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Utah Prefers Married Couples

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UTAH PREFERS MARRIED COUPLES

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As early as March 2000, Utahns identified the apparent contradiction between Florida's prohibition of adoptions by homosexuals[1] and its concurrent licensure of homosexuals as foster parents. Seeking to avoid the train wreck vividly exposed in the *Lofton v. Secretary of the Department of Children & Family Services*[2] controversy, Utah lawmakers enacted a statute and corresponding regulations, which provide that *legally married* couples are preferred as prospective adoptive parents.[3] Utah did not ban adoptions or foster parenting by single individuals, nor did it use sexual preference as a criterion for disqualification of prospective adoptive parents or prospective foster parents.[4] In Utah, non-*cohabiting* heterosexuals and homosexuals may qualify as both prospective adoptive parents and prospective foster parents.[5]

This unique statute, which has general application to all adoptions in the state, reads in pertinent part:

> (2) The court shall make a specific finding regarding the best interest of the child, taking into consideration information provided to the court pursuant to the requirements of this chapter relating to the health, safety, and welfare of the child and the moral climate of the potential adoptive placement.
>
> (3)(a) The Legislature specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a

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1. *See* FLA. STAT. § 63.042(2)-(3) (2005). I recognize that the use of the term "homosexual" carries, in popular parlance, a hint of bias. However, the term "lesbigay" (meaning lesbians, bisexuals, and gay men), while current, is not sufficiently well-established in the standard English lexicon. For purposes of this essay, the terms are synonymous.

2. 358 F.3d 804 (11th Cir. 2004), *reh'g denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

3. *See* UTAH CODE ANN. § 78-30-9(3)(a) (2005).

4. *See* § 78-30-9(3)(a)-(b).

5. *See* § 78-30-9.

> relationship that is not a legally valid and binding marriage under the laws of this state. Nothing in this section limits or prohibits the court's placement of a child with a single adult who is not cohabiting as defined in Subsection (3)(b).
>
> (b) For purposes of this section, "cohabiting" means residing with another person and being involved in a sexual relationship with that person. [6]

With respect to the adoption of children *in state custody*, applicable regulations are closely tied to standards for foster parents, as noted in the "Requirements for Adoptive Parents," as follows: "Prospective adoptive Parent(s) who apply to adopt a child in the custody of the Division,[7] including kin[,] . . . must meet all of the following requirements[,] . . . obtain a foster care license . . . or meet the same standards, or receive a written waiver from the Division of a standard . . . ."[8]

These standards are further clarified in the "Adoption Assessment" (e.g., pre-adoption home studies) guidelines governing, "*the requirements used to qualify adoptive parents or individuals and the criteria for adoption placement.*"[9] The "Adoption Assessment" provides that "[a]n adoption assessment must be consistent with the standards of the Child Welfare League of America . . . and must include . . . a declaration that applicants are not cohabiting in a relationship that is not a legal marriage and in compliance with Section 78-30-9(3)(a and b).[10]

Lest there be lingering confusion on the subject, the following definitions are also included in the regulations: "*Cohabiting means residing with another person and being involved in a sexual relationship. . . . Involved in a sexual relationship means any sexual activity and conduct between persons. . . . Residing means living in the same household on an uninterrupted or an intermittent basis.*"[11]

Utah's preference for married couples as licensed foster parents is reinforced in licensure requirements, as follows: "An individual or legally married couple age 21 and over may apply to be foster or proctor parents . . . . *The application shall require the applicant to list each member of the applicant's household.*"[12] Furthermore, "[l]icensure approval is not a

6. § 78-30-9(2)-(3)(a)(b).

7. UTAH ADMIN. CODE r. 512-41-3(A) (referring to the Division of Child & Family Services) (2005).

8. r. 512-41-3(A)(3).

9. r. 512-41-1(A) (emphasis added).

10. r. 512-41-4(A)(3).

