

**ABSTRACTS for Papers to be Presented at the  
*LOFTON* Lesbigay Adoption Symposium  
Stetson University, Tampa, Florida**

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## **Adoption by Married Heterosexual Couples Preferred: Looking Back on the Utah Experience**

Scott H. Clark, Esq.

Five years ago, the Utah legislature adopted a finding that it is in the best interest of prospective adoptive children that they be adopted by persons living in marriage relationships recognized as valid and binding under Utah law. The effect of this finding was to disfavor adoptions by polygamous groups and by gay and lesbian partners. While not outlawing adoptions by single persons (and not outlawing adoptions by single gay or lesbian persons), Utah prohibited adoptions by persons “co-habiting” in sexual relationships with other persons to whom they are not legally married. This broad proscription extends to unmarried single persons in heterosexual relationships as well as in gay and lesbian partnerships. The legislature thus adopted a socially conservative standard that prospective adoptive parents should not then be “living as husband and wife” (e.g. involved in sexual relationships) without the benefit of marriage.

That such a standard would be enacted by Utah is hardly a surprise in view of other more onerous standards required by public and private adoption agencies but the prospect that such unmarried persons might be precluded set off a minor temblor nonetheless. In considering these changes, Utah’s lawmakers immediately recognized that the legalization of adoptions by unmarried persons would have ramifications beyond the gay and lesbian communities; Utah’s courts had already struggled to balance preferences for married couples with competing preferences in adoptive and foster care placements, primarily preferences for placements with “kin,” including polygamous fathers and wives. Even so, the struggle which ensued was framed by gay and lesbian activists as a civil rights campaign. Dire consequences were predicted if the marriage preference standards were enacted.

The history of child welfare in Utah since the enactment of this legislation has not borne out these dire predictions. Despite the relatively large number of children in Utah, the number of children in foster placement and adoptive placement caseloads has remained stable. The backlog in finding suitable adoptive placements has not ballooned notwithstanding the apparent shrinking of the pool of adoptive parents. (Indeed, there is some question of whether the “pool” of prospective adoptive parents shrank in any measurable degree whatsoever.) Whether or not the exclusion of unmarried adoptive parents (couples or groups) from the pool of prospective adoptive parents has reduced sexual contact between adults and children cannot be proven. Nonetheless, the extension of the same standards used to qualify foster parents as temporary care-givers to children to persons seeking to qualify as permanent care-providers has not been seriously questioned (outside of the political arena) since the enactment.

## **A Legislator's Analysis of the Regulation of Adoption by Adults Who Engage in Homosexual Relationships**

Chris Clem

Representative, Tennessee House of Representatives and Adoption Lawyer

Legislation need not address the issue of whether homosexuality is natural or merely a choice of action. Legislation can restrict adoption to those who actively engage in homosexual activity. Accordingly, those who claim to feel such tendencies but do not engage in such actions can qualify to adopt. This enables legislation to have a bright line test.

Adoption is a privilege, not a right. Adoption protects best interest of child and does not protect interest of the homosexual.

Limitations on homosexual adoption is not a discrimination issue or an equal protection issue. State adoption statutes routinely and frequently limit prospective parents who have financial problems, bankruptcies, too many previous marriages, educational problems, arrest records and poor living conditions. Such people may start their own private families without the help of government. But, such people do not have a right to adopt state children. Placing the child in the best home possible and setting priorities for those homes is the primary if not only interest a state need look too when placing a child up for adoption. This is not an issue of the rights of the adoptive parents. It is only an issue of what is best for the child. In which case, any rational basis that a state legislature deems appropriate is sufficient to restrict adoptions.

**Beyond the Courts and Into our Homes:  
Real and Fictional Gay and Lesbian Families and the Law**

Catherine Connolly

Director, Women's Studies Program & Professor of Sociology, University of Wyoming

In contrast to judicial opinion in successful cases that often characterizes gay and lesbian parents and families as analogous to heterosexual families and thus deserving of recognition, my previous research with 20 gay and lesbian parents who used the courts to obtain second parent adoptions indicated that they not only disagree with the heterosexual analogy but actively resisted it. This paper will expand what previous research through re-interviewing those individuals and couples about new family situations which may have required contact with the law and whether their experiences and perceptions have changed since the initial contact. In addition, because GLBT families and the quest for legal recognition and rights have been visible recently in the media, how G&L families and relationships are portrayed in popular culture, such as televisions *Queer as Folk*, and the comic strip *Dykes to Watch Out For* will also be explored.

