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## OPENING ANOTHER EXIT FROM CHILD WELFARE FOR SPECIAL NEEDS CHILDREN – WHY SOME GAY MEN AND LESBIANS SHOULD HAVE THE PRIVILEGE TO ADOPT CHILDREN IN FLORIDA

CYNTHIA R. MABRY\*

Florida is one of a few states in the United States that has passed legislation that expressly forbids same-sex adoption by individuals and/or couples.<sup>1</sup> The Florida statute provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”<sup>2</sup> In several of the remaining forty-seven states and the District of Columbia, gay and lesbian single individuals and unmarried couples may and do adopt children.<sup>3</sup> Sometimes, they adopt special needs children. Special needs children are children who have psychological, emotional or physical disabilities, serious illnesses such as HIV disease or AIDS, prenatal drug or alcohol exposure, are older than four years old, are members of sibling groups, or are children of color. Because these children have one or more of these characteristics, it often is difficult to place them for adoption without a lengthy stay in foster care.<sup>4</sup>

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1. See, e.g., FLA. STAT. ANN. § 63.042 (c) (3) (West 2005); MISS. CODE ANN. § 93-17-3 (2) (2005); OKL. ST. ANN. tit.10 § 7502-1.4a; UTAH CODE ANN. § 78-30-1 (2005). Constitutional issues regarding whether same sex individuals and couples should adopt children focus on the prospective parent's rights. See generally Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421 (2005) (hereinafter Strasser). Because this article is child-centered the constitutional arguments are beyond the scope of this article.

2. FLA. STAT. ANN. § 63.042 (c) (3) (West 2005).

3. See, e.g., MD. FAM. L. § 5-345(b)(1) (2005 Supp.) (allowing any adult to petition a court); N.Y. DOM. REL. LAW § 110 (Mckinney 2004); *In re J.M.G.*, 632 A.2d 550, 553 (N.J. 1993) (acknowledging the Division of Youth and Family Services for the State of New Jersey's unwritten policy of supporting same-sex adoption).

4. Judith K. McKenzie, *Adoption of Children with Special Needs in the Future of Children*, at 62, 63 (1993); See also *Cox v. Department of Health and Rehab. Servs.*, 656 So. 2d 902, 902-03 (Fla. 1995) (describing special needs children as those that are hard to place); *In the Interest of Hart*, 806 A.2d 1179, 1182 n.1 (Del. 2001); LAURA BEAUVAIS – GODWIN AND RAYMOND GODWIN, *THE COMPLETE ADOPTION BOOK* 255 (2000) [hereinafter GODWIN AND GODWIN] (reporting that most of these children have more than one of these characteristics); Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L. Q. 347, 365-66 (1991) (hereinafter Evall); 42 U.S.C.A. § 673 (c) (2005) that similarly defines special needs children:

For purposes of this section, a child shall not be considered a child with special needs unless—

On September 30, 2001, 542,000 children were in the child welfare system in the United States.<sup>5</sup> Forty-seven percent (250,051) were between the ages of eleven and eighteen.<sup>6</sup> Thirty-eight percent (204,973) were African-American; one percent (3,649) were Asian; and seventeen percent (89,785) were Latino.<sup>7</sup> The mean length of time that children stayed in the child welfare system was thirty-three months.<sup>8</sup> The plan for forty-four percent (241,051) of the children was reunification; but for twenty-two percent (116,653), the plan was adoption.<sup>9</sup> Even without data on these children's physical and mental abilities, these figures vividly demonstrate that tens of thousands of them would be classified as special needs children because of their age and their ethnicity.

This article addresses the question of whether some gay and lesbian adults should be permitted to adopt any children in the State of Florida, especially children with special needs. Part I more clearly describes children with special needs. Part II discusses who may adopt special needs children. Part III briefly covers gay and lesbian adoption statistics. Part IV sets forth general and specific factors that may be used in determining whether a particular gay man or lesbian is suitable for adopting children in

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(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B)

that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

*See also* 42 U.S.C.A. § 5111 (2) and (5)(B) (2005) (describing special needs children).

5. United States Department of Health and Human Services, Administration for Children and Families, Adoption and Foster Care Analysis and Reporting System at 1, <http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm> [hereinafter *The AFCARS Report*]. *See also* Casey Family Programs, Child Welfare Fact Sheet [hereinafter *Casey*] (indicating that the number of children in foster care in 2003 was 523,000) (source on file with author).

6. *The AFCARS Report*, *supra* note 5, at 1.

7. *Id.* at 2.

8. *Id.* at 1 (reporting that the median number of months was nineteen months).

9. *Id.*

Florida. This section also enumerates and discusses reasons that are offered to support bans on same-sex adoption. Part V focuses on how well gays and lesbians have cared for children as licensed foster parents in Florida. Part VI takes a look at how times have changed so that society as a whole is more accepting of gay men and lesbians. Throughout the article, relevant parts of the *Lofton v. Secretary of the Department of Children and Family Services*<sup>10</sup> opinion are discussed. Finally, in Part VII, I conclude that the State of Florida's legislature should repeal section 63.042(c)(3) of the Florida adoption statutes and amend section 63.042(c)(2) to allow same-sex adoption. Because there are so many more children who are available for adoption than there are prospective parents who are willing to adopt them, this unjustifiable barrier to gay and lesbian adoption should be removed. As a result, with diligent case-by-case investigations of all applicants, more children, especially special needs children, will be placed in secure, loving and caring homes.

## I. CLASSIFYING SPECIAL NEEDS CHILDREN IN FLORIDA

Whether a child who is eligible for adoption will be classified as a child with special needs depends upon how the state legislature where that child is domiciled defines "special needs." In Florida, a child is considered a child with special needs when the child (a) has developed a significant emotional bond to foster parents, or, (b) the child probably will not be adopted because the child is eight years old or older; mentally, physically, or emotionally disabled; is African American or biracial; or a member of a sibling group.<sup>11</sup> Florida's current profile of children in its child welfare system includes 4,642 children.<sup>12</sup> Placements have been identified for all except 1,915 of those children.<sup>13</sup> In accordance with Florida's definition, many of these children are special needs children: 1,131 are African American, 95 are Latino, and 42 are biracial.<sup>14</sup> Many of them are older than eight years old;<sup>15</sup> 507 are fifteen or older.<sup>16</sup> Hundreds, exactly 742, are between the ages of eleven and fourteen.<sup>17</sup> The last group contains 440

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10. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 807 (11th Cir. 2004).

11. FLA. STAT. ANN. § 409.166 (2)(a) (West 2005).

12. The Florida Department of Children and Families, <http://www.dcf.state.fl.us/adoption/search/indexnew.asp> (last visited Jan. 14, 2006).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

children who are between the ages of six and ten.<sup>18</sup> Also, there are 376 sibling groups who are available for adoption.<sup>19</sup> The smallest sibling group has only two children while the largest group contains eight children.<sup>20</sup>

Because of their disabilities or their experiences prior to the child welfare system's intervention, many special needs children suffer behavioral problems. They may have difficulties bonding with others, including their adoptive parents. They may not want to be touched. They may have learning disabilities and poor communication skills. Some will be angry, withdrawn, and may seek negative attention.<sup>21</sup>

On a national basis, hundreds of thousands of children in the child welfare system would be classified as special needs children because they are over four years old and/or they are children of color. In 2003, for example, seventy-one percent of children who were in the system were over five years old.<sup>22</sup> Fifty-three percent of the children were boys.<sup>23</sup> Fifty-nine percent were African American, Latino, American Indian, Asian or Biracial.<sup>24</sup> The report does not indicate how many of the children were disabled.<sup>25</sup>

Two years earlier, of the 126,000 children who were available for adoption from child welfare on September 30, 2001, fifty-three percent (66,175) were male and forty-seven percent (59,825) were female.<sup>26</sup> Sixty-four percent (80,945) were between the ages of six and eighteen.<sup>27</sup> The mean number of months that they had been awaiting adoption while in continuous state care was forty-four months.<sup>28</sup> Forty-five percent (56,306) were African-American; twelve percent (15,253) were Latino and zero percent (484) were Asian.<sup>29</sup> Again, all of those children would be classified as special needs children because of their age and their ethnicity.

Only 50,000 of the 126,000 children who were awaiting adoption from the child welfare system were adopted in 2001.<sup>30</sup> Fifty-two percent

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18. *Id.*

19. *Id.*

20. *Id.*

21. Abstracts, 4 WHITTIER J. CHILD & FAM. ADVOC. 81, 84, 87 (2004).

22. The AFCARS Report, *supra* note 5.

23. *Id.*

24. *Id.*

25. Casey, *supra* note 5.

26. The AFCARS Report, *supra* note 5, at 4; National Adoption Information Clearinghouse (2004), [http://naic.acf.hhs.gov/pubs/s\\_adopted/index.cfm](http://naic.acf.hhs.gov/pubs/s_adopted/index.cfm) (noting that approximately 127,000 of all children were adopted in the United States).

27. The AFCARS Report, *supra* note 5, at 4.

28. *Id.*

29. *Id.* (noting that Latino children may be of any race).

30. *Id.* at 5.

(26,015) of the adopted children were between the ages of six and eighteen;<sup>31</sup> however only eighteen percent (9,256) of the adopted children were between the ages of eleven and eighteen.<sup>32</sup> With regard to race and ethnicity, the highest number of adoptees were White (19,139), followed by African American children (17,606), Latino children (8,033), and Asian children (260).<sup>33</sup>

## II. WHO MAY ADOPT SPECIAL NEEDS CHILDREN

In adoption proceedings, three questions must be answered after a child is adjudged eligible for adoption. The first question is whether the petitioner has complied with relevant adoption statutes. The second question is whether the petitioner is suitable for adopting a child under the applicable state statute. In the context of same-sex adoption in Florida, the more narrow question is whether a gay or lesbian applicant may adopt a child in Florida. The third question is whether the petitioner's adoption of a particular child would be in that child's best interest or, in the same-sex adoption context, whether the gay or lesbian petitioner's adoption of a particular child would be in that child's best interests.<sup>34</sup> This section addresses the first issue. The second issue is discussed in Part IV. Although it is an important part of the adoption process, the best interests analysis is not addressed in depth, because until the Florida legislature determines that gays and lesbians may adopt children in that state, the court will not reach a best interests analysis.

A national survey indicates that a large percentage of prospective parents would consider adopting a special needs child. Fifty-six percent of those polled said that they would adopt a child between the ages of six and twelve, while only 37% percent were willing to adopt a child who was thirteen or older.<sup>35</sup> While only 33% percent of the prospective parents were willing to adopt children with a severe disability, 83% percent would adopt a child with a "mild physical or mental disability."<sup>36</sup> Sixty-six percent would adopt a sibling group and 79% of women who were polled said that they would adopt an African American child.<sup>37</sup>

31. *Id.*

32. *Id.*

33. *Id.*

34. See *In re T.S.*, 7 Cal. Rptr. 3d 173, 177 (Cal. Ct. App. 2003) (citation omitted) (quoting *In re Scott M.*, 13 Cal. App. 4th 839 (Cal. Ct. App. 1993)).

35. Evan B. Donaldson Adoption Institute, *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care* 9 (March 2005) [hereinafter Donaldson].

36. *Id.*

37. *Id.* (reporting that ninety percent of the women were willing to adopt other non-white children).

Most adoptive parents who adopt special needs children and children from child welfare are married heterosexual couples, but there is undisputed evidence that single prospective parents also tend to adopt special needs children.<sup>38</sup> The children that single adults adopt are often older, children of color, and/or disabled children.<sup>39</sup> In 2001, single females and single males adopted thirty-two percent of children who were adopted. Single women adopted 14,975 children while single men adopted a smaller number of 1,110 children.<sup>40</sup> Of the 46,000 children who were adopted from public agencies in 1999, for example, some were seven years old, and some were teenagers. They were Latino and African American. Some of the adoptive parents were gay men and lesbians who adopted singly or as a couple.<sup>41</sup> Just thirty years ago, single adults were not allowed to adopt children.<sup>42</sup>

Despite these statistics, approximately 25,000 children will not be adopted before they reach the age of eighteen.<sup>43</sup> At eighteen, unless the person has special circumstances, such as an extended plan for child welfare, which is rare, he or she will age out of the system.<sup>44</sup> Some children will not be adopted because there are barriers to their adoption like the one that the Florida legislature passed in 1977 when it forbade gay and lesbian adoption.<sup>45</sup>

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38. The AFCARS Report, *supra* note 5, at 7 (indicating that sixty-seven percent of married couples adopted children from child welfare in 2001).

39. Child Welfare League of America, Single Adoptive Parents Fact Sheet, <http://www.cwla.org/programs/adoption/adoptionfactsheet2.htm> (last visited Feb. 20, 2006).

40. The AFCARS Report, *supra* note 5, at 7 (indicating that sixty-seven percent or 33,251 children were adopted by married couples and one percent or 664 were adopted by unmarried couples).

41. ADAM PERTMAN, ADOPTION NATION 158 (2000) (hereinafter PERTMAN) (estimating that 6-14 million children have been adopted by gays and lesbians); See Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 341-42 (2005) [hereinafter *Parentlessness*]; Child Welfare League of America, Children's Voice Article (January 2002), available at <http://www.cwla.org/articles/cv0201gayadopt.htm>, [hereinafter Children's Voice Article].

42. ERIC FERRERO ET AL., ACLU, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 41 (2005) [hereinafter FERRERO ET AL.].

43. *Id.* at 39.

44. *Id.* at 23, 39.

45. *Id.* at 1.

## A. WHO MAY ADOPT SPECIAL NEEDS CHILDREN IN FLORIDA

Adoption is not a right for gays, lesbians or any other prospective parent. It is a "statutory privilege."<sup>46</sup> Each state in the United States has enacted a statute that determines who may adopt children in that state. In making adoption decisions, state courts must strictly construe the statutory language because adoptions are governed by these statutes. If a statute does not permit certain individuals to adopt a child, those adoptions will not be recognized in that state and the court may not grant an unauthorized petitioner's application.

In Florida, under section 63.042(2), single adults, married persons jointly, and stepparents may adopt children.<sup>47</sup> However, section 63.042(3) specifically excludes gay men and lesbians from adopting children.<sup>48</sup> Therefore, regardless of how qualified the gay or lesbian petitioner is to be an adoptive parent, a Florida court may not approve that applicant's petition.

## B. SAME-SEX ADOPTION BY SINGLE ADULTS IN OTHER STATES

Courts and legislatures in several other states, including Ohio, have allowed same-sex adoptions.<sup>49</sup> In *Adoption of Charles B.*,<sup>50</sup> for example, Charles was an eight-year-old boy who had suffered from multiple mental and physical disabilities.<sup>51</sup> He had a low functioning I.Q.<sup>52</sup> He had leukemia.<sup>53</sup> He had a speech impediment.<sup>54</sup> His motor skills were deficient.<sup>55</sup> He may have suffered brain damage as a result of fetal alcohol syndrome.<sup>56</sup> He also was neglected and abused.<sup>57</sup>

When Charles was only three years old, his parents relinquished their parental rights to the Department of Human Services ("DHS").<sup>58</sup> Later, as

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46. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004); *Buckner*, 876 So. 2d at 1288; *See also V.J.L. v. R.E.D.*, 39 P.3d 1110, 1113 (Wis. 2002) (explaining how adoption is a "creature of statute").

47. FLA. STAT. ANN. § 63.042(2) (West 2005).

48. FLA. STAT. ANN. § 63.042(3) (West 2005).

49. *See generally In re Adoption of Charles B.*, 552 N.E. 2d 884 (Ohio 1990) (granting the adoption of an eight-year-old boy by a gay man).