11. UTAH ADMIN. CODE r. 512-41-2(A)(2)-(3), (5) (emphasis added).

12. r. 501-12-4(1) (emphasis added).

guarantee that a child will be placed in the home. Additional requirements for adoptive parents and adoptive assessments for children in State custody are included in R512-41(3)(4)."[13] In Utah, foster and proctor parents are required to be "emotionally stable and responsible persons over 21 years of age. Legally married couples and single individuals, may be foster or proctor parents."[14]

Gay and lesbian activists maintain that Utah's preference for *legally married* couples is a mere sophism, concealing public antipathy toward gays and lesbians, even though the law applies to heterosexuals as well as homosexuals.[15] It is true that the statute represents a qualitative judgment – a normative standard of the people of Utah – that foster parents and prospective adoptive parents should provide an exemplary "moral climate" for children in their care.[16] Former University of Chicago Law School Professor, jurist, and religious leader Dallin H. Oaks made the case for such legislative standards when he wrote:

> It is inevitable that the law will codify and teach moral values not shared by some portion of the society – usually a minority. Preservation of the public health, safety and morals is a traditional concern of legislation. This does not justify laws in furtherance of the special morality of a particular group, but it does justify legislation in support of standards of right and wrong of such sufficient general acceptance that they can qualify as "Collective Morality".[17]

The underlying belief that fathers and mothers model appropriate gender behavior ("masculine" and "feminine" behaviors) for their children, and that fathers' and mothers' contributions to the appropriate maturation and socialization of their children cannot be duplicated by same-sex parents, was one of the most strongly expressed reasons for the enactment of the *legally married* couples preference statute.[18] That theme was echoed

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13. r. 501-12-4(8)(g).

14. r. 501-12-6(1)(b).

15. *See generally* Holly Mullen, *Utah Bans Some Adoptions by Gay Couples; Law Covers State Fostered Children Only. Unmarried Straight Couples Affected, Too; Adoption Law Bans Some Placements with Gay Couples,* SALT LAKE TRIBUNE, Jan. 24, 1999, at A1 (comments of Shannon Minter, Staff Attorney, National Center for Lesbian Rights, San Francisco, Cal.). *See also* Letter of Marilyn Criddle, A.C.L.U. of Utah (Jan. 19, 1999) addressed to Utah Board of Child & Family Services included in the record of *Utah Children v. Utah State Board of Child & Family Services, et al.*

16. UTAH CODE ANN. § 78-30-9(2) (2005).

17. DALLIN H. OAKS, THE POPULAR MYTH OF VICTIMLESS CRIME (Commissioner's Lecture Series, Brigham Young University Press 1974).

18. *Why the Utah Legislature Should Enact H.B. 103 Before the Standing Committee of the Utah House of Representatives*, (2000) (Presentation of Lynn D. Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University).

in the halls of Utah's legislature and was the primary justification for the change when the Governor signed the bill into law.[19] Definitive, scientific analysis of the basis of that widely shared cultural assumption remains to be completed.[20] However, human societies do not need scientific studies to justify the continuation of long established cultural practices, and few cultural practices have histories as long as the "'traditional' family" identified by Governor Leavitt.[21]

While the preference for *legally married* couples is an expression of "Collective Morality," it has also proven to be a prescription for the betterment of child welfare. Utah adopted these standards in the context of an intense (and very public) examination of the child welfare system and methodologies designed to improve permanency and safety for children in foster care and in adoptive homes.[22] Utah lawmakers determined, and experience seems to indicate, that the limitation of intimate access to adoptive and foster children by sexually promiscuous adults (by preferring adoptions by *legally married* couples), be they heterosexual or homosexual, tends to produce permanency and safety for children, notwithstanding the recognition that not all *legally married* couples are sexually faithful to their marriage partners.[23]

