



# Same-Sex Adoptions

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## Summary

While the federal government plays a role in supporting adoption through grants and tax benefits, states have the primary responsibility in setting policy to govern child adoption. As such, states may restrict adoption based on a myriad of factors including sexual orientation and/or marital status. For example, while most states are silent on the issue of adoption by gay and/or lesbian individuals or same-sex couples, states such as Florida, Arkansas, and Mississippi have statutory provisions which prevent such individuals or couples from adopting. However, lower courts in Florida and Arkansas have found such bans unconstitutional on state equal protection grounds. While state courts have struck down such statutory provisions, the only federal court to address the issue reached a contrary result. In a matter of first impression, the United States Court of Appeals for the 11<sup>th</sup> Circuit found that Florida's ban does not violate equal protection or due process under the 14<sup>th</sup> Amendment of the U.S. Constitution.

This report summarizes state laws concerning non-relative adoption by homosexual individuals and couples. The report will be updated as developments warrant.

Consistent with other areas of family law, adoption statutes are promulgated by state legislatures in accordance with public policy considerations that often include providing for the best interests of the child, achieving finality in the placement of children and promoting stability in family relations. Thus, individual states have different statutes regarding non-relative adoption by homosexual individuals and couples.<sup>1</sup>

Most states currently permit an individual gay or lesbian adult to adopt a minor child subject, as in any adoption, to a finding by a judge, that adoption by that individual is in the child's best interest.<sup>2</sup> State statutes concerning the eligibility of homosexuals to adopt range from Florida's statutory prohibition<sup>3</sup> on homosexual individuals adopting to Mississippi's statute barring adoption by same-sex couples<sup>4</sup> to Utah's prohibition on cohabitating unmarried couples, heterosexual or homosexual, from adopting.<sup>5</sup> Many state statutes are silent on the issue, leaving the subject open to interpretation by courts.<sup>6</sup> For example, the Ohio Supreme Court permitted the adoption of a "special needs" child by a homosexual, stating that there is a need to review adoption applications on a case-by-case basis without exacting any clear-cut rules regarding homosexual applicants.<sup>7</sup> Similarly, a New Jersey court allowed a homosexual couple to adopt a special needs child whom they fostered for approximately two years.<sup>8</sup>

<sup>1</sup> The related issue of second-parent adoption is beyond the scope of this report. A second-parent adoption is a legal procedure which allows a same-sex co-parent to adopt his or her partner's child.

<sup>2</sup> Numerous factors converge and influence this standard, including the home environment, stability of the parents, the time a parent and child spend together, the quality of the relationship between parent and child, sexual conduct and criminal background of the parents, as well as other factors the court deems appropriate. See 2 Am. Jur. 2d Adoption § 137. Florida is currently the only state which prohibits homosexual individuals from adopting. Fla. Stat. Ann. 63.042.

<sup>3</sup> Fla. Stat. Ann. 63.042 (3). On January 28, 2004, the 11<sup>th</sup> Circuit Court of Appeals found that the statute does not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment. *Lofton v. Sec. of the Dept. of Children and Family Services*, 358 F.3d 804, 816 (11<sup>th</sup> Cir. 2004). However, on August 29, 2008, a state court found this statute facially invalid under the state's constitution. Specifically, the court held that the statutory ban violated constitutional provisions pertaining to adoption, prohibiting bills of attainder and separation of powers. *In re Adoption of John Doe*, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008). Similarly, a state appellate court found the ban violated the state's equal protection rights. The court found that there was no rational basis for categorically excluding a homosexual from adoption based solely on the individual's sexual orientation. *In re Adoption of X.X.G. and N.R.G.*, 2010 WL 3655782, No. 3D08-3044 (Fla. App. 3 Dist., Sept. 22, 2010).

<sup>4</sup> Miss Ann. Code § 93-17-3(5).

<sup>5</sup> Utah Stat. § 78B-6-117. The statute does not expressly prohibit adoption by single people, nor does it ban same-sex couples from adopting from private agencies. On November 4, 2008, voters in Arkansas approved a similar citizen-initiated statute prohibiting unmarried sexual partners (both opposite-sex and same-sex couples) from adopting or serving as foster parents. In a related issue, Oklahoma passed the Oklahoma Adoption Invalidation Law (OK. Stat. Tit. 10 § 7502-1.4(A)), which prohibits the state from acknowledging adoptions by same-sex couples from other jurisdictions. The 10<sup>th</sup> Circuit Court of Appeals affirmed a lower court's ruling that the law, by its refusal to recognize and give effect to a valid judgment from another court of competent jurisdiction, which established their status as parents of their respective children, violates the Full Faith and Credit Clause of the U.S. Constitution. *Finstuen v. Crutcher*, 496 F.3d 1139 (10<sup>th</sup> Cir. 2007).

<sup>6</sup> See, e.g., *In re Lace*, 516 N.W.2d 678, 686 (Wis. 1994) (barring adoption of mother's daughter by mother's female partner because statutory scheme "balances society's interest in promoting stable, legally recognized families with its interests in promoting the best interests of the children involved.") see also, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding that Massachusetts law did not preclude same-sex cohabitants from jointly adopting a child); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (holding Vermont law does not require the termination of a natural mother's parental rights if her children are adopted by a person to whom she is not married, if it is in the best interests of the children).