## **LINKING ADOPTION AND MARRIAGE**

William C. Duncan

*Symposium on Lofton and the Future of Lesbian and Gay Adoption*

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It has been remarked that while jurisdictions in the United States have been willing to allow for adoption by same-sex couples while at the same time refusing to create legal status for same-sex couples, other Western countries have followed the opposite approach. However, many of the recent decisions on the definition of marriage have seen the allowance of same-sex adoption as relevant to the question of whether the state is required to redefine marriage as the union of any two persons. Often, this asserted relevance is as a means of rebutting the state's claim that its marriage policy promotes important state interests.

This presentation will review discussions of same-sex adoption in the cases weighing the definition of marriage. It will also critique the courts' arguments about the implications of adoption law and suggest an alternative understanding of the ramifications of adoption law for state marriage policy.

**Opening Another Exit for Children: Allowing Them to Walk Through the Foster Care Door into a Suitable Home**

Professor Cynthia Mabry

Professor of Law, Howard University School of Law

Tens of thousands of children are available for adoption in the United States and many of them are awaiting adoption in the State of Florida. The amount of children who are available for adoption far outnumbers the number of prospective parents who are willing to adopt them. Many of the children who either languish in the foster care system for years or age out of the system because no one ever adopts them are children of color or children with special needs. This presentation will focus on how allowing same sex couples or individuals whom are adjudged suitable to adopt a child would promote children's best interests. One phenomenal impact, for example, is that such adoptions would ensure that many more children of all races and cultures would be placed in permanent homes because the pool of prospective parents will be larger. Suitability criteria would be the same as for any other adoption. Such criteria would include child preference and a parental preference or statement that the parent is not opposed to a same sex adoption. Moreover, it has been established that same sex couples have been foster parents for decades without negative mental or physical impacts on the children whom they take into their care. It has been well-established that children do not have a right to be adopted. Indeed, adoption is an extraordinary privilege from which more children in Florida and others throughout the nation should benefit.

## **A Right to Adoption?: “De Facto Family” Privacy After *Lawrence***

David D. Meyer

University of Illinois College of Law

The Eleventh Circuit’s decision in *Lofton v. Secretary of the Department of Children and Family Services* upholding the constitutionality of Florida’s statutory ban on adoptions by homosexuals has attracted considerable public commentary. Understandably, much of the controversy has focused on whether the court’s validation of discrimination against gays and lesbians can be squared with constitutional guarantees of equality and sexual privacy, particularly given the Supreme Court’s decision in *Lawrence v. Texas*. Indeed, it was on these bases that Judge Barkett argued strenuously (though unsuccessfully) that the panel’s decision should be reheard *en banc*.

In this paper, I wish to focus on a different aspect of *Lofton*’s constitutional analysis: its rejection of the idea that the fundamental right of “family privacy” under the Constitution might extend to prospective adoptive families and others sometimes labeled “*de facto* families” under the law. The question is enormously important given the growing diversity in American family life and yet received essentially no attention in the extensive arguments exchanged on the petition for rehearing. Although the contending judges on the Eleventh Circuit fairly surveyed the possible relevance of the *Lawrence* decision for the plaintiff’s equal protection and sexual privacy claims, they neglected to address its potential significance for the family privacy claim. In my view, this was a substantial oversight. In conferring substantial constitutional protection on the intimate relationships of gay and lesbian couples, *Lawrence* provides the strongest support yet for the claim of a constitutional right of *de facto* family privacy. In rejecting the family privacy claim, *Lofton* reasoned that the Constitution’s respect for family privacy extends no farther than family arrangements securely anchored in “nature” or in law. *Lawrence*, however, suggests that constitutional protection has a broader scope and respects all durable emotional attachment that contemporary society regards as “family.” This would certainly encompass the plaintiff-families in *Lofton*, conferring on them heightened constitutional protection against state intervention intended to break up the family and, possibly, even to complete the normalization of their family through adoption.