At the time of the enactment of the statute, opponents listed a number of dire consequences for the public child welfare system. Their prognostications of doom have not been borne out. First of all, opponents threatened to sue the state because of the purported discriminatory application of the statute.[24] At the time, a lawsuit against the Utah Board of Child & Family Services (the agency which first enacted the policy limiting adoptions by unmarried persons), brought by the child advocacy group Utah Children, the American Civil Liberties Union, and three gay and lesbian activists,[25] was then pending. Soon after the legislative session

19. Lucinda Dillon, *Critics Jab Leavitt on Adoption Bill,* DESERET NEWS, Feb. 16, 2000, at B01 (quoting Utah Governor Mike Leavitt as stating, "[a] child in crisis is best served in a traditional family setting . . . [b]ecause the traditional family setting serves the child best," in response to reporter's inquiry of Leavitt's reasons for supporting legislation that would "codify a controversial state Division of Child and Family Services policy that restricts state-sponsored adoptions by same-sex couples and unmarried heterosexual couples.").

20. *But see* George A. Rekers, *Review of Research on Homosexual Parenting, Adoption, and Foster Parenting* 50 (2004) (unpublished monograph).

21. Dillon, *supra* note 19.

22. *See generally* Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*, 5 J. L. & FAM. STUD. 203 (2003) (providing background to the enactment of Utah's unique approach).

23. *Id.* at 207.

24. *Id.* at 209.

25. Utah Children v. Utah State Board of Child & Family Services, et al., Civ. 990910881

was adjourned, the pending lawsuit was voluntarily dismissed, and to date, no further legal challenge has been filed.[26]

Second, opponents claimed that children in state custody would not be placed for adoption or would languish in foster care because the policy would cause an unnecessary reduction in the number of prospective adoptive couples.[27] Contrary to this claim, however, the adoption of the statute and policy preferring *legally married* couples had no immediate effect upon the placement of children for adoption by the state because the policy reflected the long-standing practice of placing children in state custody with married couples, and no delays were anticipated in transitioning children from foster care to adoptive placements.[28] Representative Nora Stephens, the sponsor of the bill enacting the change, indicated that all children in the custody of the Utah Division of Child & Family Services who were eligible for adoption had been placed for adoption, none were placed with same-sex couples, and the exclusion of same-sex couples as prospective adoptive parents would not mean that any children would be left in foster care who would otherwise be adopted.[29]

These positive outcomes have continued notwithstanding the enactment of the statutory preference for *legally married* couples as adoptive parents. During 2004, the Utah Division of Child & Family Services placed a record number of children for adoption (more than 400), despite the fact that a record number of children came into state custody.[30] In 2001, 70.8% of such children were placed within twenty-four months of first entering foster care.[31] In 2002, the figure was 77.9%; in 2003, it was 75.9%; and in 2004, 74.9% were placed for adoption within twenty-four

(3d Dist. Ct. Salt Lake County, Utah filed Oct. 28, 1999) (dismissed as moot).

26. Clark, *supra* note 22, at 211-12.

27. *Id.* at 214.

28. *Id.*

29. *See generally* Lynn D. Wardle, Notes of Statement of Rep. Nora Stephens before Utah House of Representatives Committee, Feb. 17, 2000, (in 1999 Utah Division of Child & Family Services ("D.C.F.S.")) placed 383 children for adoption; 94% with married two-parent homes; 5% with single women; 1% with single men; in December 1999, 103 children in D.C.F.S. custody were eligible for adoption and all had been placed for adoption; in January-February 2000, 100 children were available for adoption and 175 families had applied to adopt children); Hearing of Utah House of Representatives Committee (Feb. 17, 2000); Mullen, *supra* note 15, at A1 (more than 93% of all children in D.C.F.S. custody placed for adoption in 1998 were placed with married couples); Marjorie Cortez, *Adoptive-Parent Pool Reduced – Ban Affects Same-Sex Couples, Unwed Pairs and Polygamists*, DESERET NEWS, Jan. 23, 1999, at A01.

