad effect upon future court decisions evaluating an interracial adoption's impact upon the family and child. Because the three prongs provide a "checklist" of criteria a court must consider, decisions may become more thorough and predictable. Moreover, the detail resulting from the test's application may ensure decisions tailored more closely to the individual child's best interests. The test provide a constitutionally sound basis from which courts may consider race in adoption proceedings.

Although many problems develop in raising children in an interracial

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83. *R.M.G.*, 454 A.2d at 807.

84. *Id.* at 807-08. The dissent claimed the cases cited in the majority opinion, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) and *Compos*, 341 F. Supp. 264 (E.D. La. 1972), stood for the tenet that a party seeking to uphold the constitutionality of state action must demonstrate, during subsequent judicial review, that the action met the appropriate level of scrutiny. *R.M.G.*, 454 A.2d at 808.

85. This prong evaluates how race might affect the child's identity development. *Id.* at 791-92.

86. This prong evaluates the significance of the families' race when viewed with all other relevant adoption factors. The dissent noted the trial court's conclusion that the race factor favored the grandparents while all other factors stood equal—thus meeting the third prong. *Id.*

87. Contending that the entire adoption process balances competing petitions in light of how the families' identity will be affected by race, the dissent deemed the second prong so fundamental that it was unnecessary for the court to expressly discuss it. The dissent did find, however, an "explicit statement . . . supplied by the court" allegedly evaluating this prong. *Id.* at 809.

environment, critical problems also prevail in fragmenting a psychological parent relationship.[88] The majority tempers this constitutional and practical disadvantage by striking a middle ground whereby race continues to be relevant but not presumptive or decisive. If the very goal of the adoption procedures hinges upon decisions in the child's best interests, the options must be considered in light of the individual's unique needs. The *In re R.M.G. and E.M.G.* decision attempts to do just that.

D. Michael Reilly

88. In Lucas v. Kreischer, the Pennsylvania Supreme Court reiterated the observations of Judge Hoffman: "in a multiracial society such as ours, racial prejudice and tension are inevitable. If . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such." 450 Pa. 352, 356, 299 A.2d 243, 246 (1973).