50. *Id.*

51. *Id.* at 884.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*



a ward of the State of Ohio, Charles was placed in four different foster homes.<sup>59</sup> One year after his parents left Charles with DHS, Mr. B. began to counsel Charles.<sup>60</sup> Mr. B. was a psychological counselor who specialized in childhood and adolescent psychology.<sup>61</sup> He was well-educated.<sup>62</sup> At the graduate level, he studied family life education and human sexuality.<sup>63</sup> Later, Mr. B. obtained a master's degree in those subjects and completed a portion of his studies for obtaining a Ph.D. in psychology.<sup>64</sup> Mr. B. lived with his partner, Mr. K., who was a research scientist.<sup>65</sup>

Over time, Mr. B. developed a close relationship with Charles while he was counseling him.<sup>66</sup> Mr. B. obtained DHS's permission for Charles to spend several weekends with him and Mr. K. at their home.<sup>67</sup> Also, Charles celebrated one Thanksgiving holiday with Mr. B. and Mr. K.<sup>68</sup>

When Mr. B. petitioned to adopt Charles, DHS objected to the adoption.<sup>69</sup> DHS composed a permanency plan for Charles that described the type of family that it believed would be ideal for Charles.<sup>70</sup> The child-centered family DHS proposed would consist of two heterosexual parents with children who were older than Charles. One of the couple's children would be male. The mother and father would have experience in dealing with children who had behavioral disorders, learning disabilities, speech impediments, and medical disabilities. Several prospective families had been identified for Charles but not one of the prospective parents who met Charles had petitioned to adopt him.<sup>71</sup> Yet, DHS would not give its consent for Mr. B.'s adoption even though Mr. B. had successfully completed a home assessment and a pre-placement application.<sup>72</sup>

Charles' guardian ad litem ("GAL") supported Mr. B.'s application for adoption.<sup>73</sup> The GAL reported that Charles, who had developed a close relationship with Mr. B., wanted Mr. B. to adopt him.<sup>74</sup> Also, the GAL

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59. *Id.*

60. *Id.* at 885.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 886.

70. *Id.* at 887.

71. *Id.*

72. *Id.* at 885-87.

73. *Id.* at 887, 889.

74. *Id.* at 887.

noted that Mr. B.'s immediate family, which included female role models for Charles, would provide additional family support for Mr. B.<sup>75</sup> Thus, Charles' GAL informed the court that Mr. B. was qualified to adopt Charles and that he would be a good parent.<sup>76</sup>

In its analysis, the court examined section 3107.03(B) of the Ohio adoption statute, which provided that "an unmarried adult" may adopt a child.<sup>77</sup> Thus, the court ruled that Mr. B. was *statutorily* permitted to adopt a minor in Ohio.<sup>78</sup> In her dissenting opinion, Justice Resnick concurred that gays and lesbians were not barred from adopting children in Ohio.<sup>79</sup>

### C. SAME-SEX SECOND-PARENT ADOPTION IN OTHER STATES

Some gay and lesbian applicants seek to adopt children through second-parent adoption. A second-parent adoption is "an adoption by an unmarried cohabiting partner of a child's legal parent, not involving the termination of a legal parent's rights; esp., an adoption in which a lesbian, gay man or unmarried heterosexual person adopts his or her partner's biological or adoptive child."<sup>80</sup> Most of the children whom same-sex second-parents adopt are their partner's biological or adopted child, a family member's child, or a close friend's child. The latter two types of second-parent adoption typically occur when the child's natural parent dies or becomes unable to care for the child.<sup>81</sup>

In several states, including California, the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, and Vermont, courts have granted second-parent petitions for adoption by same-sex

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75. *Id.*

76. *Id.* at 887, 889.

77. *Id.* at 886; OHIO REV. CODE ANN. § 3107.03 (West 2006).

78. *Charles B.*, 552 N.E.2d at 886.

79. *See id.* at 890 (Resnick, J. dissenting) (finding that the court failed to determine whether there was a nexus between the prospective parent's homosexuality and the adoption that could adversely effect the child).

80. A HANDBOOK OF FAMILY TERMS 28 (Bryan A. Garner, ed. 2001) (hereinafter HANDBOOK) (indicating that the practice of second-parent adoption "is becoming more widely accepted"). *See also* Sharon S. v. Superior Ct. of San Diego Cty., 73 P.3d 554, 571 (Cal. 2003) (describing the different types of second-parent adoptions that involve heterosexual and same-sex adoptive parents).

81. National Gay and Lesbian Task Force, The Issues, <http://www.thetaskforce.org/theissues/issue.cfm?issueID=30> (last visited October 6, 2005) (discussing parenting and adoption issues for gay men and lesbians as individuals and as partners). *But see* Timothy J. Dailey, Ph.D., State of the States: Update on Homosexual Adoption in the U.S., for the Family Research Council, <http://www.frc.org/get.cfm?i=IS02D2&v=> (last visited Oct. 6, 2005) (finding that homosexual parenting is rare).

partners.<sup>82</sup> Three questions must be answered before a court may grant a second-parent's petition to adopt a child: 1) whether the applicable statute permits such adoptions; 2) whether the petitioner qualifies as a "parent" to the child; and 3) whether the petitioner's adoption would be in the child's best interests.<sup>83</sup> With regard to the statute under which such adoptions are permitted, usually the language is very broad and does not provide an express or implied prohibition of same-sex adoption. As discussed below, when the statute is silent on the permissibility of same-sex second-parent adoption, several courts have interpreted the statutory language in a way that would allow same-sex adoption.

As in single gay male or lesbian adoptions, the first question for same-sex second-parent adoption is whether the governing state statute allows such adoptions. In *In re Adoption of E.O.G.*, a lesbian couple sought to adopt two minor children in Pennsylvania.<sup>84</sup> Section 2312 of the Pennsylvania Adoption Act provided that "[a]ny individual may become an adopting parent."<sup>85</sup> The Common Pleas Court of York County determined that the broad language of the Pennsylvania adoption provision concerning who may adopt children did not preclude same-sex couples from adopting children.<sup>86</sup> Specifically, the court concluded that the "gender neutral" Adoption Act "does not disqualify a homosexual couple from adopting a child or children."<sup>87</sup>

In 1993, courts in three states – Massachusetts, New Jersey, and Vermont – similarly decided whether a same-sex second-parent's application for adoption should be granted under the statutes in those states. First, in *Adoption of Tammy*,<sup>88</sup> a Massachusetts court construed broad statutory language that allowed a "person of full age" to file a petition to adopt a child unless the applicant was the child's close relative.<sup>89</sup> The

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82. See, e.g., *Sharon S.*, 73 P.3d at 570, 571 n.2 (noting that this adoption process was "routine" in California and that twenty-one jurisdictions had adopted the concept); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). But see *In re Adoptions of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996) (requiring termination of the biological mother's parental rights); *In re Adoption of Luke, B.P., and A.E.*, 640 N.W.2d 374 (Neb. 2002); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (prohibiting second-parent adoption).

83. See generally *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001) (answering all three questions).

84. *In re Adoption of E.O.G.*, 28 Pa. D. & C.4th 262 (Pa. Common Pleas 1993).

85. *Id.* at 265, see 23 PA. CONS. STAT. § 2312 (2005).

86. *E.O.G.*, 28 Pa. D. & C.4th at 265. See also 23 PA. CONS. STAT. § 2312.

87. *E.O.G.*, 28 Pa. D. & C.4th at 265, 268.

88. 619 N.E.2d 315 (Mass. 1993).

89. *Id.* at 318.

court held that the statute did not preclude “joint adoption of a child by two unmarried cohabitants.”<sup>90</sup> Neither did the statute preclude adoption based on the applicant’s sexual orientation.<sup>91</sup> The court reasoned that

[a]lthough the singular “a person” is used, it is a legislatively mandated rule of statutory construction that “words importing the singular number may extend and be applied to several persons” unless the resulting construction is “inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute.”<sup>92</sup>

The court then analyzed the circumstances presented in the petition before it in light of the statutory language. It ruled that allowing the lesbian couple to jointly adopt the child was consistent with the state’s adoption goals.<sup>93</sup> The *Tammy* court reasoned:

In the context of adoption, where the legislative intent to promote the best interests of the child is evidenced throughout the governing statute, and the adoption of a child by two unmarried individuals accomplishes that goal, construing the term “person” as “persons” clearly enhances, rather than defeats, the purpose of the statute.<sup>94</sup>

Then, in *Adoption of B.L.V.B. & E.L.V.B.*,<sup>95</sup> the Vermont case, the court reviewed the statutory language regarding who could adopt children in Vermont and the legislative history of that statute.<sup>96</sup> The governing statute provided that “[a] person or husband and wife together” could adopt a child.<sup>97</sup> The court decided that the statute permitted a lesbian co-parent to adopt her partner’s sons.<sup>98</sup> The court’s rationale was that there was no language in the statute that excluded an unmarried partner from those who could adopt a child and it was “highly unlikely that the legislature contemplated the possibility of adoptions by same-sex partners, the scant legislative history [did] not indicate that such adoptions were considered.”<sup>99</sup> Therefore, the court granted the petition.<sup>100</sup>

90. *Id.*

91. *Id.* at 319 n.2.

92. *Id.* at 318-19 (citations omitted).

93. *Id.* at 319; *See also In re Adoption of B.L.V.B. and E.L.V.B.*, 628 A.2d at 1273 (finding that the state’s primary concern is to promote the welfare of children and not to limit the categories of persons entitled to adopt).

94. *Tammy*, 619 N.E. 2d at 319. *But see In re Angel Lace M.*, 516 N.W.2d at 683-84 (presuming that where the legislature enumerates exceptions to a statute, it intends to exclude other exceptions).

95. *B.L.V.B.*, 628 A.2d at 1271.

96. *See id.* at 1272-73.

97. *Id.* at 1272.

98. *Id.* at 1276. *But see VT. STAT. ANN. tit. 15A, § 1-102* (2005) (indicating the current statutory language).

99. *B.L.V.B.*, 628 A.2d at 1273.

100. *Id.* at 1276.

The third 1993 case was a New Jersey case with the same outcome. In *In re Adoption of a Child by J.M.G.*,<sup>101</sup> the broad New Jersey statute provided that “[a]ny person may institute an action for adoption.”<sup>102</sup> The court decided that statutory language should be liberally construed to promote the best interests of children in the State of New Jersey.<sup>103</sup>

In *In re Hart*,<sup>104</sup> a 2001 Delaware adoption case, the court wrote a comprehensive opinion addressing all three issues related to second-parent adoption. Peter and George were two special needs children who had been living with a gay couple, Hart and Shiri, for more than one year.<sup>105</sup> Peter was thought to have been autistic and epileptic, and had serious behavioral problems when he was placed with the couple.<sup>106</sup> Peter’s brother, George, tested positive for cocaine and was considered a high risk for contracting the AIDS virus when he was born.<sup>107</sup> George was placed with Hart and Shiri when he was released from the hospital.<sup>108</sup> After he cared for each boy for at least one year, Hart filed separate petitions to adopt them. The adoption decree for Peter was signed in June 1999, and the order of adoption for George was signed in April 2001.<sup>109</sup>

While Hart’s petitions were pending, Shiri filed separate petitions to adopt the boys as their stepparent.<sup>110</sup> The issue before the court was whether Shiri, a gay man who was in a twenty-year committed relationship with Hart, had standing to bring a petition to adopt Peter and George whom Hart already had adopted.<sup>111</sup> The court reviewed the statute, which provided in pertinent part that

[a]n unmarried person . . . being a resident of the State at the time of filing the petition or with whom a child has been placed for adoption . . . and being over 21 years of age, may petition the Family Court for an order authorizing the petitioner . . . to adopt a child not his, hers, or theirs.<sup>112</sup>

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101. 632 A.2d 550 (N.J. Ch. 1993).

102. *Id.* at 552-53 (adding that termination of the biological mother’s interest “would defeat the purpose of the adoption . . . and it would be antithetical to the child’s best interests”) (quoting N.J. STAT. ANN. § 9:3-43 (West 2005)). *Accord In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995).

103. *J.M.G.*, 632 A.2d at 552.

104. 806 A.2d 1179 (Del. Fam. Ct. 2001).

105. *Id.* at 1179-80.

106. *Id.* at 1180.

107. *Id.* at 1181.

108. *Id.*

109. *Id.* at 1180-81.

110. *Id.* at 1182.

111. *Id.* at 1184.

112. *Id.* at 1185 (quoting DEL. CODE ANN. tit. 13, § 903 (2001)).

The Delaware court ruled that Shiri did have standing to adopt the children.<sup>113</sup> The court reasoned that he was an unmarried resident of Delaware.<sup>114</sup> In addition, the statute did not prohibit second-parent adoptions. The statute included the plural form as well as the singular form of “unmarried person;” therefore, more than one person could be a child’s adoptive parent.<sup>115</sup> Furthermore, since section 932 of the Delaware Code provided that in the interest of accomplishing the state’s goal of establishing placements for the best interests of the child without undue delay, “all questions of interpretation shall be resolved with that objective in mind.”<sup>116</sup> The court’s rationale was that

[a]lthough the Delaware General Assembly may not have specifically contemplated adoption by a “second parent” when enacting the adoption laws of th[e] State, it is inconceivable to conclude, given the statutory mandate to read the statute in the best interest of children, that our Legislature would have meant to exclude loving and nurturing two parent homes as a resource for some of the states most needy children.<sup>117</sup>

The second question in second-parent adoptions is whether the applicant qualifies as a parent to the child whom he or she seeks to adopt. The court in *Hart* listed some of the criteria for examining a petitioner’s relationship with a child to ascertain whether the petitioner should be considered a parent. The petitioner will be a parent if he or she:

Has the support and consent of the parent who has fostered the formation and establishment of a parent-like relationship with the child.

Has assumed the obligations of parenthood by taking significant responsibility for the child’s care, education and development – including the child’s support, without the expectation of financial compensation.

Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship that is parental in nature.

Has helped to shape the child’s daily routine by addressing developmental needs, disciplining the child, providing for the child’s education and medical care and serving as a moral guide.

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113. *Hart*, 806 A.2d at 1185.

114. *Id.*

115. *Id.* at 1185 (citing DEL. CODE. ANN. tit. 1, § 304(a) (2001), which provided that for statutory interpretation purposes, “[w]ords used in singular number include the plural and the plural includes the singular”).

116. *Hart*, 806 A.2d at 1184.

117. *Id.* at 1185.

Has on a day to day basis, through interaction, companionship, interplay, and mutuality, fulfilled the child's needs for a psychological adult who helped fulfill the child's needs to be loved, valued, appreciated and received, as an essential person by the adult who cares for him.<sup>118</sup>

The *Hart* court concluded that under these criteria, Shiri was one of Peter's and George's parents and that they had known him as one of their parents from the time that they moved into the Hart/Shiri household.<sup>119</sup> Shiri had actively participated in parenting both children. On a daily basis, he fed them, kept them clean, and educated them.<sup>120</sup> The children called Shiri "Poppy."<sup>121</sup> In addition, Hart, who already had become their legal parent, strongly supported Shiri's application.<sup>122</sup>

Finally, in answer to the third inquiry, the *Hart* court considered eight criteria to determine whether Shiri's adoption of the boys would be in their best interests. These criteria included the child's and the child's parent's wishes, the child's interaction with other residents of the household and extended family members, the child's adjustment to the home, school and community environments, the prospective parent's mental health, their commitment to upholding their parenting rights and obligations, their history concerning domestic violence and their relationship.<sup>123</sup>

In accordance with the evidence presented on those factors, the court decided that Shiri's adoption was in the children's best interests.<sup>124</sup> When Hart brought the boys into their home, he fully intended to establish a family that included Shiri and the boys. The children had bonded with both men equally and Peter repeatedly had expressed fears about being removed from their home and placed with strangers. The couple's immediate and extended family members consisted of grandparents, siblings, and a cousin who had embraced the boys as members of the family and had spent time with them. Both children were thriving in Hart and Shiri's care. Both men were in good mental and physical health. Neither man had a history of child abuse or criminal convictions. They had been in a long-term committed relationship for twenty-two years.<sup>125</sup> Furthermore, both men were prepared to deal with some of the unique challenges that their same-

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118. *Id.* at 1187-88.

119. *Id.* at 1188.

120. *Id.* at 1187.

121. *Id.*

122. *Id.* *Accord* *Mariga v. Flint*, 822 N.E.2d 620, 626 (Ind. 2005) (finding that the lesbian partner "was significantly involved in the children's day-to-day lives").

123. *Hart*, 806 A.2d at 1188-90.

124. *Id.* at 1191.