## **Federal and State Benefits for Same-Sex Couples**

Janice Kay McClendon  
Stetson University School of Law

Professor McClendon provides an overview of state, county, municipal and private employer initiatives extending rights and benefits to same-sex couples and how those initiatives are negated in the area of federally-regulated employee benefit plans. She also analyzes recent federal and state court decisions challenging federal and state laws denying legal recognition to same-sex couples, and concludes that court decisions are unlikely to extend rights to same-sex couples in the area of federally-regulated employee benefit plans. Based on her findings, Professor McClendon recommends amending federal law to afford employee benefits and tax advantages to same-sex couples where their relationships are legally recognized under state same-sex civil marriage, civil union or domestic partnership laws.

## **Empirical Support for the Rational Basis for Legally Prohibiting Adoption by Homosexually-Behaving Individuals or Couples**

George A. Rekers, Ph.D.

Distinguished Professor of Neuropsychiatry & Behavioral Science Emeritus & Chairman, Faculty in Psychology, University of South Carolina School of Medicine

Considering the best interests of children, there are at least three empirically-supported reasons that laws prohibiting adoption by practicing homosexuals have a rational basis: [1] The inherent nature and structure of households with a homosexually-behaving adult uniquely endangers children by exposing them to a substantial level of harmful stresses associated with the impact of the significantly higher rates of psychological disorder, suicidal ideation, suicide attempt, suicide completion, conduct disorder, and substance abuse among homosexuals that are over and above usual stress levels in heterosexual homes. Further, because research indicates that homosexual behavior is widely disapproved by the majority of the U.S. population, school-aged children generally suffer stress and social disruption associated with their shame, embarrassment, fears that others will discover their family member's homosexuality. [2] Homosexual partner relationships are significantly and substantially less stable and more short-lived on the average compared to a marriage of a man and a woman. Homosexually-behaving adults inherently suffer significantly and substantially higher rates of partner relationship breakups, psychological disorder, suicidal ideation, suicidal attempt, completed suicide, conduct disorder, and substance abuse; therefore, as a group, households with a resident homosexually-behaving adult are substantially less capable of providing the best psychologically stable and secure home environments needed by children. [3] The inherent structure of households headed by homosexually-behaving adults deprives children of vitally needed positive contributions to child adjustment that are only present in heterosexual homes. Homosexual households lack a daily resident model of either a mother or a father, lack the unique contributions of either a mother or a father to childrearing, and lack a model of a husband/wife relationship. Empirical research indicates that the best child adjustment results from living with a married man and woman compared to all other family structures.

## **Evaluating the Quality of Research on Gay Male and Lesbian Parenting**

Walter R. Schumm, Ph.D.

Professor, School of Family Studies & Human Services, Kansas State University

The ability of gay parents to be successful parents has remained controversial. Research has been expected to help the professional world to resolve the controversies involved. However, a detailed review of the available research finds numerous flaws that continue to limit our ability to draw firm conclusions about the potential, from a macro-sociological perspective, of gay men and lesbians to parent young children as successfully as heterosexual men and women.

***Lofton and Lawrence***

Professor Mark Strasser

Trustees' Professor of Law, Capital University School of Law

*Lofton* is the kind of case that the *Lawrence* majority and concurrence should have been anxious to hear and reverse – it stands for exactly the kinds of positions that those striking the Texas law said could not be maintained. Perhaps the Court believed *Lofton* too controversial to address in the wake of *Lawrence*, although it is quite regrettable that Florida's and other states' children must suffer so that the Court can avoid its duty to assure that basic constitutional guarantees are respected. One can only hope that the Court will behave more responsibly when it confronts the next *Lofton*-case.

## **Trends on (Intercountry) Adoption by Gay and Lesbian Couples in Western Europe**

Paul Vlaardingerbroek

Professor of Law, Private Law Department, Tilburg University, The Netherlands,  
and President, International Society of Family Law

The Netherlands was one of the first countries that has accepted this possibility. In this paper I will deal with the developments in Western Europe in the field of (intercountry) adoption by homosexuals. Some countries have accepted the legal possibility to adopt a child by homosexual individuals and/or couples, although this does not mean that in all cases children can be adopted by lesbians and gay persons. For intercountry adoption there are several restrictions. The jurisprudence of the European Court on Human Rights with regard to adoption by homosexuals is (still?) rather restrictive.

In my paper I will deal with the question whether it is a human right to adopt or to be adopted and if adoption should be promoted in other countries as well. What are the positive and what the negative legal and social consequences of adoption by gay and lesbian couples? An overview of experiences after the enactment of gay and lesbian adoption in our legislations will be provided.