30. *See* 2004 UTAH'S DIV. OF CHILD AND FAM. SERVICES ANN. REP. 7, *available at* http://www.dcfs.utah.gov/index.htm (last visited Feb. 21, 2006).

31. Richard Anderson, Executive Director, Utah Division of Child & Family Services, *Child Welfare Outcomes 2001-2004* (unpublished report, on file with author) [hereinafter Child Welfare Outcomes].

months of first coming into foster care.[32] Utah led the nation in these statistics all four years and, in 2004, the average length that children in Utah (whose permanency goal was adoption) spent in foster care was nineteen months.[33] Moreover, during the period 2002 through 2004, the median length of stay for children in "out-of-home-care" (including all forms of foster care placement and institutional care) remained steady: 10.9 months in 2002; 13.0 months in 2003; and 11.0 months in 2004.[34] By comparison, figures for Wisconsin in 2002 were the longest stays, at 35.8 months, while Colorado logged the shortest stays during 2002 – 9.6 months.[35] During this period, Utah experienced increasing numbers of children coming into state care, largely as a result of increasing substance abuse.[36] In 2004, the total number of children under eighteen in Utah was 742,927, and the number of children who came into state custody during 2004 reached 2,439.[37] Clearly, Utah is not isolated from the negative trend of increased substance abuse in U.S. society. Even so, the dire predictions that children in foster care and children whose permanency goals were adoptive placements were not negatively impacted by Utah's preference for adoptive placements with *legally married* couples.

One related claim that was made by opponents of the statutory preference for *legally married* couples was that "special needs" children in state care need the option to be placed in foster care with unmarried same-sex couples, and, if their permanent goals are adoptive placements, the option to be placed for adoption with same-sex couples.[38] The suggestion was that, without an expanded pool of same-sex couples as foster parents and as prospective adoptive parents, such children (primarily from minority ethnic groups) would be disproportionately impacted.[39] Utah's experience points to the contrary. For purposes of defining the classes of children (not limited to children in state custody) who are eligible for state-supported adoption assistance and post-adoptive placement subsidies (required under

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Interview with Richard Anderson, Executive Director, Utah Division of Child & Family Services (Oct. 26, 2005) [hereinafter Interview with Richard Anderson].

37. *Id.*

38. See the following letters included in the record of *Utah Children v. Utah State Board of Child & Family Services, et al.*: Letter from Gilbert A. Holmes, Texas Wesleyan University (June 28, 1999); Letter from Terry S. Kogan, Human Rights Campaign (June 28, 1999); Letter from Angela M. Kupenda, Mississippi College (June 29, 1999) [hereinafter Letters]. *But see* Dennis Romboy, *3 Gays Seeking to Join Suite on Adoption Rule,* DESERET NEWS, Dec. 1, 1999, at B1.

39. *See* Letters, *supra* note 38.

applicable federal law),[40] a "[c]hild who has a special need" is not *per se* a child of ethnic or racial minority groups.[41] The reason they are not classified as such is that the Utah Division of Child & Family Services has experienced only minor difficulties in the placement of such children (from ethnic or racial minority groups) in foster care or in adoptive placements.[42] Utah has invested substantial sums in the recruitment and training of foster parents, and in 1998, at the insistence of then Governor Michael Leavitt,[43] Utah's legislature authorized the Utah Division of Child & Family Services to contract with private foundations for the recruitment and training of foster parents.[44] As a result, the supply of trained foster parents has exceeded the demand, even with respect to the placement of children of ethnic and racial minorities in foster care.[45] Indeed, foster parents have complained because no children have been placed with them, notwithstanding their investment in training.[46] Furthermore, the majority of adoptive placements (other than kinship placements) are with foster parents.[47] Apparently, the supply of trained foster parents has resulted in a reliable supply of prospective adoptive couples.[48] Clearly, the claim that same-sex couples are desperately needed as foster parents and as adoptive parents is without basis in Utah's experience.