125. *Id.* at 1182.

sex household would present. For example, they had become members of support networks for same-sex families, adoptive parents and parenting groups to learn how to solve any problems that arose.<sup>126</sup>

A central argument in favor of second-parent adoptions is that the child gains significant benefits when the biological or adoptive parent's partner is permitted to adopt the child. As a result of the second parent adoption, the child will be entitled to inherit from the partner's estate. The child will be eligible to recover social security benefits,<sup>127</sup> wrongful death benefits, and workers' compensation if the partner becomes injured, disabled, or dies. The child will be entitled to health insurance under the partner's insurance policy.<sup>128</sup> The partner will be obligated to support the child and the child will be entitled to visitation with the partner if the couple's relationship is dissolved or terminated.<sup>129</sup> Also, the child will have the security of knowing that she or he will remain in the partner's custody if the biological or adoptive parent becomes unable to care for the child or dies.<sup>130</sup> The *Hart* court ruled that allowing the second-parent adoption would serve the children's best interests because they would be entitled to these benefits.<sup>131</sup>

Often, an issue in second parent adoptions for heterosexual as well as same-sex couples is whether the partner who is already the child's biological or adoptive parent must terminate his or her parental rights before the prospective parent may adopt the child. The *Hart* court decided that the statute which provided that a child's "relationship to his birth parent who is married to the stepparent shall in no way be altered by reason of the adoption" was applicable to second-parent adoption.<sup>132</sup> Addressing the fact that Shiri did not fit the specific description in the statute because he was not married to the children's father, the court determined that its "analysis would be no different if Mr. Shiri were an unmarried male companion seeking to adopt the child of his female companion or *vice versa*."<sup>133</sup> "The notion that the analysis should be any different because

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126. *Id.* See also Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 DEVELOPMENTAL AND BEHAV. PEDIATRICS 224, 236 (2005) [hereinafter Tasker].

127. Social Security Act, 42 U.S.C.A. § 402(d)(1), 402(d)(1)(c)(3) (2005).

128. *In re Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993).

129. *Id.*

130. See generally *Tammy*, 619 N.E.2d at 320 (Mass. 1993) (discussing the child's rights); See generally *Hart*, 806 A.2d at 1179; Sharon S. v. Superior Court of San Diego Cty., 73 P.3d 554, 568-69 (Cal. 2003) (listing the benefits of second parent adoption for the child). See, e.g., N.Y. DOM. REL. LAW § 117 (McKinney 2004) (listing the child's rights upon adoption).

131. *Hart*, 806 A.2d at 1185-86.

132. *Id.* at 1186 (quoting DEL. CODE. ANN. tit. 13, § 919(b) (2001)).

133. *Hart*, 806 A.2d at 1186.



Mr. Shiri is gay would violate the statutory proscription to resolve all questions of interpretation in the best interest of the children and would produce an absurd and unacceptable social result.”<sup>134</sup>

By analogy, Florida’s current law expressly prohibits same-sex adoption. As previously noted, the applicable statute provides that no “homosexual” may adopt under the Florida adoption statute.<sup>135</sup> The language in the Florida statute is not ambiguous or vague. It is not silent on the question of whether a same-sex individual or couple may adopt a child. Therefore, under Florida adoption law, which Florida courts must apply, no gay man or lesbian may petition to adopt a child and no court may grant a petition.

In sum, as single persons and as couples, gay and lesbian applicants are interested in adopting special needs children. Suitable gay and lesbian applicants should be included among those who may be allowed to adopt children in Florida. In its Standards of Excellence for Adoption Services, The Child Welfare League of America took an all-inclusive position on who should be allowed to adopt children. Standard 4.7 provides that all applicants should be assessed on the basis of their abilities to successfully parent a child needing a family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing lifestyle, or sexual orientation.<sup>136</sup>

### III. GAY AND LESBIAN ADOPTION STATISTICS

A recent census report revealed that there are approximately 600,000 same-sex couples in the United States.<sup>137</sup> The actual number of gay and lesbian adoptions is unknown because some agencies do not record statistics about prospective parents’ sexual orientation and others do not request that information from prospective parents. Some agency representatives coach prospective parents on how to adopt a child without

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134. *Id.* Compare *In re R.B.F.*, 803 A.2d 1195, 1203 (Pa. 2002) (remanding the case to ascertain whether the statutory requirement for relinquishment when a non-parent seeks to adopt applied to same-sex couple).

135. FLA. STAT. ANN. § 63.042(3) (West 2005).

136. See Child Welfare League of America, The Child Welfare League of America’s Standards of Excellence for Adoption Services, (1998), available at [http://www.lethimstay.com/wrong\\_policy\\_positions.html](http://www.lethimstay.com/wrong_policy_positions.html) (last visited Mar. 21, 2006). Child Welfare League of America, Standards of Excellence for Adoption Services, ¶ 4.7 (2004) (providing that no foster parent should be rejected solely because of the foster parent’s sexual orientation).

137. See Genaro C. Armas, Census finds almost 600,000 households nationwide include same-sex couples, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2001/08/21/national0256EDT0452.DTL> (last visited Feb. 22, 2006).

disclosing their sexual orientation.<sup>138</sup> Also, some gay and lesbian prospective parents intentionally conceal their sexual orientation for fear that their opportunity to adopt a child will be denied.<sup>139</sup>

State, caseworker, and agency intolerance has forced applicants to conceal, misrepresent or leave out details about their sexual orientation so that they may adopt a child.<sup>140</sup> To illustrate, Stephen Lofton did not answer the question on the Florida application that requested information about his sexual orientation, and he did not identify his partner, Roger Croteau, as a member of his household.<sup>141</sup> Even though the actual number of gay and lesbian adoptions is unknown, it is estimated that thousands of gay men and lesbians become adoptive parents each year and millions of adopted children live with one or two same-sex parents.<sup>142</sup> A national study of gay and lesbian adoptive parents and their adopted children disclosed that several of the families included in the study were from Florida.<sup>143</sup>

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138. PERTMAN, *supra* note 41, at 163 (helping some applicants by “discreetly” suggesting ways to circumvent adoption regulations); See Molly Cooper, *What Makes a Family? Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 181 (2004) [hereinafter Cooper]; David K. Flaks, Ilda Ficher, Frank Masterpasqua and Gregory Joseph, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, Vol. 31 DEVELOPMENTAL PSYCH. 105, 105 (1995) [hereinafter Flaks, et al.] (estimating that 5 or 10 thousand lesbians have given birth and that hundreds more have adopted children); *Adoption Options for Same-Sex Couples*, FAM. ADVOC. 41, 42 (Spring 1997) [hereinafter *Options*] (quoting Madelyn Freundlich, former Director of the Evan B. Donaldson Adoption Institute). See also Scott D. Ryan and Scottye Cash, *Adoptive Families Headed By Gay or Lesbian Parents: A Threat . . . Or Hidden Resource*, 15 U. FLA. J.L. & PUB. POL’Y 443, 460 (2004) [hereinafter Ryan and Cash] (reporting that forty-three percent of the prospective parents studied were asked and eighty-five percent of those questioned revealed their sexual orientation).

139. FERRERO ET AL., *supra* note 42, at 3 (lying about their sexual orientation on the Florida application); Charlotte J. Patterson, *Lesbian and Gay Parenting*, <http://www.apa.org/pi/parent.html> (last visited October 16, 2005) [hereinafter Patterson] (making it difficult to ascertain how large the population of gay and lesbian parents is in the United States).

140. *Options*, *supra*, note 138, at 46 (concealing one’s sexual orientation).

141. *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 807-08 (11th Cir. 2004).

142. R. Bradley Sears, Gary Gates, and William B. Rubenstein, *Same-Sex Couples and Same-sex Couples Raising Children in the United States 10-12* (Sept. 2005), <http://www.law.ucla.edu/williamsproj/publications/USReport.pdf> (last visited Feb. 24, 2006) (finding that same-sex couples are raising 250,000 children and that many of them are adopted and of varied ethnic origin); National Gay and Lesbian Task Force, *The Issues*, <http://www.thetaskforce.org/theissues/issue.cfm> (last visited Oct. 6, 2005) (discussing parenting and adoption issues for gay men and lesbians as individuals and as partners); Flaks, et al., *supra* note 138, at 105 (indicating that it is difficult to obtain accurate numbers of how many lesbians are rearing children). But see Timothy J. Dailey, Ph.D., *State of the States: Update on Homosexual Adoption in the U.S.*, for the Family Research Council, <http://www.frc.org/get.cfm?i=IS02D2> (last visited Oct. 6, 2005) (finding that same-sex parenting is rare).

143. Ryan and Cash, *supra* note 138, at 464.

There is some evidence that single gay men and lesbians adopt special needs children from state child welfare systems.<sup>144</sup> Some adopt these children because they are more willing to accept special needs children than some prospective parents who seek to adopt healthy white infants.<sup>145</sup> In other jurisdictions, some gays and lesbians adopt special needs children because they are the only children available for gays and lesbians to adopt. Lisa Bennett, Deputy Director of the Human Rights Campaign, reported that many same-sex parents adopted their children from the child welfare program. "They are so interested in becoming parents that they are willing to take children others are not."<sup>146</sup>

The results of the first large-scale study of gays and lesbians and their adopted children were reported in 2004. That study revealed that ninety-five percent of the 183 subjects of the study had adopted children who would be considered special needs children.<sup>147</sup> The average age of the children was 7.24 years.<sup>148</sup> Most (61.5%) of the children were male.<sup>149</sup> Many had ethnic backgrounds: Arabic (17.4%), Native American (16.6%), African American (12.9%) and Latino (12.7%).<sup>150</sup> Twenty-one percent of the children had an identifiable special physical need.<sup>151</sup> Seventy-four percent had "special behavioral/emotional" needs.<sup>152</sup>

Forty-nine percent of gays and lesbians surveyed say that they want to adopt children.<sup>153</sup> Their ability to adopt may be hindered. Some barriers like the Florida legislation prevent them from adopting children. Also, birth mothers, many of whom are single, who have an opportunity to choose their biological child's adoptive parent tend to prefer two-parent heterosexual homes. In addition, some birth mothers will not choose a gay or lesbian adult because of his or her sexual orientation.<sup>154</sup>

144. GODWIN AND GODWIN, *supra* note 4, at 134.

145. *Id.*; Cooper, *supra* note 138, at 181; Evall, *supra* note 4, at 378.

146. Children's Voice Article, *supra* note 41, at 4 (quoting Michael Golberg, an adoptive same-sex parent, who cautions advocates not to create an impression that it is acceptable for "B-list parents adopting B-list children"). See also PERTMAN, *supra* note 41, at 164 (reserving the "youngest and healthiest" children for married couples); See also *In re Hart*, 806 A.2d 1179, 1180-82 (Del. Fam. Ct. 2001) (adopting children with cocaine in their systems at birth after they had been placed in their care as foster parents).

147. Ryan and Cash, *supra* note 138, at 456.

148. *Id.* at 461.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. FERRERO ET AL., *supra* note 42, at 14-15.

154. GODWIN AND GODWIN, *supra* note 4, at 134-35 (stating that private agencies and independent adoption assistants who promote homosexual adoptions also will be rare); *Options*,

Cases demonstrate that some unknown number of gay men and lesbians have adopted or attempted to adopt special needs children and their applications have been denied because of their sexual orientation. In 1995, in *Cox v. Department of Health and Rehabilitative Services*,<sup>155</sup> a gay applicant sought to adopt a special needs child but his application was denied because of his sexual orientation.<sup>156</sup> In *Lofton v. Secretary of the Department of Children and Family Services*,<sup>157</sup> not only was Stephen Lofton a foster parent, but he also parented three special needs children.<sup>158</sup> Each of the children was HIV positive at birth.<sup>159</sup> The fourth child Lofton sought to adopt tested positive for HIV and cocaine when he was born.<sup>160</sup> The boy was placed with Lofton shortly after his birth.<sup>161</sup>

Douglas E. Houghton, Jr., a clinical nurse specialist who joined Lofton as a plaintiff in the Florida lawsuit, had parented another child who would be classified as a special needs child. The child's biological father, who was an unemployed and homeless alcoholic, abandoned the child by leaving him with Houghton. The child was eleven years old when Houghton sought permission to adopt him.<sup>162</sup> The male child had been in Houghton's care since he was four years old.<sup>163</sup> Houghton's home assessment was "overwhelmingly favorable . . ."<sup>164</sup> Like Lofton, Houghton's application to adopt the child was denied solely because of his sexual orientation.<sup>165</sup>

In some states, gay and lesbian prospective parents may adopt children from a public agency.<sup>166</sup> Most of the children who are available for adoption through a public agency will be special needs children. One concern that has been raised about placing special needs children with same-sex adoptive parents is that these children "have usually lived chaotic lives filled with emotional pain. To place them in gay and lesbian homes

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*supra*, note 138, at 42; FERRERO ET AL., *supra* note 42, at 26 (quoting the Child Welfare League of America's Standards Regarding Sexual Orientation of Applicants).

155. 656 So. 2d 902 (Fla. 1995).

156. *Id.* at 903.

157. 358 F.3d 807 (11<sup>th</sup> Cir. 2004).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (noting that after eighteen months, the child tested negative for HIV).

162. FERRERO ET AL., *supra* note 42, at 1.

163. *Lofton*, 358 F.3d at 808. See also FERRERO ET AL., *supra* note 42, at 1-2.

164. FERRERO ET AL., *supra* note 42, at 2 (recounting how Houghton had cared for the child for three years before his father left him with Houghton).

165. *Lofton*, 358 F.3d at 808.

166. GODWIN AND GODWIN, *supra* note 4, at 135 (opining that same-sex parents should not be allowed to adopt children who have been sexually abused).

may mean more emotional challenges as they seek to integrate their adoptive home experience with their past.”<sup>167</sup> At least one renowned adoption specialist, Joan Hollinger, believes that gay and lesbian parents may be more sensitive to a special child’s needs. At a recent symposium, Hollinger said, “Often, people who themselves have had a difficult time being accepted [in childhood] or have faced criticism have special insight or empathy . . . [r]ather than excluding, one might consider that some people, because of their sexual orientation, may be better able to serve these children.”<sup>168</sup>

#### IV. SUITABILITY ANALYSIS FOR SAME-SEX ADOPTION

The second major question that must be answered in all adoption proceedings is whether the petitioner is suitable for adopting a particular child. In the process, the prospective parent’s home environment and other intimate details of his or her life are scrutinized closely. The *Lofton* court wrote that because adoption applicants are seeking “official recognition [and] . . . the highest level of constitutional insulation from subsequent state interference . . . [they] are electing to open their homes and their private lives to close scrutiny by the state.”<sup>169</sup> Surely, prospective parents would not object to “close scrutiny” of their homes and private lives as long as the same scrutiny is applied for all prospective parents. Here, however, the problem is not the type of investigation that is launched when a same-sex individual seeks to adopt a child. Rather, it is that in a state like Florida, when gays and lesbians check the box that indicates their sexual orientation, they may not get the opportunity to show that they are suitable parents or they may go through the entire laborious adoption process only to receive an agency’s negative recommendation.

As the *Lofton* Court ruled in Florida, the state’s paramount focus in adoption proceedings is the child’s best interest.<sup>170</sup> The court described the state’s pivotal role in this stage of the adoption process: “Florida, acting *parens patriae* for children who have lost their natural parents, bears the high duty of determining what adoptive home environments will best serve all aspects of the child’s growth and development.”<sup>171</sup>

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167. *Id.*

168. Children’s Voice Article, *supra* note 41, at 3 (quoting Hollinger).

169. *Lofton*, 358 F.3d at 810-11.

170. *Id.* at 810. *Accord* Buckner v. Family Servs. of Cent. Fla., Inc, 876 So. 2d 1285, 1289 (Fla. Dist. Ct. App. 2004).

171. *Lofton*, 358 F.3d at 810.

## A. General Factors for Consideration

In short, to answer the second question, courts and agencies consider a list of criteria to ascertain whether a prospective parent will be a suitable parent for a child.<sup>172</sup> The factors used to screen prospective adoptive parents vary from state to state.<sup>173</sup> In the State of Florida, several criteria have been enumerated to evaluate applicants. Those factors include the child's wishes and specific inquiries about the prospective parents.<sup>174</sup> The court will also consider the prospective parent's willingness to adopt siblings; commitment to respect and appreciate the child's racial and ethnic heritage and to educate the child about his or her background; experience in rearing children; marital status; residence; income; community environment; health; availability to spend time with the child during the transition period; treatment and care of other children; and, moral character.<sup>175</sup> The same factors that are used to ascertain whether a heterosexual parent is suitable to adopt a child should be used for making the determination for gay and lesbian prospective parents.<sup>176</sup>

Quoting another court, the *Charles B.* court ruled that "any recommendations and reports along with other evidence would be used by the court in deciding "[w]hether the petitioner is suitably qualified to care for and rear the child."<sup>177</sup> Factors that the *Charles B.* court considered were similar to those that Florida courts use to make the suitability determination. Based on those factors, the court analyzed the circumstances that supported Mr. B's petition. Mr. B. and Charles shared a strong emotional bond.<sup>178</sup> Charles also wanted Mr. B. to adopt him.<sup>179</sup> Mr. B. had the ability to parent Charles and to address his special needs.<sup>180</sup> He had plans for Charles' medical care, education, and discipline.<sup>181</sup> Mr. B's immediate and extended family members had also embraced Charles as a member of the family and he had developed a relationship with them.<sup>182</sup>

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172. FLA. ADMIN. CODE ANN. r. 65C-16.005(3) (2005). See also *Lofton*, 358 F.3d at 810, 811 (listing some factors).