<sup>7</sup> *In re Adoption of Charles B.*, 552 N.E. 2d 884 (Ohio 1990). "Special needs" child refers to the fact that Charles B. suffered from leukemia, possible brain damage from fetal alcohol syndrome, a low I.Q., and a speech impediment. His natural family abused him and he lived in four different foster homes. These factors led the court to believe that Charles B. would be better off with his adoptive parent, a homosexual, instead of in an institution or moving from foster home (continued...)

On January 28, 2004, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit affirmed a lower court decision<sup>9</sup> upholding a Florida statute banning adoption by homosexual individuals. In *Lofton v. Sec. of the Dept. of Children and Family Services*,<sup>10</sup> the court found that a Florida statute denying homosexuals the right to adopt does not violate the constitutional guarantees of equal protection or due process under the 14<sup>th</sup> Amendment of the U.S. Constitution.<sup>11</sup> In addressing the plaintiffs' due process claim, the court emphasized that there is no fundamental right to adopt, nor a fundamental right to be adopted as adoption is a privilege created by statute and not by common law.<sup>12</sup> Thus, the court reasoned there can be no fundamental right to apply for adoption.<sup>13</sup> As such, the liberty interest biological parents enjoy in raising their children without state interference could not be extended to a foster parent or guardian based merely on the existence of strong emotional ties between the foster parent or guardian and the child.<sup>14</sup>

Moreover, the court rejected plaintiffs' argument that the Supreme Court's decision in *Lawrence v. Texas*,<sup>15</sup> identified an unarticulated fundamental right to private sexual intimacy. The court stated that it was "hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis."<sup>16</sup> The court noted the absence of "two primary features" of fundamental-rights analysis in the *Lawrence* decision.<sup>17</sup> First, the court stated that the *Lawrence* opinion contained "virtually no inquiry into the question of whether the petitioners' asserted right is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."<sup>18</sup> Second, the court noted that the *Lawrence* opinion "notably never provides the careful description of the asserted fundamental liberty interest" that is to accompany fundamental-rights analysis.<sup>19</sup>

Moreover, the court found that the holding of *Lawrence* did not control in the adoption context as *Lawrence* was limited to consenting adults and a criminal prohibition. The court reiterated that the relevant state action was not a criminal prohibition, but a grant of a statutory privilege. In

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to foster home. *Id.*

<sup>8</sup> See, Joyce F. Sims, "Homosexuals Battling the Barriers of Mainstream Adoption-And Winning," 23 T. Marshall L. Rev. 551, 581 (1998). Subsequently, the parties entered into an agreement in which gay and unmarried couples will be measured by the same adoption standards as married couples. Furthermore, no couple could be barred from adoption based on their sexual orientation or marital status.

<sup>9</sup> *Lofton v. Kearney*, 157 F.Supp.2d 1372 (S.D. Fla. 2001).

<sup>10</sup> 358 F.3d 804 (11<sup>th</sup> Cir. 2004). This marked the first time a federal appellate court addressed the constitutionality of banning adoption by homosexual individuals.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 809-811.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 539 U.S. 558 (2003) (holding that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct between adults). For a legal analysis of this decision, refer to CRS Report RL31681, *Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in Lawrence v. Texas*, by Jody Feder.

<sup>16</sup> *Lofton v. Sec. of the Dept. of Children and Family Services*, 358 F.3d 804, 816 (11<sup>th</sup> Cir. 2004).

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

addition the court stated that “the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition.”<sup>20</sup> Therefore, the court concluded that the *Lawrence* decision could not be extrapolated to create a right to adopt for homosexual persons.<sup>21</sup>

Addressing the equal protection argument, the court rejected the plaintiffs’ assertion that the court should apply strict scrutiny in analyzing the statute. The court noted that as Florida’s adoption statute burdens no fundamental right nor suspect class, the appropriate standard of review was rational basis. The court found that Florida has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children.<sup>22</sup> In addition, the court reasoned that the state has a legitimate interest in encouraging an optimal family structure by seeking to place adoptive children in homes that have both a mother and father.<sup>23</sup>

The court rejected appellants’ argument that the statute was not rationally related to this interest by noting that “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” Moreover, the court stated that neither the fact that a statutory classification may be overinclusive or underinclusive nor the fact that the generalization underlying the classification is subject to exception renders such a classification irrational, for purposes of equal protection.<sup>24</sup> Instead, the court stated that the question “is whether the Florida legislature could have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions.” The court found that there are plausible rational reasons for the disparate treatment of homosexuals under Florida adoption law.

Finally, the court noted that “any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law. The legislature is the proper forum for this debate, and we do not sit as a superlegislature ‘to award by judicial decree what was not achievable by political consensus.’”

On January 10, 2005, the United States Supreme Court, without comment, declined to hear the case.<sup>25</sup>

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<sup>20</sup> *Id.* at 817.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 818.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 819.

<sup>25</sup> 358 F.3d 804 (11<sup>th</sup> Cir. 2004), pet. for cert. denied 73 U.S.L.W. 3399.