A third prediction of the opponents was that such a preference could not be administered without undue interference in the private lives of prospective adoptive couples, that is to say, adoptive caseworkers would be required to monitor the bedroom behaviors of their clients in order to prepare pre-placement home studies. At the author's request, Richard Anderson, who has served as Executive Director of the Utah Division of Child & Family Services since 2000, conducted an informal survey of his staff to identify problems experienced in the administration of the statutory preference for *legally married* couples as adoptive parents.[49] He indicated that all home studies must include the "declaration" identified in Utah Administrative Code, rule 512-41-4, to the effect that the couple is legally

40. UTAH CODE ANN. § 62A-4a-907(1)(a) (2005).
41. *See* § 62A-4a-902(2)(a)-(c); *see also* § 62A-4a-903 through § 62A-4a-906.
42. *See* Interview with Richard Anderson, *supra* note 36.
43. *Id.*
44. UTAH CODE ANN. § 62A-1-107.5.
45. *See* Interview with Richard Anderson, *supra* note 36.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

married under the laws of Utah, and that neither the husband nor the wife are "cohabiting" with any other person (as defined in the statute).[50]

Anecdotal evidence suggests that some *legally married* couples feel that caseworkers, in asking for the "declaration," are suggesting that the couple engages in extra-marital affairs. Typically, however, the couple's reluctance to provide the "declaration" is assuaged when it is explained that *all* adoptive couples must provide the "declaration" or otherwise be disqualified. Anderson indicated that the universal requirement of the "declaration" prevents polygamists and undocumented common-law couples (common law marriages between men and women that are recognized in Utah)[51] from qualifying as adoptive parents or as foster parents.[52] Additionally, Anderson indicated that on one occasion only, a case worker suggested that the agency overlook the apparent noncompliance (with the "cohabitation" prohibition) of a foster child's unmarried female kin as a prospective adoptive placement because of the established "familial" relationship between the woman and the child.[53] Ultimately, according to Anderson, the agency decided to faithfully implement the law, and the child was eventually placed with a *legally married* couple.[54] He further indicated that the placement of the child with the *legally married* couple was successful.[55] Anderson recalled another isolated occasion when two gay men sought training as foster parents, but indicated that they would seek to adopt a child *in California* when it was explained to them that they would not qualify as either foster parents or adoptive parents.[56] While these accounts are anecdotal at best, they provide an indication that few problems have arisen in the administration of the preference statute.

Another "administrative" consideration must also be addressed. In Utah, a substantial portion of children who come into state custody are ultimately reunited with their natural families or are placed with kin. In 2004, 358 children were reunited with their families and 305 were placed with kin.[57] Moreover, it must be noted that Utah uses voluntary relinquishments by natural parents in placing children in foster care.[58] The

50. *Id.*
51. UTAH CODE ANN. §§ 30-1-4.1, 30-1-4.5; *see also* Anderson, *supra* note 36.
52. *See* Interview with Richard Anderson, *supra* note 36.
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. *See* Child Welfare Outcomes, *supra* note 31.
58. *See* Interview with Richard Anderson, *supra* note 36.

initial permanency goal of most of these children is natural family reunification, when possible. As noted in George Rekers' *Review of Research on Homosexual Parenting, Adoption and Foster Parenting,*[59] temporary placement of children, whose permanency goal is reunification with their parents, with foster parents who are unmarried couples, would likely have a chilling effect on reunification with parents and voluntary relinquishments by natural parents.[60] Echoing the words of prominent former Utah Board of Child & Family Services member, Jim Anderson, M.S.W., spoken at the Board's public hearing on the (then proposed) policy change,[61] the licensure of unmarried couples as foster parents and the placement of children for adoption by unmarried couples (whether heterosexual or homosexual) is simply not the "best practice."[62]

The acid test of the validity of Utah's statutory preference for *legally married* couples as adoptive parents is whether or not the policy produces greater *permanence* (here read *safety* and *stability*) for adopted children, and whether the preference produces quantifiably superior outcomes in *education* and *social adjustment.*[63] Other *political* considerations sometimes raised in objection to the statutory preference, such as fairness

59. Rekers, *supra* note 20.

60. *See id.* at 45.