173. Evall, *supra* note 4, at 349-51.

174. 65C-16.005(3) (2005) (discussing details of each requirement).

175. *Id.* See also DEL. CODE ANN. tit. 13, § 722 (2005) (listing criteria that Delaware courts must rely upon).

176. See Flaks, et al., *supra* note 138, at 113 (concluding that based on their findings there was no need to treat lesbian couples differently in the "legal arena").

177. *In re Adoption of Charles B.*, 552 N.E.2d 884, 889 (Ohio 1990).

178. *Id.* at 887, 889.

179. *Id.* at 887.

180. *Id.*

181. *Id.*

182. *Id.* at 889.

Accordingly, the appellate court ruled that the trial court properly granted Mr. B.'s petition to adopt Charles.<sup>183</sup>

Likewise, in its second parent adoption case, the *Hart* court considered a number of factors to determine whether the gay partner was suitable for adopting Hart's children. The court concluded that the second parent adoption would be in the children's best interests for several reasons. The child's father, the petitioner's partner, consented to the adoption and wanted the petitioner to fully participate in rearing the children.<sup>184</sup> The boys were bonded equally and strongly to the petitioner and their adoptive father.<sup>185</sup> Both men's immediate family members and extended family members had welcomed the children into the family.<sup>186</sup> Both men were in good emotional and physical health.<sup>187</sup> They had a support network that would help them to deal with the "unique challenges" of a same-sex couple rearing children of a different race. There was no history of child abuse in either man's background.<sup>188</sup> Finally, the judge wrote that the fact that these applicants were gay men "in and of itself" was of "no concern to the [c]ourt" and granted the petition.<sup>189</sup> The court further reasoned that

[f]or [it] to ignore what exists in fact in the best interest of children would ignore logic; be antithetical to the needs and bests [sic] interests of children who are being cared for, raised and nurtured in a home where two adults are committed and dedicated to their welfare; and produce an absurd and unacceptable social result.<sup>190</sup> In short, to rule otherwise would violate the clear mandate of the statute to "resolve all questions of interpretation" in the children's best interest.<sup>191</sup>

## B. Specific Factors Associated with Same-Sex Adoption

In general, the same criteria that are used to evaluate heterosexual applications should be used to evaluate same-sex applications. On the other hand, in the best interests of the child whom they will adopt, and without undue intrusiveness, a caseworker or a court may want to consider certain factors in more depth when same-sex applicants are involved. This section discusses specific details of those factors.

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183. *Id.* at 889-90.

184. *In re Hart*, 806 A.2d 1179, 1182-83 (Del. Fam. Ct. 2001).

185. *Id.* at 1188.

186. *Id.* at 1189.

187. *Id.*

188. *Id.* at 1190.

189. *Id.*

190. *Id.* at 1186.

191. *Id.*

## 1. Potential Adverse Effects of the Applicant's Sexual Conduct or Orientation

One of the main concerns voiced when a same-sex applicant wants to adopt a child is whether the prospective parent's sexual conduct would adversely affect the child.<sup>192</sup> One contention, for example, is that gay men are so consumed by their relationship that they will neglect their children. Sexual activity is a factor that courts may consider in heterosexual and same-sex adoption proceedings.<sup>193</sup> Sexual orientation is a separate factor that may be considered in same-sex adoption.<sup>194</sup> "[Either] factor is only dispositive if it is proven that it adversely affects the child."<sup>195</sup>

The substantive issue that the *Charles B.* court considered in its opinion was Mr. B.'s sexual orientation. More specifically, it considered the allegation that Mr. B., a gay male, was engaging in non-marital sexual conduct that some people considered immoral and against the best interest of the child.<sup>196</sup> The court reviewed pertinent custody cases which decided whether a same-sex parent should be allowed to have unsupervised custody.<sup>197</sup> After reviewing these cases, the court adopted an Ohio court's holding that "immoral conduct must be shown to have a direct or probable adverse impact on the welfare of the child in order to justify a change of custody."<sup>198</sup> The court further noted that the same principle applied to "immoral conduct or cohabitation."<sup>199</sup> The only evidence that was offered at the hearing regarding Mr. B.'s reputation was that it was "beyond reproach."<sup>200</sup> There was no evidence that his sexual orientation adversely affected Charles.<sup>201</sup>

192. *In re Adoption of E.O.G.*, 28 Pa. D. & C.4th 262, 266-67 (1993) (considering that the adoptions would assure that the children would be the adopters' legal heirs and beneficiaries of their insurance and social security benefits also).

193. *In re Adoption of Charles B.*, 552 N.E.2d 884, 887-88 (Ohio 1990).

194. CONN. GEN. STAT. ANN. § 45a-726a (West 2004); *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 838 (N.Y. Fam. Ct. 1994); *In re Pima County Juvenile Action B-10489*, 727 P.2d 830, 833-34 (Ariz. Ct. App. 1986). *But see Matter of Carolyn B.*, 6 A.D.3d 67, 68-69 (N.Y. App. Div. 2004) (deciding that sexual orientation "is of no significance, because the goal of the statute is to 'encourag[e]' the adoption of as many children as possible").

195. *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 553 (N.J. Ch. 1993). *See also* N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2006) (forbidding a rejection of an application based solely on an applicant's "homosexuality").

196. *Charles B.*, 552 N.E. 2d at 886.

197. *Id.* at 888.

198. *Id.* at 888 (citing *Whaley v. Whaley* 339 N.E. 2d 1270 (1978)).

199. *Charles B.*, 552 N.E.2d at 888 (citing *Wyss v. Wyss*, 445 N.E. 2d 1153 (Ohio 1982), also noting that the principle also applied to overnight visitation as held in *Conkel v. Conkel*, 509 N.E. 2d 983 (Ohio 1987)).

200. *Charles B.*, 552 N.E.2d at 889.

201. *See id.* at 888-89.



Similarly, in the *E.O.G.* adoption proceeding, the appellate court adopted the Superior Court of Pennsylvania's holding that "a court may not restrict a homosexual parent's custodial rights absent a showing that the parent's sexual relationship with her partner will be harmful to the child."<sup>202</sup> The court reviewed the evidence presented and was reassured that the same-sex couple's adoption of the two children was in their best interests because the children were thriving, the couple's sexual orientation had not adversely affected them, and there was "pervasive evidence" that the couple's sexual orientation would not affect the children in the future.<sup>203</sup>

## 2. Prospective Parent's Coping Skills

In addition to other concerns, social scientists have concluded that same-sex parents may face some "unique challenges" in raising children.<sup>204</sup> For example, the children's peers may harass and tease them about their parent's sexual orientation. Some sociologists, psychologists and opponents of same-sex adoption are concerned that this peer pressure will magnify difficulties that children from child welfare, many of whom have been abused and neglected before they entered the system, have in adjusting to their new home and their adoptive parents.<sup>205</sup> Researchers reported, however, that children with lesbian mothers enjoyed normal relationships with their peers and described their peer relationships in positive terms.<sup>206</sup> Nevertheless, one study did indicate that a large percentage of children with gay fathers did have relationship problems.<sup>207</sup>

It would not be unreasonable for the court and the child's representatives to explore whether a gay or lesbian prospective parent is prepared to cope with these challenges and to help the child to cope with similar challenges.<sup>208</sup> Psychiatrists recommend, for example, that same-sex parents have conversations with their children about the parents' sexual orientation to prepare the children for related issues such as potential peer

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202. *In re Adoption of E.O.G.*, Pa. D. & C.4th at 267 (citing *Blew v. Verta*, 617 A.2d 31 (Pa. 1992)).

203. *E.O.G.*, Pa. D. & C.4th at 267-68 (indicating that "[t]he quality of mothering rather than the mother's sexual orientation is the most crucial factor").

204. Patterson, *supra* note 139, at 1.

205. See Tasker, *supra* note 126, at 232 (finding that children with lesbian mothers reported quality friendships).

206. Patterson, *supra* note 139, at 6.

207. Tasker, *supra* note 126, at 232.

208. See *In re Hart*, 806 A.2d 1179, 1189 (Del. Fam. Ct. 2001).

exclusion and isolation.<sup>209</sup> The parent also will need the necessary coping skills and access to support groups that will provide additional assistance. Different groups offer varying support with adoption issues and parenting issues, as well as more specific same-sex parenting issues.<sup>210</sup> Additionally, to avoid potential feelings of isolation, children with gay and lesbian parents should have their own support groups consisting of young people who also have gay or lesbian parents.<sup>211</sup>

### 3. Availability of Role Models of the Opposite Sex

When one or two gays and lesbians seek(s) to adopt a child, there may be concerns about whether the child will have interaction with role models of the opposite sex. For the child's complete social and psychological development, the court should ascertain whether such role models will be available to the child. However, it is not necessary that the role model live in the same home with the child and the adoptive parents. In *Hart*, for example, two gay men adopted two boys.<sup>212</sup> Female adoptive relatives, including a grandmother, an aunt, and some cousins, had embraced the children and, as a result, the children spent a considerable amount of time with their relatives.<sup>213</sup> These women and girls served not only as the boys' extended family members, but as their female role models as well.<sup>214</sup>

### 4. The Child's Wishes

Many adoption statutes provide that a child's wishes for adoption may be considered when the child is an older child. Actually, the child's consent to the adoption may be required if she is an older child.<sup>215</sup> Because special needs children tend to be older, many of them will have the ability to understand the distinction between heterosexual and same-sex parents. Thus, case workers, guardians ad litem, attorneys, and others who participate in the adoption process should ask older special needs children about whether they want to be placed with a same-sex adoptive parent. In

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209. See, e.g., Joanna Bunker Rohrbach, *Lesbian Families: Clinical Issues and Theoretical Implications*, 23 PROF. PSYCH.: RESEARCH AND PRACTICE 467, 470 (1992); Tasker, *supra* note 126, at 232-33, 237 (relating how gay and lesbian parents and their children cope and some of the abuse that parents and their children experience).

210. See *Hart*, 806 A.2d at 1189-90 (participating in all three groups to ensure that they have the necessary skills to help the children).

211. See Patterson, *supra* note 139, at 9; Tasker, *supra* note 126, at 232.

212. *Hart*, 806 A.2d at 1180.

213. *Id.* at 1189 & n. 13.

214. *Id.* (finding that they had a close relationship with the men's female relatives).

215. See, e.g., DEL. CODE ANN. tit. 13, § 722(a)(2) (2005); FLA. ADMIN. CODE ANN. R. 65C-16.005 (3)(a) (2005) (requiring the child's consent for the adoption if the child is twelve or older).

age-appropriate language, to assure that the child understands some of the consequences of an affirmative decision, the child should be informed about potential challenges that may occur.<sup>216</sup>

No empirical study has been done on how many children who desperately seek love and a permanent home would choose to live in an institution or in foster homes over living with a same-sex adoptive parent. Anecdotal, however, there is evidence that some children already have chosen to live with gay or lesbian parents.<sup>217</sup> Charles B., Peter in *Hart*, and Bert, the child Lofton sought to adopt, chose to live with a gay foster parent. In addition, a child in at least one other Florida case chose to live with his mother's lesbian partner after his mother's death instead of living with his heterosexual grandparents.<sup>218</sup>

### C. Reasons Offered for Denying Same-Sex Adoption

For several decades, arguments have been offered consistently to deny same-sex adoption. Some of the arguments focus on the child's best interests while others focus on the prospective parent's lifestyle and the potential negative effects of that lifestyle on the child. This section will explore some of the common arguments. Although an abundance of scientific studies refute these contentions, they continue to be relied upon to deny same-sex individuals and their partners the opportunity to adopt children.

#### 1. Dual-gender Parenting as the "Optimal" Model for Parenting

At the *Lofton* hearing, attorneys who represented the State of Florida argued that the linchpin of Florida's adoption policy is creation of adoptive homes "that resemble the nuclear family as closely as possible."<sup>219</sup> In furtherance of that policy, the State's representative opined that "dual-gender parenting" with a married man and a woman is in the adoptee's best

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216. See also Tasker, *supra* note 126, at 236; Devon Brooks, *Gay and Lesbian Adoptive and Foster Care Placements: Can They Meet the Needs of Waiting Children*, 46 SOC. WORK 147, 148 (2001) [hereinafter Brooks] (recommending that adoptive parents and caseworkers prepare adoptees). But see Patterson, *supra* note 139, at 9 (imploing parents to tell their children before they reach early adolescence).

217. PERTMAN, *supra* note 41, at 165-66 (consenting to adoption by a prospective adoptive parent who told adoptee that he only dates men but not children).

218. *In re Pearlman*, 15 FAM. L. REP. (BNA) 1355 (Fla. Cir. Ct. 1989) (telling the court that the only present that he wanted for Christmas was to live with his de facto lesbian parent).

219. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). See also *Parentlessness*, *supra* note 41, at 323, 338, 366-71 (advocating for "an imitative family environment").

interests for “optimal childhood development.”<sup>220</sup> The State’s rationale was that married heterosexual couples provide a more stable home environment for children; they provide male and female role models who help children to develop appropriate sexual and gender identities; and, they provide male and female “authority figures” for the children.<sup>221</sup>

In favor of the dual-parenting preference, some opponents argue that same-sex couples should not rear children because men and women have “gender-linked differences” that they share with their children.<sup>222</sup> The different contributions that mothers and fathers make, including the way that they love, nurture and interact with the children, are important for the children’s “full and healthy development.”<sup>223</sup> Under this theory, to diminish the risk that children will develop gay or lesbian interests, children need male and female role models in the home so that children can learn their appropriate gender roles.<sup>224</sup>

In the State of Florida’s view, as summarized in *Lofton*, married heterosexual couples provide a more “stable and nurturing environment for the education and socialization of its adopted children.”<sup>225</sup> In contrast, gays and lesbians are emotionally unstable and their relationships are short-lived.<sup>226</sup> On this point, the *Lofton* Court concluded that “[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens . . . particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.”<sup>227</sup>

The irony, of course, is that most same-sex adults grew up in homes with heterosexual parents.<sup>228</sup> Additionally, those who argue in favor of the

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220. *Lofton*, 358 F.3d at 818. Accord Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852, 857-66 [hereinafter Wardle] (advocating for dual-gender parenting instead of homosexual parenting). But see Strasser, *supra* note 1, at 438-39 (asserting that since Florida allows single parents to adopt, it undermines the argument that children should be placed with married couples); World Divorce Rates, United States, <http://www.divorcereform.org/gul.html> [hereinafter World Divorce Rates] (reporting that the divorce rate per 100 marriages in the United States is 54.8) (last visited Feb. 20, 2006).

221. *Lofton*, 358 F.3d at 818.

222. Wardle, *supra* note 220, at 857.

223. *Id.*

224. *Id.* at 860-64 (comparing the losses and instability that children will sustain in single-parent and homosexual parent homes).

225. *Lofton*, 358 F.3d at 819.

226. Isiaah Crawford, et al., *Psychologists’ Attitudes Toward Gay and Lesbian Parenting*, 30 PROF. PSYCHOL.: RES. AND PRAC. 394, 394 (1999) (referring to common negative stereotypes).

227. *Lofton*, 358 F.3d at 819. The *Lofton* court reasoned that single heterosexual adoptive parents were in a better position to educate and guide adoptive children through puberty and adolescent years because they could share their own experiences with the child. *Id.*

228. Evall, *supra* note 4, at 370.

dual-gender model ignore factual evidence that appears in a small sampling of cases – *Lofton and Goodridge v. Department of Public Health*.<sup>229</sup> In *Lofton*, Roger and Steven had been partners for eighteen years.<sup>230</sup> Smith and Skahen had been partners for “nearly a decade.”<sup>231</sup> In *Goodridge*, named lesbian plaintiff couples had been in committed relationships for thirty years, twenty years, thirteen years, eleven years, seven years, and four years respectively.<sup>232</sup> Furthermore, the mean number of years that same-sex couples who participated in one study had been together was eleven years.<sup>233</sup> That is much longer than many heterosexual couples stay married. Of course, some heterosexual marriages last for decades or until one spouse dies, but other heterosexual marriages actually last for only a few hours, days or months.<sup>234</sup> The divorce rate among heterosexuals in the United States has hovered around fifty percent for years. Presently, the rate is a staggering 54.8%.<sup>235</sup>

In response to this dual-gender policy argument, the American Civil Liberties Union (“ACLU”) declared that foster children do not have the option of choosing a heterosexual couple as parents because there are not enough married heterosexual couples who are interested in adopting each child who is available for adoption. The ACLU concluded that “adoption policies must deal with reality, or our children will never escape foster care.”<sup>236</sup> Also, in the ACLU’s view, children who do not have a role model of the opposite sex in the home may have influential access to such role models through interaction with relatives, friends and neighbors.<sup>237</sup>

The *Lofton* Court’s and the State of Florida’s argument for the Dan Quayle type of family unit (man, woman and child) ignores the scores of grandmothers and single fathers and mothers who successfully manage households and rear children alone. This happens for a number of reasons,

229. 798 N.E.2d 941 (Mass. 2003).