## **Narratives and Concerns About Promoting Gay Adoption**

Lynn D. Wardle

Professor of Law, J. Reuben Clark Law School, Brigham Young University

Because adoption by individuals involved in lesbian or gay homosexual relationships (herein “gay adoption”) is a relatively new phenomenon, there are not many reports from children who have been raised in that environment. It took nearly a full generation before the voice of children of no-fault divorce-on-demand was generally recognized, so it will probably be another decade or two before American society hears the voice of children of gay adoption. However, there are some early narratives that foretell the kinds of risk to children that responsible professionals and lawmakers concerned for the well-being of children ought not to ignore. These individual accounts give corroborative support to the extensive research that solidly indicates that children thrive best in a dual-gender home with a biological or adoptive mom and dad.

In addition to the individual narratives and research suggesting some the potential dangers to children as individuals, some serious institutional concerns about the potential deleterious impact of legalizing gay adoption upon the system and institution of adoption will be discussed. Several of these institutional concerns will be discussed.

Alternative methods of resolving the claim for adoption by gay and lesbian couples will be considered. There may be a compromise for an alternative status to gay adoption similar to some limited domestic partnerships, civil union, or reciprocal beneficiary laws provide an alternative to same-sex marriage.

Finally, this paper will raise concerns about the chilling effect of some of the legal, judicial, and public discourse finding that the historic position that homosexual couples or partners may not adopt children is “irrational.”

## **Adult Sexual Desire and the Best Interests of the Child**

Richard G. Wilkins and Trent Christensen

In *Lofton v. Secretary of The Department of Children and Family Services*, the United States Court of Appeals for the 11<sup>th</sup> Circuit sustained Florida's legislative decision to restrict adoption to heterosexual married couples or unmarried individuals not engaged in homosexual conduct. The court rejected claims by prospective homosexual parents that Florida had impermissibly intruded upon their "familial privacy rights," unconstitutionally burdened their "right to private sexual intimacy," and – by treating homosexual applicants for adoption differently than heterosexual applicants – transgressed the commands of the Equal Protection Clause. The court properly rejected these contentions.

All of plaintiffs' claims ultimately rest upon the submission that consensual private sexual intimacy establishes – as a matter of constitutional law – an entitlement to all legislative and social rights historically conferred on fathers, mothers and married couples. The recently discovered constitutional protection for the expression of adult sexual desire, however, does not sweep so broadly. While government may no longer criminally proscribe certain sexual practices between consenting adults, this right to be "left alone" does not mandate judicial bestowal of all social rights, benefits and status desired by sexual partners. The state's constitutional obligation not to intrude upon consensual adult sexual relationships, in short, does not impose *any* obligation to create parent/child relationships unrelated to those private intimacies.

Unlike the "right to procreate," which is neither created by government action nor subject to intrusive regulatory oversight, adoption is entirely a creature of state law. Through the adoption process, the state – acting *parens patriae* for children who have lost their natural parents – shoulders (as *Lofton* recognized) "the high duty of determining what adoptive home environments will best serve all aspects of the child's growth and development." Adult sexual desire does not control, nor can it supplant, the state's reasoned evaluation of (and preference for) family forms that, on balance, are most likely to further the best interests of an adoptive child.

## **Family Norms in Adoption Law: Safeguarding the Best Interests of the Adopted Child**

Camille S. Williams

Administrative Director, Marriage & family Law Research Grant  
J. Reuben Clark Law School, Brigham Young University

Biological parents are presumed to be fit custodians of their children, and have a natural right to the custody, care and control of their children. Only if there is family disruption, for example, divorce, or a substantiated report of neglect or abuse, will the state intervene in the privacy of the family. Once custody is “challenged” as it were by the incident or situation leading to state intervention will the best interests of the child test be applied.

In contrast, in adoption some incident such as the death or disability of parents, or the parents’ relinquishment of parental rights and duties, triggers the need for a custody decision, with the operative presumption, sometimes implicit, that it is in the best interests of the child to place him or her with a stable family most like the biological family from whence the child originated.

Adoptive placement preferences for married couples, with unmarried individuals as a secondary preference, have substituted for household structure and process that have been considered the norm for stable child rearing practices. Given the fact that there are significant differences in the structure and processes of married heterosexual couples in comparison to the structure and processes in same-sex couple households or polyamorous households, to have a married couple norm as a threshold screening apparatus, prior to a more specific analysis of parental fitness, is a rational, constitutional approach to providing stability for adoptive children.