61. During the January 22, 1999 meeting of the Utah Board of Child & Family Services, James L. Anderson made the following comments, indicating that the placement of children with legally married persons reflected "best practice" of professional social workers:

> After spending thirty-five years working in the field of child welfare and providing direct care and clinical treatment to dependent children, I have developed the belief that children are America's most precious and important resource, and that as such, they have rights that must be honored, respected, protected, preserved and cherished. Children have a right to be raised in environments that assure their optimal protection, safety, security, nurture, parenting, relationship constancy and healthy human growth and development. In order to provide these developmental essentials, these environments must assure that a child's right to be raised with stability and permanency are met. With all of this kept carefully in mind, the question is naturally raised, "what is the optimal or best practice environment for the raising of children." It is my conviction that the supreme being created the nuclear family led by both a mature and responsible mother and father who are legally married to provide for the raising of his children, and that this has been, since the days of our founding fathers, and continues to be to this day, the optimal and best practice choice for a child's "upbringing." I have observed the steady and pervasive erosion of marriage and the family through the course of my career and have come to believe that children have a right to expect that society will protect, preserve and strengthen these traditional institutions for their sake. As public officials and direct care and service providers, I believe we have a solemn duty to see that children under our charge receive the absolute best care, rearing and service that can be provided in a best practice fashion, and not be sidetracked or distracted by a secondary self-serving adult interest.

James L. Anderson, Comments at Meeting of Utah Board of Child & Family Services (Jan. 22, 1999) (on file with author) [hereinafter Comments].

62. Comments, *supra* note 61.

63. *See generally* Clark, *supra* note 22.

and justice for unmarried couples, primarily focus upon the fulfillment of (admittedly important) goals of the couples as adoptive *parents*.[64] Because it is my view that the "best interest" of the affected *children* should be the overriding objective of this inquiry, and because Utah law (and the law of most other states) enshrines the "best interest" of children[65] as the touchstone of decision making in this area, I will not address these other considerations.

Unfortunately, advocates on all sides of this controversy have irreconcilable views and disparate interpretations of the limited research on these important issues. It is, therefore, with trepidation that I summarize information which tends to support the continuation of the preference for *legally married* couples as good public policy.

First, regarding safety and stability, Utah lawmakers received abundant testimony regarding patterns of incest and physical abuse of young girls, and patterns of abuse and expulsion of young boys by polygamist fathers.[66] While polygamist families appear to endure generation after generation, testimony of sufficient numbers of escapees from these secret societies before the lawmakers thoroughly discredited any lingering notions that life for children in such clans is benign. With respect to same-sex couples, Dr. Rekers notes that children in homes with homosexual adults are more likely to experience sexual molestation by homosexual adults than children parented by heterosexual adults, and children are likely to experience sexual contact with adults at earlier ages than children in homes parented by heterosexuals.[67] Homes headed by same-sex couples are more transitory than homes headed by married heterosexuals, and tend to experience disruption and dissolution at rates several times greater than homes headed by married heterosexuals. [68]

The second summary concerns positive outcomes in education. In the course of hearings preceding the adoption of the statutory preference for *legally married* couples as adoptive parents, testimony of educators and

64. *Id.* In disregarding "political" objections to the statutory preference for legally married couples, we should be careful not to politicize Utah's successes in improving child welfare. Utah's statutory preference for legally married couples has contributed to positive child welfare "outcomes," but it is a part of a wide ranging effort, including improved foster parent recruitment and training, improved training and support of child welfare workers, improved legal processes and improved financial support of children in out-of-home care. It is clear, however, that the preference for legally married persons has enhanced (and has in no way impaired) positive child welfare "outcomes."