230. FERRERO ET AL., *supra* note 42, at 4.

231. *Id.* at 3.

232. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

233. Ryan and Cash, *supra* note 138, at 464.

234. See, e.g., Michelle Tauber, et al., *Hello . . . Goodbye*, PEOPLE MAGAZINE, Oct. 3, 2005 at 90-96 (counting the hours, days and months that some heterosexual couples had been married).

235. World Divorce Rates, *supra* note 220 (reporting that the divorce rate per 100 marriages in the United States is 54.8). See also Mariga v. Flint, 822 N.E.2d 620, 628 (Ind. Ct. App. 2005) (opining that the parties cannot give a court “total assurance that [the] couple is committed to each other and will remain so forever”). See generally ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005) (relating the negative effects of divorce on children that expands into adulthood).

236. American Civil Liberties Union, *In the Child’s Best Interests: Defending Fair and Sensible Adoption Policies* 4, April, 1998, <http://www.aclu.org/lgbt/parenting/11859res19980430.html> (last visited Apr. 16, 2006) [hereinafter ACLU Policy Memo].

237. *Id.* at 4-5.

including the death of a spouse. A married couple is the norm for many children in the United States. However, the 2000 United States Census Bureau report indicated that 19.8 children lived with only one parent.<sup>238</sup> Most of them (16.5 million) lived with their mother, while the others (3.3 million) lived with their father.<sup>239</sup> These mothers and fathers did not live with a partner. In addition, many children live with their grandparents in kinship care that the state does not supervise.<sup>240</sup> This is the make-up of many modern day families.

## 2. The “Immorality” of Same-Sex Relationships

Opponents of same-sex adoption assert that gays and lesbians engage in immoral sexual conduct.<sup>241</sup> When someone’s conduct is immoral, it is “contrary to established morality.”<sup>242</sup> It is sexual conduct that deviates from codes of acceptable behavior.<sup>243</sup> Christian theology, for example, labels same-sex intimate relationships as immoral, repugnant and abhorrent.

Several religions teach that engaging in a same-sex relationship is sinful.<sup>244</sup> To illustrate, one verse of the New King James Version of the Holy Bible that Christians rely upon for spiritual guidance reads: “You shall not lie with [a man] as with [a woman]: it is abomination.”<sup>245</sup> The punishment for this sin is severe – it is death.<sup>246</sup>

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238. Robert Bernstein, United States Census Bureau, *About 7-in-10 Children Live With their Parents, According to Census Bureau Pre-Father’s Day Release*, June 12, 2003, <http://www.census.gov/Press-Release/www/releases/archives/children/001125.html> (last visited Mar. 21, 2006).

239. *Id.*

240. *Id.* See also Jason Fields, United States Bureau, *U.S. Adults Postponing Marriage, Census Bureau Reports*, June 29, 2001, <http://www.census.gov/Press-Release/www/2001/cb01-113.html> (last visited Mar. 21, 2006) (reporting that the number of single mothers has increased in the last thirty years from 3 million to 10 million and the number of single fathers has increased from 393,000 to 2 million).

241. George A. Rekers, *A Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody By Any Person Residing in a Household that Includes a Homosexually Behaving Adult* [hereinafter Rekers], 18 ST. THOMAS L. REV. 327 (2006).

242. THE AMERICAN HERITAGE DICTIONARY 658 (1976) (defining immoral and immorality).

243. See Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 553-54 (1990).

244. See, e.g., *Friends Label Miers as Pro Life*, BUFFALO NEWS, Oct. 6, 2005, at A6 (preaching that “homosexuality is a sin”).

245. *Leviticus* 18:22 (King James).

246. *Leviticus* 20:13 (King James). But see Polikoff, *supra* note 245, at 549 (declaring that there is some ambiguity in Bible references).

The immorality argument is associated with same-sex sexual activity. With regard to adoptions, the inference is that because of their immoral lifestyle, gays and lesbians are unfit to parent children. For example, some couples engage in consensual sodomy that, until recently, was punishable as a crime in many states. In *Lawrence v. Texas*, however, the Supreme Court overturned a Texas law that punished couples for engaging in sodomy as an unconstitutional infringement on the couple's due process liberty interests.<sup>247</sup> As a result, Texas repealed its sodomy statute.<sup>248</sup> Because the Supreme Court issued that opinion in June 2003, it also forced other states, including Florida, to repeal its sodomy laws and those related laws for which sodomy laws formed the foundation. Moreover, proponents of same-sex adoption aver that some gays and lesbians choose a celibate lifestyle. Thus, those who argue that gays and lesbians should not be allowed to adopt children because of their allegedly immoral sexual activity should not impose over-inclusive bans on same-sex adoption that would include individuals who are not sexually active.<sup>249</sup>

When Florida asserted its interest in promoting public morality in *Lofton*, the court recognized the state's substantial "interest in protecting . . . morality."<sup>250</sup> The ACLU's response was poignant. Large numbers of heterosexuals who have been allowed to adopt children have engaged in conduct that other heterosexuals would consider immoral. Some of these offenses include atheism, drinking alcoholic beverages and gambling. Consequently, the ACLU continues, "[i]f we eliminated from consideration all of the [prospective parents] that somebody thought was immoral, we would have almost no parents left to adopt."<sup>251</sup>

### 3. Influencing Children to Adopt a Same-Sex Lifestyle

Another assertion made in opposition to gay and lesbian adoption is that same-sex parents will cause their children to develop confusion about their gender identity, gender role, and/or sexual orientation.<sup>252</sup> However,

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247. 539 U.S. 558, 578 (2003). See also Strasser, *supra*, note 1, at 421, 441 (opining that the *Lofton* court appeared "almost willful in its refusal to follow *Lawrence*" and that Florida's law is over-inclusive because it punishes gay men and lesbians who are celibate).

248. TEX. PENAL. CODE ANN. § 21.06 (Vernon 1994) (provided that a person would be guilty of a misdemeanor if "he engages in deviate sexual intercourse with another individual of the same sex").

249. Strasser, *supra*, note 1, at 441.

250. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 819 n.17 (11th Cir. 2004) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), and *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)).

251. ACLU Policy Memo, *supra*, note 236, at 6.

252. Wardle, *supra*, note 220, at 851; Patterson, *supra*, note 139, at 3.

long-term studies of children who grew up in same-sex homes disprove that argument. Regarding gender identity, studies show that boys and girls with lesbian parents are content with their gender and no gender identity confusion was reported.<sup>253</sup> With respect to gender-role behavior, several studies have demonstrated that children who grew up with lesbian parents chose toys, games, television shows, activities and other interests that were appropriate for their gender.<sup>254</sup> Children with lesbian parents also have normal “intellectual functioning and behavioral adjustment.”<sup>255</sup> Finally, with regard to the children’s sexual orientation, a majority of teenagers and adults who were reared by gay men and lesbians reported that they were heterosexual.<sup>256</sup> Based upon its review of several studies, one court concluded that “despite the concern of many courts about the negative influence on a child, sexual orientation, . . . is developed independently of one’s parents and the concern of [j]udges that a homosexual parent will rear homosexual children is unwarranted by the evidence.”<sup>257</sup>

Researchers who conducted studies of lesbian parents and their children discovered that although children who grow up with same-sex parents are more likely to have experimental relationships with a person of the same-sex and are more amenable to considering a same-sex relationship, most lesbians’ children become heterosexual adults.<sup>258</sup> On the other hand, the families’ attitude about same-sex sexual orientation, such as acceptance and openness, was recognized as one of the influences that would allow the adult child to develop an interest in same-sex sexual orientation more freely.<sup>259</sup> Yet, children in one recent longitudinal study still chose a heterosexual lifestyle even after they experimented with same-sex relationships.<sup>260</sup>

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253. Patterson, *supra* note 139, at 4.

254. *Id.* at 4-5.

255. Flaks, et al., *supra* note 138, at 112.

256. Patterson, *supra* note 139, at 5; Tasker, *supra* note 126, at 233.

257. *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 840 (N.Y. Fam. Ct. 1994). *Accord* Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (taking “judicial notice that . . . there is substantial consensus among experts that being raised by a [same-sex] parent does not increase the likelihood that a child will become [attracted to the same-sex]”).

258. Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCH. 3, 7-8 (1996) [hereinafter Golombok & Tasker] (reporting that only 2 of the children who were adults at the end of the study described themselves as lesbian).

259. *Id.* at 7.

260. Jeanie Lerche Davis, *Adoption in Same-sex Couples*, [http://my.webmd.com/content/Article/25/3606\\_1217.htm](http://my.webmd.com/content/Article/25/3606_1217.htm) (last visited October 6, 2005). *See also* ACLU Policy Memo, *supra* note 236, at 5 (finding that these children tolerate diversity); Polikoff, *supra* note 243, at 548 (finding no “causal connection” between the parent’s sexual orientation and the children’s sexual orientation); Golombok & Tasker, *supra* note 258, at 9; Tasker, *supra* note 126, at 233-34.



#### 4. Predicting Molestation of Children

Opponents of same-sex adoption assert that gay and lesbian parents are more likely to molest children than heterosexual parents.<sup>261</sup> In its memorandum, the ACLU makes an important distinction between pedophilia and sexual orientation. It shows that the two terms are not connected. "Sexual orientation, whether heterosexual or [same-sex], is an adult attraction to [other adults]. Pedophilia, on the other hand, is an adult sexual attraction to children."<sup>262</sup>

The empirical evidence on who commits sexual abuse of children in the United States is much more established and conclusive than empirical evidence on whether gay and lesbian parenting is harmful to children. The evidence regarding the types of people who commit these atrocities against children is overwhelmingly clear. Adult women rarely sexually abuse children.<sup>263</sup> Heterosexual men usually abuse female children and heterosexual men commit the majority of sexual offenses against children.<sup>264</sup> Of course, that does not mean that gay men never molest children. In one case study involving more than 260 incidents of sexual abuse, only two gay men were named as the perpetrators.<sup>265</sup> Furthermore, publicized incidents of abuse of adopted children have involved heterosexual couples.<sup>266</sup>

#### 5. Damaging the Adoptee's Sense of Well-Being and Self-Esteem

In an effort to shield children from teasing and peer pressure associated with their parents' sexual orientation, some proponents of heterosexual adoption forcefully argue that children who are reared by gay and lesbian parents will be subject to peer abuse. They contend that the

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261. Wardle, *supra* note 220, at 865-66. See also George A. Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT UNIV. L. REV. 343, 377-78 (2001-02) [hereinafter Rekers & Kilgus].

262. ACLU Policy Memo, *supra*, note 236, at 6. Accord National Adoption Information Clearinghouse, Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents 1, [http://naic.acf.hhs.gov/pubs/f\\_gay/f\\_gayb.cfm](http://naic.acf.hhs.gov/pubs/f_gay/f_gayb.cfm) (last visited October 16, 2005) [hereinafter Gay and Lesbian Adoptive Parents].

263. Patterson, *supra* note 139, at 6-7.

264. *Id.*

265. ACLU Policy Memo, *supra* note 236, at 6. See generally Carole Jenny, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41 (1994); PERTMAN, *supra* note 41, at 166 (noting that straight men abuse ninety percent of boys and girls who are sexually abused); Polikoff, *supra* note 243, at 545.

266. See, e.g., Bill Hewitt, Barbara Sandler, & David Searls, *Why Did These Kids Live In Cages?*, PEOPLE, Oct. 3, 2005, at 83 (reporting that 8 of 11 adopted special needs children slept in cages and some were spanked with broomsticks).

children's peers will taunt them and cause them to feel ashamed about their gay or lesbian parent's sexual preference.<sup>267</sup> They cite one or two studies which found that living with same-sex individuals or couples is harmful to children. According to those researchers and some scientists who only reviewed other researchers' work, children suffer relentless stress because of their peers' ridicule and teasing about their parents' lifestyle, as well as the pressure of having to conceal their parent's sexual orientation to avoid their peers' disdain.<sup>268</sup> As a result, these reviewers conclude, children who live with lesbians or gay parents suffer needlessly from a higher rate of depression, anxiety and suicide than children with heterosexual parents.<sup>269</sup>

Proponents of gay and lesbian parenting admittedly found that children with lesbian mothers reported experiencing a greater degree of stress and some teasing. Despite the stress, however, these children did not have developmental delays or lower self-esteem anymore than their counterparts who lived in heterosexual households. In fact, their overall sense of well-being actually surpassed that of children in comparison groups who had heterosexual parents.<sup>270</sup>

In making placement decisions, some courts have refused to give significant weight to potential stigmatization, prejudice and other challenges that children may experience because of their parents' same-sex relationships. In *Blew v. Verta*,<sup>271</sup> the court was asked to decide whether an eight-year-old boy's lesbian mother's lifestyle would have an adverse impact on the child. The trial court had restricted the mother's custody because the evidence showed that the child was embarrassed, confused and angry in response to outsiders' reactions to his mother's lesbian relationship with another woman.<sup>272</sup> The Superior Court of Pennsylvania reversed the trial court's custody order and reaffirmed a previous decision in favor of the lesbian mother. Regarding outsiders' prejudices that the child may feel the need to react to, the court wrote:

[T]he merits of a custody arrangement ought not to depend upon *other people's* reactions . . . . A court may not assume that because children will encounter prejudice in one parent's custody, their best interests will be served by giving them to the other parent. If the children are taunted and hurt . . . , with love and help they may surmount their hurt

267. See Tasker, *supra* note 126, at 232-33.

268. Rekers, *supra* note 241, at 370. See also Flaks, et al., *supra* note 138, at 106 (citing studies which found that children benefited from living with lesbian mothers who were psychologically healthy).

269. Rekers, *supra* note 241, at 329.

270. Patterson, *supra* note 139, at 6; Gay and Lesbian Adoptive Parents, *supra* note 262, at 2.

271. *Blew v. Verta*, 617 A.2d 31, 31 (Pa. Super. Ct. 1992).

272. *Id.* at 32, 33-34.

and grow up strong and decent – the sort of children any parent would be proud of . . . . [A] court must never *yield* to prejudice because it cannot *prevent* prejudice. Let the court know that prejudice will condemn its award, [still] it must not trim its sails.<sup>273</sup>

*Blew* can be distinguished factually because it was a custody dispute between one biological parent who was a lesbian and another who was heterosexual. Still, the court's holding and rationale regarding how courts should react to external prejudice should be applicable in adoption matters. The fact that an adoptee may experience some discomfort, shame and embarrassment because an adoptive parent is gay or lesbian should be a consideration, but that, in and of itself, should not prevent a court from granting an adoption application.

The fact that some children may be teased because their parents are gay or lesbian is a reality. In their recent study, Scott D. Ryan and Scottye Cash concluded "there were very few differences between the child being teased because he or she was adopted and because he or she had [same-sex parents]." <sup>274</sup> The results indicated that 68% of parents reported that the child was never teased because his or her parent was [same-sex], <sup>275</sup> and almost 22% indicated that the adopted child of focus was "hardly ever" teased. <sup>276</sup> Nearly 8% indicated the child was sometimes teased, and 2.2% indicated that the child was often teased. <sup>277</sup>

Proponents of same-sex adoption believe that if the child who is teased receives proper support from gay and lesbian parents who are capable of addressing the child's concern, the child will not have lasting effects as a result of this peer pressure. In its policy memo, the ACLU wrote that teasing is something that children do, but children who are subject to teasing are very resilient when they have caring and loving parents:

Children make fun of other children for all kinds of reasons: for being too short or too tall, for being too thin or too fat, for being of a different race or religion or speaking a different language. Children show remarkable resiliency, especially if they are provided with a stable and loving home environment. <sup>278</sup>

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273. *Id.* (emphasis in original) (quoting *In re Custody of Temos*, 450 A.2d 111, 120 (Pa. 1982)).