65. *See* UTAH CODE ANN. §§ 78-3a-406(3), 78-30-1.

66. *See* Clark, *supra* note 22, at 219.

67. *See* Rekers, *supra* note 20, at 31.

68. *See id.* at 40-41.

anti-polygamist activists from "Tapestry of Polygamy" strongly suggested the existence of negative educational patterns among teens in polygamist clans, including early exits from schools by boys and girls to pursue subsistent level jobs, and a high rate of teenage pregnancies (fathered by older males in the clans).[69] Sotirios Sarantakos' study of Australian families found that children in homes headed by same-sex couples and children in homes headed by unmarried heterosexual couples did measurably poorer in language studies, math studies, and sports activities, when compared with children in homes headed by married heterosexual couples.[70] Only in the area of social studies did the performance of children in homes headed by same-sex couples match or exceed the performance of children in homes headed by married heterosexuals.[71]

Finally, in the area of positive outcomes in social adjustment, the pivotal moment for Utah legislators came when Heidi Morrison of Springville, Utah, testified in favor of the (then proposed) statutory preference, and identified herself as a reluctant exemplar of the pain and confusion of a child who grew up in a home headed by a same-sex couple.[72] Testifying about her sense of confusion, isolation, and shame, she called upon state senators to pass the bill precluding adoptions by couples like her mother and her mother's partner. Dr. Rekers also notes that children in homes headed by same-sex couples experience these same sentiments of isolation, shame, and confusion to a greater degree than children in homes headed by married heterosexuals.[73] Dr. Sarantakos notes that children in homes headed by married heterosexuals scored measurably better with respect to positive attitudes toward learning, support with homework, sociability, and confidence about sexual identity than did children in homes headed by unmarried heterosexuals and homes headed by same-sex couples.[74]

CONCLUSION

Utah avoided the problems highlighted by the *Lofton* case in a manner which, in retrospect, is somewhat unique. Its lawmakers chose to enact a statutory preference for the placement of children with prospective

69. *See* Clark, *supra* note 22, at 219 & n. 70.

70. Sotirios Sarantakos, Ph.D., *Children in Three Contexts: Family, Education, and Social Development,* 21 CHILDREN AUSTRALIA 23, 23-25 (1996).

71. *Id.*

72. Hilary Groutage, *Amendments to Adoption Bills Axed; Without Them, Unmarried Couples Not Allowed to Adopt,* SALT LAKE TRIB., Feb. 19, 2000, at A1.

73. Rekers, *supra* note 20, at 12, 23-27.

74. Sarantakos, *supra* note 70, at 25-27.

adoptive parents who are *legally married.* This preference does not exclude placements with single persons, provided that such persons are not "cohabiting" with other persons to whom they are not married. This preference greatly reduces the placement of children in the protective custody of the state in homes other than those headed by married couples. The preference bans the placement of children, whether or not in state custody, with unmarried "couples," whether heterosexual or homosexual, including "common law" relationships between heterosexuals and persons living in polygamous clans. The preference does not target prospective adoptive parents by sexual preference, however, and single, statutorily-defined "non-cohabiting" adults are permitted to adopt, even if heterosexuality is not their sexual preference.

The policy was adopted, in part, as a codification of the existing practices of the community and as an expression of Utah's "Collective Morality" with regard to marriage and families. Evidence adduced at the time that the statutory preference was established, and subsequent experience in the administration of the statute, support the continuation of the policy. Children in state custody, who are placed in foster care or who are placed for adoption, have not sustained any measurable harm as a result of the apparent restriction (albeit minor) with respect to the number of persons eligible to serve as foster parents or as prospective adoptive parents. Statistics chronicling the recent successes of Utah's child welfare agency, as well as clinical studies of children in foster care and in adoptive homes in other areas, support the conclusion that the statutory preference for *legally married* couples has produced and will continue to produce positive outcomes for children, including greater permanence, better educational outcomes, and better social and emotional adjustments.