274. Ryan and Cash, *supra* note 138, at 462 (internal citation omitted).

275. *Id.*

276. *Id.*

277. *Id.*

278. ACLU Policy Memo, *supra* note 236, at 6 (noting that children in foster care are ridiculed because they do not have parents and they have to suffer through that abuse without a

In summary, children can be ruthless and cruel, especially when they identify a child who is different or in a different situation. Although it is not condoned, children are teased for a number of reasons – sometimes because of their parents and sometimes for no reason at all. Some are teased because a parent is obese. Others may be teased because a parent has a physical or mental disability. Some children who are adopted by one or two same-sex parents may be teased as well. That is why courts, agencies, and all who are charged with a child's care must be certain that the same-sex applicant who wants to adopt any child is capable of teaching the child coping skills and how the child should respond to such behavior. This is one of the purposes of a probing home assessment and interview. To further ensure the child's protection, pre-and post-adoption counseling for the children and the parents are two of the services that should be available to these families.

Also, much of this teasing will happen, if it happens at all,<sup>279</sup> at the children's school or in the community where the family lives. Educating children and the adults in their communities will cause a decrease in the amount and the magnitude of teasing. Recently, some parents have lobbied for banning books about gay and lesbian families from school classrooms and libraries.<sup>280</sup> Instead of banning books that are written in good taste and age-appropriate educational materials describing diverse family units, children should be educated about diverse lifestyles and taught to be more tolerant of different lifestyles. In addition, children who tease and bully other children because of their parents' sexual orientation should be punished in a meaningful way that will signal to the bully and other children that this behavior is unacceptable and will not be tolerated.

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loving family); Polikoff, *supra* note 243, at 567-72 (discussing the effects of peer pressure on children of same-sex parents).

279. See *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 552 (N.J. 1993) (declaring that some of the conclusions are drawn based on the mere assumption that harassment will occur without any actual proof of harassment). But see Tasker, *supra* note 126, at 232 (finding some evidence of teasing).

280. Gary Mason, *Hate is a learned behavior*, GLOBEMAIL, Sept. 24, 2005, at A9 (banning books about same-sex parents and censuring other materials about the same-sex lifestyle). See, e.g., alysonbookstore, <http://store.yahoo.com/alysonbooks/kids.html> (last visited Oct. 16, 2005) (listing books for children whose parents are gay and lesbian). See also COLAGE, Tips for Making Classrooms Safer for Students with Lesbian, Gay, Bisexual, and Transgender Parents, [http://www.colage.org/pubs/safe\\_classrooms.pdf](http://www.colage.org/pubs/safe_classrooms.pdf) (discussing legislation regarding hate crimes and suggesting ways that teachers can ensure that children of gay and lesbian parents feel safe at school).

## 6. Flawed Studies about the Effects of Gay and Lesbian Parenting

Since the early 1970s, when the first studies of gay and lesbian parenting were published, at least fifty studies have been conducted on gay and lesbian parenting and the effects of their parenting on the children in their homes.<sup>281</sup> A majority of the studies reveal that children who grow up in households with lesbian or gay parents are not disadvantaged developmentally, psychologically, or emotionally.<sup>282</sup> There are not any significant differences between their self-esteem or emotional and psychological health and the self-esteem and emotional and psychological health of children who grow up in households headed by heterosexual parents.<sup>283</sup> Instead, children with gay and lesbian parents are healthy, happy and well-adjusted.<sup>284</sup> Overall, these studies do not demonstrate that gay men and lesbians are unfit to adopt and parent children. "The evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."<sup>285</sup> A November 2004 study reveals that teenagers who grow up with same-sex parents are also well-adjusted. Their performance in school, their self-esteem, psychological adjustment and their sexual behavior is no different from that of teenagers who live with heterosexual parents.<sup>286</sup>

Additionally, some studies further show that there are positive attributes of growing up in a gay or lesbian parented household. Children who are reared by gay and lesbian parents are more "tolerant of diversity, which is certainly of value in our multicultural society . . . . [They] also seem to be less aggressive, more nurturing at a young age – in preschool and early elementary school. They seem to be able to resolve conflicts in a less-aggressive way than other children."<sup>287</sup>

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281. American Psychological Association, *Empirical Studies on Lesbian and Gay Parenting*, <http://www.apa.org/pi/l&gbib.html> (last visited October 16, 2005) (synthesizing forty-three studies about gay and lesbian parents and their children).

282. *See id.*

283. Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 54-56 (2005) [hereinafter *The Last Thirty Years*].

284. *Id.* *See also* Golombok & Tasker, *supra* note 258, at 9 (finding no difference between the mental health of children raised by lesbian parents and those raised by heterosexual parents); Tasker, *supra* note 126, at 238; Brooks, *supra* note 216.

285. Patterson, *supra* note 139, at 9.

286. *See* Jennifer Wainright, *Psychological Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 J. CHILD DEVELOPMENT 1886 (Nov. 2004).

287. Jeanie Lerche Davis, *Adoption in Same-Sex Couples*, WEBMD, Feb. 4, 2002, [http://my.webmd.com/content/Article125/3606\\_1217.htm](http://my.webmd.com/content/Article125/3606_1217.htm) (last visited Oct. 6, 2005). *See also* *The Last*

On the contrary, a few researchers and reviewers maintain that empirical studies that supposedly conclude that gay and lesbian parenting is not harmful to children are flawed methodologically.<sup>288</sup> They contend that sample sizes involving fewer than fifty parents and their children are so small they could not possibly reflect the views of a representative population of gays and lesbians.<sup>289</sup> Charlotte J. Patterson has stated, however, that this is an unjustified criticism because since no one knows what the size of the gay and lesbian population is, it is impossible for anyone to argue that a sizeable portion of the population is not represented.<sup>290</sup>

Opponents also aver that the subjects of the studies (both parents and their children) make the studies unreliable. Often researchers rely upon self-selected volunteer participants to provide the information that the researchers need. To arrive at more objective results, opponents assert that random samples of gays and lesbians would produce more unbiased outcomes. In contrast, self-selected participants have a vested interest in a positive outcome. As a result, their answers to questions may be distorted to ensure a positive outcome for the benefit of gays and lesbians (i.e., they will be considered good parents).<sup>291</sup> Another criticism of favorable studies is that most studies do not distinguish between gay, lesbian and bisexual subjects. For example, researchers may classify a woman as a lesbian while others may classify her as a bisexual.<sup>292</sup> Opponents further contend that longitudinal studies have not been done to reflect the effects of same-sex parenting over time as the children mature and become adults. Instead, most of the studies focus on young children.<sup>293</sup> However, a few studies have demonstrated that most adults who have same-sex parents are well-adjusted heterosexuals too.<sup>294</sup> Another contention against use of the favorable studies to buttress arguments for gay and lesbian adoption is that the wrong control groups were used for comparison purposes. Instead of using married heterosexual couples or groups, for example, most studies

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*Thirty Years*, *supra* note 283, at 56 (declaring that departure from “gender-typed play activity and career goals” may not be “such a bad idea”).

288. See Judith Stacey and Timothy Biblarz, *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV. 164-67 (2001). See also Tasker, *supra* note 126, at 234 (noting some of the problems with the research).

289. See Wardle, *supra* note 220, at 845; Rekers & Kilgus, *supra* note 261, at 354-57.

290. Patterson, *supra* note 139, at 2. Accord Tasker, *supra* note 126, at 234 (opining that because it is not safe for gays and lesbians to reveal their sexual orientation, a representative sample “constitutes an unattainable goal”).

291. Wardle, *supra* note 220, at 846; Rekers and Kilgus, *supra* note 261, at 359.

292. Wardle, *supra* note 220, at 848.

293. *Id.*

294. See generally Golombok & Tasker, *supra* note 258, at 7-8.

compare single heterosexual parents and their children with single same-sex parents and their children.<sup>295</sup> One fair criticism of the studies is that many of them focus on lesbian parents' relationships with their children. By comparison, only a few studies of gay male subjects and their children have been conducted.<sup>296</sup>

In addition, expert reviewers accuse researchers of using overgeneralizations in reporting their results. For example, a researcher may conclude that same-sex parenting did not affect children negatively. However, the data that the researcher compiled was inconsistent with the conclusion.<sup>297</sup>

One author concludes that based on these and other criticisms, the plethora of social science literature that has been produced is so one-sided and defective that it is unreliable.<sup>298</sup> Some adversaries and judges appear to be demanding conclusive determinations regarding the effect of gay and lesbian parenting on children. The same author cites a sociologist who declares that "social science research is almost never conclusive."<sup>299</sup> Charlotte J. Patterson has done research in this area for several years. Even she admits that no study "is entirely invincible to . . . criticism."<sup>300</sup> Courts, agencies, and child advocates should review these studies as a whole and, in the best interests of children, use the studies to make more informed decisions about selecting adoptive parents who are capable of parenting special needs children.

#### D. Lofton's Suitability Analysis

Regarding the scientific research on whether same-sex adoptions are in children's best interests, the *Lofton* Court found that the empirical evidence regarding whether a child's permanent placement in a same-sex environment will cause harm to the children was "inconclusive" and "conflicting."<sup>301</sup> The court further noted some of the aforementioned

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295. Wardle, *supra* note 220, at 847 (opining that other controls involving education, income and other factors were not utilized); Patterson, *supra* note 139, at 2 (indicating that future research should distinguish mothers with partners from those who do not have partners).

296. See Tasker, *supra* note 126, at 225, 229-30 (noting that identifying a representative sample may be difficult); Patterson, *supra* note 139, at 9 (suggesting that additional studies of gay men and their children are needed).

297. Wardle, *supra* note 220, at 849; Rekers & Kilgus, *supra* note 261, at 370-74.

298. See generally Wardle, *supra* note 220, at 897.

299. *Id.* at 863 (citing Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47).

300. Patterson, *supra* note 139, at 2.

301. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 826 (11th Cir. 2004).

criticisms of studies that have been published, such as inadequate sampling and too much reliance on self-reporting subjects.<sup>302</sup> It also referenced studies that had negative findings regarding the effect of lesbian and gay parenting. These studies found that children who were reared in same-sex households were worse off than those who were reared in heterosexual households. Namely, the children who grew up in same-sex households were more depressed and were subject to sexual identity confusion.<sup>303</sup>

In the *Lofton* court's opinion, "[a]lthough the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models are matters of ongoing debate, they ultimately involve empirical disputes not readily amenable to judicial resolution – as well as policy judgments best exercised in the legislative arena."<sup>304</sup> The court concluded that the evidence was not so "well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption."<sup>305</sup>

#### E. Summary

In sum, although there are noteworthy flaws in some of the empirical research that concludes that same-sex parenting is not harmful, there is very little empirical evidence that gay or lesbian parenting is harmful to children. The American Psychiatric Association ("APA") released a position statement on same-sex adoption and co-parenting in November 2002. *Inter alia*, the APA supports same-sex adoption and refutes arguments that children will suffer harm if they are adopted and parented by a gay man or lesbian woman:

Numerous studies . . . consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.<sup>306</sup>

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302. *Id.* at 825.

303. *Id.* (citing and quoting several social science studies).

304. *Id.* at 822.

305. *Id.* at 825.

306. The American Psychiatric Association, *Adoption and Co-parenting of Children by Same-Sex Couples*, Position Statement, APA Document Reference No. 200214 (November 2002). Accord The American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage*, Position Statement (July 2005) (declaring that there is not any research that demonstrates that children raised by same-sex couples are less well adjusted than children raised by heterosexual parents).



Likewise, the American Academy of Pediatrics (the "Academy") supports gay and lesbian adoption. In its February 2002 position statement, the Academy announced that "[a] growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual."<sup>307</sup> The American Psychological Association and the National Association of Social Workers also announced their organizational support for same-sex adoption in 2002.<sup>308</sup>

For every one study that has yielded negative results about gay or lesbian parenting there are ten or more studies that yielded positive outcomes in favor of gay and lesbian adoption. These studies emphatically conclude that some gay and lesbian parents can be good parents:

[T]he psychological and sociological data indicate that the sexual orientation of a parent is not a predictor of whether or not children parented by them will develop either major psychological problems, or same-sex sexual orientation. There is no competent science data developed in the last twenty years which indicates anything other than that homosexuals are as qualified as heterosexuals to parent children."<sup>309</sup>

Prejudices applied to same-sex individuals prevent otherwise qualified adults from adopting children. More importantly, "the child in need of [the willing and able] parent's love and home" also is deprived of that love and home.<sup>310</sup>

In *Charles B.*, the vice-president of Lutheran Social Services, who also was an adoptive parent, testified about the type of parent that special needs children really need: "an adoptive child with special needs requires an adoptive parent with stability and flexibility, and the willingness to seek needed services."<sup>311</sup> Some gay and lesbian parents will fit that description. The question is not simply whether same-sex prospective parents should be permitted to adopt children. The more crystallized two-part question that is appropriate here is whether a particular same-sex prospective parent is

307. American Academy of Pediatrics, *Technical Report: Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341-44 (2002).

308. American Psychological Association, APA Policy Statement on Sexual Orientation, Parents and Children, <http://www.apa.org/pi/lgbcc/policy/paretns.html> (last visited Feb. 17, 2006); National Association of Social Workers, Gay Parents' Rights Backed, <http://www.socialworkers.org/pubs/news/2002/01/gay.htm> (last visited Feb. 16, 2006).

309. ROBERTA ACHTENBERG, LESBIAN AND GAY PARENTING: A PSYCHOLOGICAL AND LEGAL PERSPECTIVE 3-4 (National Center for Lesbian Rights 1987).

310. *Id.* at 4.

311. *In re Adoption of Charles B.*, 552 N.E.2d 884, 889 (Ohio 1990) (indicating why Charles' same-sex psychological counselor should be allowed to adopt him).

“suitably qualified to care for and rear the child, and whether the best interests of the child will be promoted by the adoption.”<sup>312</sup>

## V. SUITABILITY FOR FOSTER PARENT STATUS BUT NOT FOR ADOPTIVE PARENT STATUS IN FLORIDA

Foster parents care for many children who are in child welfare. Nationally, non-relative foster parents adopted fifty-nine percent (29,501) of the 126,000 children who were awaiting adoption in 2001.<sup>313</sup> In total, non-relatives acted as foster parents for 260,384 of the children (48%) in the child welfare system.<sup>314</sup> According to a January 2005 report, in Florida alone, there were 31,963 children in the child welfare system in 2002.<sup>315</sup> The number had decreased by only 514 from 32,477 in 2001.<sup>316</sup> The average time that children were in Florida’s child welfare system between 2001 and 2002 was 23.7 months.<sup>317</sup> Of the 17,061 children who left Florida’s child welfare system in 2001, 8.8% (1534) were adopted.<sup>318</sup> The number of children who were eligible for adoption but were not adopted in that year was 7,850.<sup>319</sup>

In Florida, as in many states, the second largest group of adoptive parents who adopt children from child welfare is foster parents. In its March 2004 report to the Administration for Children and Families, Florida reported that thirty-six percent of adoptive parents in 2001 were foster parents.<sup>320</sup> Data reported on the Florida Department of Children and Families web site shows that fifty-eight percent of Florida’s “adoptive placements are with foster parents who cared for the children as foster

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312. *Id.* (citation omitted).

313. AFCARS, *supra*, note 5, at 7.

314. *Id.* at 1 (indicating that twenty-four percent (130,869) of children were in foster family homes with relatives).

315. Children’s Defense Fund, Child Welfare in Florida at 1 (Jan. 2005), <http://www.childrensdefense.org/childwelfare/financing/factsheets/fl.pdf> (last visited Mar. 21, 2006) (defining foster care to include “family foster care, group care, and institutional care”) [hereinafter Child Welfare in Florida].

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 1. By 2004, when the *Lofton* court wrote its opinion, it mentioned that there were only 3,000 children in the child welfare system who had not received permanent placement. *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 823 (11th Cir. 2004).

320. United States Department of Health & Human Services, Administration for Children & Families, Prior Relationship of Adoptive Parent(s) to Child: October 1, 2001 to September 30, 2002 (March 2004), [www.acf.hhs.gov/programs/cb/stats\\_research/afcars/statistics/relationship04.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/relationship04.htm) (last visited Mar. 21, 2006) (reporting that thirty-eight percent of adoptive parents were other relatives).

children first.”<sup>321</sup> Thus, one can reasonably conclude that foster parents adopt many special needs children who are awaiting permanent homes in Florida.<sup>322</sup>

Although it does not permit same-sex adoption, Florida does allow gays and lesbians to care for children as foster parents. In a 1994 opinion, a Florida court held that the Department of Health and Rehabilitative Services did not have the authority to deny gays and lesbians the opportunity to become foster parents based on an unwritten rule.<sup>323</sup> Some children have been cared for by their Floridian foster parents for many years. Although the State of Florida has licensed gay and lesbian adults to provide foster care for many children for lengthy periods, the same individuals and couples are not deemed qualified to adopt children that they have welcomed into their home and lovingly nurtured without incident.

The licensure procedure for foster parents in Florida is rigorous. To become foster parents in Florida, applicants must complete twenty-one hours of pre-service training before they are licensed to care for children.<sup>324</sup> There are thirteen separate requirements for licensure that must be approved including the prospective licensee’s “good moral character based upon screening, education, training, and experience.”<sup>325</sup> Applicants who complete the licensure process are permitted to care for children in their homes for one year after which the license may be renewed with an additional eight hours of in-service training prior to renewal.<sup>326</sup> Foster parents receive some of the same training that prospective parents receive. Like most states, adoptive parents and foster parents are trained together in Florida.<sup>327</sup>

Same-sex applicants who are licensed foster parents and who provide proper care for children under an established standard should be allowed to adopt children in Florida. As a participant in one national study, the State of Florida reported that 25-50% of its prospective parents become foster

321. The Florida Department of Children & Families, Frequently Asked Questions on Adoption, <http://www.dcf.state.fl.us/adoption/faq.shtml> (last visited Mar. 8, 2006).

322. Donaldson, *supra* note 35, at 10, 18, 46 (indicating that fifty-nine percent of adoptions in 2001 were foster parent adoptions and that married white couples who were not college graduates also adopted these children).

323. *Matthews v. Weinberg*, 645 So. 2d 487, 489 (Fla. Ct. App. 1994); Strasser, *supra*, note 1, at 422. *Cf. Cooper*, *supra* note 138, at 181 (listing states that do not allow same-sex applicants to act as foster parents).

324. FLA. STAT. § 409.175 (14)(a)(b) (2005). *See also Lofton*, 358 F.3d at 808 (noting that Smith and Skahen completed a ten-week course).

325. FLA. STAT. § 409.175(5)(a)(5) (2005).

326. FLA. STAT. § 409.175(6)(h) (2005).

327. Donaldson, *supra* note 35, at 29.

parents to improve their opportunities to adopt.<sup>328</sup> In 1999, 49% of Florida's pre-adoptive foster parents adopted children.<sup>329</sup> Of the 25,180 special needs children who were adopted nationwide in 1999, nearly 88% were adopted by pre-adoptive foster parents.<sup>330</sup>

Special needs children like the children in *Lofton* may be placed in a particular foster home for extended periods of time.<sup>331</sup> Bert has been living with Lofton since 1992, when he was a two-month old infant. Bert is thirteen years old now and living in Oregon, where he was allowed to relocate with Lofton. Florida's child welfare and adoption laws still apply, however.<sup>332</sup> The foster parent and the child often form a strong emotional bond. As a result, the foster parent will file an application to adopt the child.<sup>333</sup>

In *Lofton*, Lofton, a registered pediatric nurse, had been a foster parent for three children. Florida agencies obviously were taking advantage of Lofton's expertise in treating children who had HIV.<sup>334</sup> He nurtured all of them from infancy for several years. Bert had been in Lofton's care for ten years. The court noted that during that time, Lofton's care of these children had been "exemplary."<sup>335</sup> Lofton was such a great parent that Florida's Children's Home Society created an award in his honor and made him its first recipient.<sup>336</sup> Moreover, Lofton was such a model foster parent that caseworkers asked him to quit his job as a nurse so that he could provide full-time care for another child who had AIDS.<sup>337</sup>

No one else expressed an interest in adopting Bert.<sup>338</sup> Two years after Lofton had filed his petition, and it had been denied, as an attempted compromise, the Department of Children and Families ("DCF") offered to make Lofton Bert's legal guardian.<sup>339</sup> A guardian is "[o]ne who has the legal authority and duty to care for another's person or property, especially

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328. *Id.* at 62.

329. *Id.* at 83.

330. See AFCARS, *supra* note 5, at 5.

331. Casey, *supra* note 5, (reporting that children stayed in foster care an average of twenty-two months in September 2003).

332. FERRERO ET AL., *supra* note 42, at 4.

333. See PERTMAN, *supra* note 41, at 162.

334. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 807 (11th Cir. 2004).

335. *Id.*

336. FERRERO ET AL., *supra* note 42, at 6 (creating the Lofton-Croteau Award).

337. *Id.* at 5.

338. Strasser, *supra* note 1, at 424-25 (comparing the *Lofton* child to a child in another case that did involve another applicant who wanted to adopt the child).

339. *Lofton*, 358 F.3d at 808.

because of the other's infancy, incapacity, or disability."<sup>340</sup> Guardianship status meant that the teenager would "leave foster care and DCF supervision."<sup>341</sup> Florida was willing to allow this child with special needs to leave the system, but not for him to have all the rights to which he would be entitled, such as inheritance and wrongful death benefits, if Lofton were allowed to adopt him.

Two other *Lofton* plaintiffs, Wayne Larue Smith and his partner Daniel Skahen, were licensed foster parents in Florida. Smith was an attorney and Skahen was a real estate broker. In just three years since they were licensed, they had served as foster parents to ten children. There was no evidence that any child had been harmed during that three-year period. Yet, their application to become adoptive parents was also denied because of their sexual orientation.<sup>342</sup> Rosie O'Donnell was also a foster parent to a little girl in Florida whom she wanted to adopt. Rosie could not adopt the girl because of Florida's prohibition against gay and lesbian adoption, so she identified some friends who agreed to adopt the child.<sup>343</sup>

Gay and lesbian parents have adopted foster children in other jurisdictions.<sup>344</sup> The *Lofton* court quoted *Smith v. Organization of Foster Families for Equality and Reform*<sup>345</sup> (and other cases) extensively regarding the issue of whether foster parents had superior rights or liberty interests in retaining custody of or adopting a foster child.<sup>346</sup> *Smith* implied that foster parents do not have a vested right or constitutional due process liberty interest in the "integrity of their family unit" that would prevent the state from removing a child from their homes.<sup>347</sup> The court held that the State's pre-removal procedures, which *inter alia* gave foster parents only ten days notice and an opportunity to request a conference with the Social Services Department, did not violate the U.S. Constitution.<sup>348</sup> On the other

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340. HANDBOOK, *supra* note 80, at 279.

341. *Lofton*, 358 F.3d at 808.

342. *Id.* See also FERRERO ET AL., *supra* note 42, at iv; Tasker, *supra* note 126, at 225 (choosing to become parents through adoption or foster parenting).

343. FERRERO ET AL., *supra* note 42, at iv.

344. *In re Hart*, 806 A.2d 1179, 1180-81 (Del. Fam. Ct. 2001) (adopting children who had been in their home for one and three years, respectively). See also *Options*, *supra* note 138, at 42 (discussing different types of gay and lesbian adoptions).

345. 431 U.S. 816 (1977).

346. *Lofton*, 358 F.3d at 813-14 (citing and quoting *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978)). See also *Buckner*, 876 So. 2d 1285, 1289-90 (Fla. Dist. Ct. App. 2004) (concluding that foster parents do not have constitutional protection but they do have a right to be heard during adoption proceedings).

347. *Smith*, 431 U.S. at 842, 845-47.

348. *Id.* at 847, 855-56.

hand, a federal statute provides that current foster parents who are caring for a child are entitled to notice and an opportunity to be heard during any review or hearing about a child who is living in their home.<sup>349</sup>

The plaintiffs in *Lofton* asserted that Florida should allow gay and lesbian adults to adopt children because it licenses them to act as foster parents.<sup>350</sup> Proponents argued that allowing same-sex individuals to act as foster parents proves that the State really does not believe that placement of a child in a gay or lesbian-headed household would be contrary to the child's best interest.<sup>351</sup> However, the court decided that the State rationally distinguished between the goals for same-sex adoptions, same-sex foster care, and guardianship. It ruled that Florida's distinctions "bear[] a rational relationship to Florida's interest in promoting the nuclear-family model of adoption since foster care and guardianship have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood, which is the legal equivalent of natural parenthood."<sup>352</sup>

After its lengthy discussion of the cases and statutes, the *Lofton* Court ruled that "under Florida law neither a foster parent nor a legal guardian could have a justifiable expectation of a permanent relationship with his or her child free from state oversight or intervention."<sup>353</sup> The court reasoned that in Florida, "foster care" is intended to be a short-term arrangement while the state attempts to find a permanent adoptive home" for a child.<sup>354</sup> The court further noted that the state's oversight continues in foster care situations so that the child may be removed from a foster parent's home at any time that the state believes it is in the child's best interests.<sup>355</sup>

Bert's thirteen-year placement with Lofton certainly cannot be considered a short-term placement. Moreover, children's concept of time is very different than adults' sense of time. What appears to be a short time for adults can appear to be an eternity to a child.<sup>356</sup>

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349. 42 U.S.C.A. § 675 (5)(G) (2005) (emphasizing that the foster parents are not entitled to become a party in the proceeding).

350. *Lofton*, 358 F.3d at 823.

351. *Id.* at 823-24.

352. *Id.* at 824 (noting that the legislature should have "leeway to approach a perceived problem incrementally").

353. *Id.* at 814.

354. *Id.* But see Strasser, *supra* note 1, at 424 (declaring that the arrangement for this child "could hardly be characterized as short-term").

355. *Lofton*, 358 F.3d at 814 (citing section 39.623(1) which allows foster care to be considered as a permanent option when the child reaches the age of fourteen).

356. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* 41-43 (The Free Press 1996). But see *Parentlessness*, *supra* note 41, at 340-41 (suggesting that the best form of foster care is long-term placement).

Emphasizing the foster child's need for stability and security, courts in other states have allowed same-sex foster parents to adopt foster children even when there have been other people willing to adopt the child. In *In re J.N.*, the court explained why it was in the special needs child's best interest to be adopted by her lesbian foster mother.<sup>357</sup> E. was born on January 25, 1990, with a cleft palate and she tested positive for cocaine.<sup>358</sup> In addition, E. had chronic ear infections and learning and speech impediments.<sup>359</sup> Although her African-American grandmother was caring for E.'s sister when she was born, the grandmother was unwilling to care for E.<sup>360</sup>

Four months after she was born, E. was placed with a white lesbian foster parent and her lesbian partner.<sup>361</sup> Together, the women cared for E. and nurtured her through three operations and dental procedures to correct her cleft palate and related deformities.<sup>362</sup> After E. had been with the couple for four years, the foster parent filed a petition to adopt her.<sup>363</sup> Then E.'s grandmother became interested in the child and filed a competing petition to adopt E.<sup>364</sup>

When the question regarding whether the African-American child should be placed with a white lesbian was presented in *J.N.*, the court cited *Palmore v. Sidoti*.<sup>365</sup> Based on the *Palmore* decision, the *J.N.* court ruled: "Contrary to forceful arguments against having this child with a white lesbian, the law of this state and nation does not legitimize private prejudices. Such prejudices shall not prevent careful consideration of the child's interests and needs."<sup>366</sup>

The judge heard testimony from various physicians about which placement would be in E.'s best interests. Most witnesses testified that E. would suffer psychological harm if she was removed from her foster parent's home.<sup>367</sup> In this instance, the court concluded that, because of her special needs, E. had a "greater need" for permanent placement with

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357. 601 N.Y.S.2d 215, 217-18 (N.Y. Fam. Ct. 1993).

358. *Id.* at 216.

359. *Id.* at 216, 218.

360. *Id.* at 216 (visiting her grandchild only after the child was two years old).

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. 466 U.S. 429 (1984).

366. *J.N.*, 601 N.Y.S.2d at 217. See also Strasser, *supra* note 1, at 426-27 (arguing that Florida was not promoting the child's best interest by giving credence to societal prejudice).

367. *J.N.*, 601 N.Y.S.2d at 217 (predicting that the child would suffer a "profound loss"). But see *id.* at 218 (testifying that she could withstand a move and would not be "unduly harmed").

someone whom she could trust.<sup>368</sup> Therefore, permanent placement for adoption with the foster parent would be in E.'s best interests. The court found that her

stability, physical and emotion security [were] more important than the desires of either adult requesting the right to adopt E. Stability of the child's environment and a reluctance to uproot [her] from familiar surroundings, quite properly is a relevant and important consideration . . . . Every child needs "stable and continuous relationships." Children also need continuity of care and are at risk for great suffering if such care is interrupted.<sup>369</sup>

It is inconsistent for Florida to allow gay men and lesbians to care for children in foster care for years and then abruptly remove the child to a stranger's home for permanent placement. All of the feared effects such as molestation and sexual influence that opponents have raised against permanency planning with same-sex petitioners certainly could happen during the period of time that the children are placed with same-sex foster parents. If a gay or lesbian foster parent wanted to harm a child, he or she has tremendous freedom to do so. This freedom is evidenced by recent events in Florida. Florida caseworkers are notoriously lax in their oversight of children who are placed in foster homes. One recent report indicated that seventy-eight percent of the children had no more than two placements, but more than one thousand children were abused and neglected while they were in the State's care.<sup>370</sup> Furthermore, an enormous number of children (561) have been lost completely after they were placed in the State's care.<sup>371</sup> At least two children, including little Rilya Wilson who made national news, died while they were in the State's care.<sup>372</sup>

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368. *Id.* at 216.

369. *Id.* at 217 (internal citations omitted).

370. Child Welfare in Florida, *supra* note 315, at 1. Children in child welfare become "victims of the foster care shuffle." Some of them live in twenty or more homes before they leave the system. Many have "increased emotional problems, delinquency, substance abuse and academic problems." ACLU, Fact Sheet: Overview of Lesbian and Gay Parenting, Adoption and Foster Care (Apr. 6, 1999), <http://www.aclu.org/lgbt/parenting/11824res19990406.html> (last visited Mar. 22, 2006) (citing R. Eagle, *The Separation Experience of Children in Long Term Care: Theory, Resources, and Implications for Practice*, 64 AM. J. OF ORTHOPSYCHIATRY 421-34 (1994); G. Robert, et al., *A Foster Care Resource Agenda For the 90's*, LXXIII Child Welfare 525-52 (1994)).

371. Carol Marbin Miller, *Rilya Wilson Case: Birthday Inspiration*, MIAMI HERALD, Sept. 30, 2005, at 1B; FERRERO ET AL., *supra* note 42, at 23 (contending that thousands of children have been lost).

372. Miller, *supra* note 371 (reporting that Rilya's caregiver, Geralyn Graham, had been charged with smothering her to death). See also Deborah Sharp, *Florida Cases Symbolize Meltdown of Child Welfare; Suits in a Dozen States Allege Trauma, Abuse*, USA TODAY, June 14, 2002, at A18; *Clear Signs of progress in Troubled Foster Care*, DAYTONA BEACH NEWS-



Ten years may be a short-term placement for Florida's caseworkers and courts, but it is a critical period in a child's life. During that time, the child develops strong emotional bonds with his or her foster parent, the foster parent's family and the community in which they live. For many special needs children, their foster parent will be the only "parent" the child has ever known. Furthermore, other adults are not lining up to adopt the children whom prospective parents like the *Lofton* plaintiffs seek to adopt. In Houghton's scenario, for example, the boy's biological father left him in Houghton's care indefinitely because he was unable to care for the boy. Later, the father voluntarily relinquished his rights entirely so that Houghton could adopt the boy.<sup>373</sup> The State of Florida legislature recognized the significance of stability in a child's life. Stability is not maintained, however, when a child is uprooted from the only stable home he has known and one for which his natural father has given his blessing.<sup>374</sup>

Representative Sheri McInvale of the Florida House of Representatives has introduced a bill that would allow a gay or lesbian foster parent to adopt children in Florida. The proposed amendment of section 63.042 reads:

Who may be adopted; who may adopt.—

(3)(a) A person is not eligible to adopt under this statute if that person is a homosexual except as provided in paragraph (b).

(b) If a court finds, by clear and convincing evidence, that the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee's parent, and granting the adoptee permanency in that home is more important to the adoptee's developmental and psychological needs than maintaining the adoptee in a temporary placement.<sup>375</sup>

It is unfortunate that gay and lesbian prospective parents are not allowed to adopt children without such restraints in Florida. Representative McInvale should be commended for her effort to give children another opportunity to exit the child welfare system. If her bill is passed, children who live with a gay or lesbian person whom they recognize as their parent may be adopted by that person if the child's developmental and

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JOURNAL, July 5, 2004, at 4A (reporting that the privatized system has improved but it still has problems with high caseworker loads and the state's failure to properly supervise the program).

373. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 808 (11th Cir. 2004). *But see id.* at n.12 (recognizing that for some children, foster care does become a permanent placement).

374. *See Strasser, supra* note 1, at 422 (opining that *Lofton's* foster child should not be removed from *Lofton's* home and placed with strangers after thirteen years).

375. [http://leagis:8080/Public/2006/Bills/0100-0199/0172/\\_s0172\\_.html](http://leagis:8080/Public/2006/Bills/0100-0199/0172/_s0172_.html) (last visited Mar. 22, 2006).

psychological needs will be met better by permanent placement with that person. This is a small step in the right direction toward permanent placement for thousands of children. It is a bill which would lead to outcomes in the best interests of children who have developed strong emotional ties and want to become established family members in their gay and lesbian parents' homes. Many of these gays and lesbians will have been a child's foster parent for many years, and passing this bill would mean stability for many children who have not had stability.

## VI. CHANGING TIMES REQUIRE LEGISLATIVE CHANGES

The *Lofton* court upheld Florida's policy of recreating the "nuclear family as closely as possible."<sup>376</sup> Times have changed markedly since 1977, when Florida's amendment against same-sex adoption was enacted. The United States Census Bureau reported that there are more than 600,000 gay and lesbian households in the United States.<sup>377</sup> However, the number reported is probably inaccurate because some gay men and lesbians still do not feel comfortable enough to disclose their sexual orientation to the public.<sup>378</sup> Many gays and lesbians are parenting children. Some reports estimate that between one and twelve percent of gays and lesbians are parents to millions of children and that another forty-nine percent would like to become parents.<sup>379</sup> Thus, Florida should establish current laws and regulations for these nontraditional families that did not exist in significant numbers in 1977.

Today, children learn about gays and lesbians when they are young.<sup>380</sup> Also, more young people who are attending elementary and high schools are revealing their own same-sex orientation. A recent Washington Post Magazine article reported that fifty-seven percent of teenagers in the Washington, D.C. area had a friend who was openly gay or lesbian.<sup>381</sup> In addition, more and more adults are revealing their same-sex orientation. On October 27, 2005, for example, Sheryl Swoopes, a Houston Comets

376. *Lofton*, 358 F.3d at 819.

377. GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 1 (2001).

378. FERRERO ET AL., *supra* note 42, at 13-14.

379. *Id.* at 14-15, 29. See *id.* at 113 (naming approximately thirty-one gay men and lesbians who are parenting children); Tasker, *supra* note 126, at 224 (estimating the number of gays and lesbians and the number who are mothers and fathers).

380. Golombok and Tasker, *supra* note 258, at 10 (expressing uncertainty about how changes will effect same-sex exploration).

381. Claudia Dean, *Everybody Loves Andy*, WASH. POST MAGAZINE, Oct. 23, 2005, at 24 (talking about a good friendship between a gay male and some straight girls and some teasing from a small group of students).

basketball star, said that she was tired of “pretending” and revealed that she is a lesbian.<sup>382</sup> There are gays and lesbians in other professions too. For example, Bishop V. Gene Robinson, a gay Episcopal bishop, was elected in 2003.<sup>383</sup> As society becomes more accepting, more lesbians and gays who pretend that they are heterosexual to have the opportunity to adopt children will feel comfortable enough to disclose their true sexual orientation.<sup>384</sup>

Legislators in progressive states have begun to pass legislation that protects the rights of gays and lesbians. In early October 2005, Connecticut became the third state to recognize civil unions for same-sex partners.<sup>385</sup> Three years earlier, the State of Vermont recognized civil unions.<sup>386</sup> In May 2003, a judge in the State of Massachusetts went further than any court had previously ventured and struck down a statute that (unconstitutionally) barred same-sex couples from marrying.<sup>387</sup> Since 1977, many cities and municipalities have passed domestic partnership legislation that allows partners to share benefits that previously had been shared only by married heterosexual couples. As a consequence of domestic partnership laws, gays and lesbians may make decisions for one another at times of incapacitation and to share non-federal benefits that include insurance and employee benefits.<sup>388</sup> Some states like California and Hawaii have enacted statewide protection for same-sex couples. Hawaii passed its reciprocal beneficiaries legislation in 1997 to allow

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382. Oscar Dixon, *Little Backlash is Expected From Swoopes' Revelation*, USA TODAY, Oct. 27, 2005, at 14C (announcing that her team members have known about her sexual orientation and that her announcement will not cause any changes in the team's locker room).

383. Kevin Eckstrom, *Episcopal Bishop Suggests Catholics Leave Over Pope*, WASH. POST, Nov. 9, 2005, at A4 (claiming that some parishioners were leaving the church as a result of the election).

384. PERTMAN, *supra* note 41, at 163.

385. David A. Fahrenthold, *Connecticut's First Same-Sex Unions Proceed Civilly*, WASH. POST, Oct. 2, 2005 at A3.

386. VT. STAT. ANN. tit. 15 § 1201 (2) (2004) (defining civil union as “two eligible persons who may receive benefits and protections and be subject to responsibilities of spouses”).

387. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (ruling that the prohibition of same-sex marriage was an unconstitutional violation of the Massachusetts constitution). *See also* Alan Cooperman and Jonathan Finer, *Hundreds Tie Knot on Day One, but Questions Remain*, WASH. POST, May 18, 2004, at A1 [hereinafter Cooperman and Finer] (reporting that more than 600 couples married on the first day). *But see* IND. CODE ANN. § 31-11-1-1 (LexisNexis 2005) (allowing only men and women to marry).

388. *See, e.g.*, CAL. CIV. CODE § 1714.01 (West 2006) (allowing domestic partners to recover damages for negligent infliction of emotional distress regarding a partner); D.C. CODE § 32-702 (2006) (instructing residents on establishing and terminating a domestic partnership). *See also* *Lowe v. Broward*, 766 So. 2d 1199, 1210-11 (Fla. Dist. Ct. App. 2000) (holding that the Florida county's domestic partnership act did not violate the state constitution). *But see* Martha Neil, *Same-Sex Benefit Bind*, 91 A.B.A. J. 22 (2005) (finding it difficult for corporate employees to award benefits to the extent desired because of federal restrictions and prohibitions).

individuals in the state who could not marry to receive “certain rights and benefits presently available only to married couples.”<sup>389</sup> In general, more states like New York have enacted legislation that forbids discrimination against persons based on their sexual orientation.<sup>390</sup> Also, some same-sex partners have taken advantage of bankruptcy benefits.<sup>391</sup>

With the passage of new laws that legitimize their committed relationships, hundreds of gay and lesbian couples have been legally married in the United States and other countries including the United Kingdom, Belgium, the Netherlands, South Africa, and provinces in Canada.<sup>392</sup> With every opportunity, thousands of same-sex couples participated in commitment ceremonies in states throughout the country including New York, Massachusetts and California. Moreover, they are announcing these ceremonies in major newspapers.<sup>393</sup> Those who are marrying and participating in civil union ceremonies will begin to test their ability to take advantage of other benefits that have not been available to them in the past, such as joint adoption of children.

Presently, the definition of the family unit has broadened from that which the *Lofton* Court and the State of Florida applaud. As early as 1989, state courts and legislatures started to redefine the concept of family in a way that was more inclusive.<sup>394</sup> In 2003, a New York court decided that a gay man had standing to sue a hospital for his partner’s alleged wrongful death.<sup>395</sup> Some court decisions favor recognition of gay and lesbian

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389. HAW. REV. STAT. ANN. § 572C-2 (LexisNexis 2005).

390. N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2006); *See also* Chris Cillizza, *Corzine Defeats Forrester To Become N.J. Governor*, WASH. POST, Nov. 9, 2005, at A18 (reporting that Maine voters voted against a repeal of the state’s anti-discrimination law). *But see id.* (indicating that Texas became the nineteenth state to pass a state constitutional ban on same-sex marriage).

391. *See generally Unequal Treatment and Creditor Frustrations: The Limited Impact of Legalizing Same Sex Marriage*, 21 BANK. DEV. J. 743 (2005).

392. *See, e.g.,* DeNeen L. Brown, *Hundreds of Gay Couples Make their Way to Ontario to Say “I Do,”* WASH. POST, June 22, 2003, at A15; Cooperman and Finer, *supra* note 387 (reporting that couples in Belgium and the Netherlands may marry legally); *South Africa’s top court OKs gay marriage*, USA TODAY, Dec. 2, 2005, at 9A; Andrea Nicholls & Michael Lucas, *It’s time to make a song and dance*, TIMES (UNITED KINGDOM), May 5, 2005, at 4 (announcing the civil partner status that would become effective on December 5, 2004, and the anticipated Elton John “marriage”). *But see* Darragh Johnson, *Paper Anniversary*, WASH. POST, Feb. 14, 2003, at C1 (invalidating same-sex marriage in Maryland based on mistaken belief that couple was heterosexual).

393. *See, e.g.,* Patrick Simon, *Marc Weiner Commitment Ceremony Announcement*, N.Y. TIMES, Oct. 17, 2004, at 14.

394. *See, e.g.,* *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989).

395. *Judge Says Gay Partner May Sue as a Spouse*, WASH. POST, Apr. 16, 2003, at A5 (declaring that this was the first time that a same-sex couple that had participated in a Vermont civil union was recognized as a married couple).

couples as family. Same-sex couples have been considered “family” for landlord and tenant purposes.<sup>396</sup> In August 2005, in two separate opinions the California Supreme Court decided that both adults who agree to create and parent children together are the children’s legal parents and they are equally obligated for the children’s support.<sup>397</sup> Some states, like New Hampshire, that had joined Florida in banning same-sex adoption have repealed their laws. New Hampshire repealed its anti-same-sex adoption statute in 1999.<sup>398</sup>

Finally, the media has contributed to more accepting views of lesbians and gays. Gays and lesbians have appeared on popular television shows and cable television shows such as “Friends,” “Will and Grace,” “Girlfriends,” and “Six Feet Under.” In these shows, actors have portrayed gay men, bisexuals and lesbians individually and as couples. In 1997, talk show hostess Ellen DeGeneres revealed her sexual orientation as a lesbian. Admittedly, there was some backlash against DeGeneres when she first announced her sexual orientation; but now she has an Emmy Award-winning show in a prime daytime time slot.<sup>399</sup>

## VII. CONCLUSION

The real goal of adoption should be finding a permanent placement for all available children, especially the thousands of special needs children in Florida who are often overlooked and the last children waiting in the child welfare system. One court summarized this goal of adoption when it wrote that

[p]ermanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.<sup>400</sup>

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396. *Braschi*, 543 N.E.2d at 50.

397. *Elisa B. v. El Dorado County*, 117 P.3d 660 (Cal. 2005) (concluding that a child could have two female parents); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (deciding that both lesbian partners who participated in vitro fertilization were the child’s parents).

398. See N.H. REV. STAT. ANN. § 354-A:1 (LexisNexis 2004) (forbidding discrimination “on account of sexual orientation”).

399. See Bloch, Julia Liederman, Katie Plato, Catherine, *Cha-cha-changes: like sands in an hourglass, these were the days of our lives*, 15 CURVE MAGAZINE, May 1, 2005, at 34 (naming other lesbians who had come out); Gay & Lesbian Alliance Against Defamation, Reality Check: GLAAD Examines the 2004 – 2005 Primetime Television Season, [http://www.glaad.org/media/release\\_detail.php?id=3719](http://www.glaad.org/media/release_detail.php?id=3719) (last visited October 6, 2005); Tracy L. Scott, *Gay Characters Gaining TV Popularity*, WASH. POST, Nov. 30, 2003, at Y6.

400. *State ex. rel. Portage Cty. Welfare Dept. v. Summers*, 311 N.E.2d 6, 13 (Ohio 1974).

Because adoption is governed by statute and Florida's statute prohibits same-sex adoption, courts are not authorized to permit gays and lesbians to adopt children in that state. Thus, it is imperative that the Florida legislature reconsider its position. In its legislative intent statement, the Florida legislature declares that "[i]t is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home."<sup>401</sup> Yet, it prohibits same-sex applicants from adopting children with special needs, thousands of whom could be placed in a loving home permanently within days if the door to adoption was opened wider to allow gay and lesbian prospective parents to adopt children. Even Professor Lynn Wardle, who at times has been a strong opponent of same-sex adoption, acknowledged that special-needs adoption may be an area where same-sex adoption should be allowed when the legislature permits it:

Adoption by adult, single homosexuals of children with special needs has been approved in several cases in which the devotion and benefit of the adult to the child has been undeniable, and the alternatives for the child have been found to be less promising. It may be preferable in current social conditions for a particular hard-to-place, special-needs child to be raised in a private home by a responsible adult gay professional with whom the child already has a positive bond than for the child to be left in the limbo and instability of state foster care or institutional care.<sup>402</sup>

Although it opposes gay and lesbian adoption, the Family Research Council ("FRC") also understands the significance of permanent placement in suitable homes for special needs children. The FRC declared that "[c]hildren deserve the best possible homes, especially children in the welfare system who have special emotional and psychological needs."<sup>403</sup>

The Florida statute that prohibits same-sex adoption was promulgated almost thirty years ago. Even the Florida legislature could not have contemplated or predicted the onslaught of child abuse and neglect findings that would cause the child welfare system to overflow. It could not have predicted the inception of a system that would cause further abuse of children by those with whom the state had entrusted the children's care. It could not have anticipated that hundreds of children would be lost and never be returned to their parents or have an opportunity to start a new life with loving adoptive parents.

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401. FLA. STAT. ANN. § 409.166(1) (LexisNexis 2005).

402. Wardle, *supra* note 220, at 882-83 (deferring to the legislature for their final decision).

403. Children's Voice Article, *supra* note 41, at 2-3.

Some writers have cautioned that it would be wrong to match the so-called less desirable children – special-needs children – with the less desirable adoptive parents – gays and lesbians.<sup>404</sup> All children have value and special needs children should not be labeled as undesirable children. They are not undesirable to the caseworkers, foster parents, kinship caregivers, and thousands of single and married couples that adopt them each year. Neither should gay men and lesbians be considered undesirable parents. Gay men and lesbians should be allowed to adopt all children and state their preference for children, if any, just as heterosexual prospective parents do. When the doors to adoption courts are opened to gay and lesbian parents in Florida, many of them will choose to adopt special needs children and those children who are able to state their wishes will consent to the adoption. The determination regarding whether a gay or lesbian individual or couple should be permitted to adopt one or more children should be made on a case-by-case basis, not an across-the-board denial of all gay and lesbian applications.

When these adoptions are allowed, same-sex individuals and couples should not ignore the difficulties that some children may experience because of their adoptive parents' sexual orientation. Everyone involved in the adoption process should be sensitive to the feelings and emotions that some children will experience. The Common Pleas Court of York County, Pennsylvania acknowledged "that [some] children will experience the difficulties of feeling different or embarrassed during the adolescent years."<sup>405</sup> The court further reasoned, however, that "on balance, the love and commitment that the adopting parents will give to them counter-balance the negative effects of the lifestyle of the home in which they live."<sup>406</sup>

The possibility that children who are adopted by same-sex individuals or couples will be stigmatized is a very real possibility – a high probability. However, in *Palmore*, the Supreme Court ruled that "the reality of private biases and the possible injury they may inflict are [not] permissible considerations."<sup>407</sup> Although *Palmore*, a custody case, may be distinguished on its facts, the principle that prohibits decisions that are based upon perceived external prejudices shall be equally applicable in the adoption context. Although adults should do everything possible to prevent and curtail the stigma and prejudice against children who have two moms

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404. See Cooper, *supra* note 138, at 179.

405. *In re Adoption of E.O.G.*, 28 Pa. D. & C.4th 262, 268 (Pa. Common Pleas 1993).

406. *Id.*

407. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (forbidding public officials from "bowing to the hypothetical effects of private racial prejudice").

or two dads, the potential effects alone should not prevent same-sex adoptions en masse.

Regarding the communities' role, heterosexual parents should teach their children to be more tolerant and that teasing of this nature is hurtful and unacceptable. Teachers who witness such abuse should correct the offending student and use the opportunity as a teaching tool for the entire class. As more and more children who have two moms and two dads who care for them emerge, the teasing and abuse will subside.

The *Lofton* court correctly concluded that changing adoption laws in Florida is the legislature's province because it could not identify a constitutional infringement in Florida's same-sex adoption prohibition.<sup>408</sup> It held that "[t]he legislature is the proper forum for this debate."<sup>409</sup> The court refused to second-guess the legislature and "sit as a super legislature 'to award by judicial decree what was not achievable by political consensus.'"<sup>410</sup>

The Florida statute should be amended to eliminate the language that forbids gay and lesbian adoption.<sup>411</sup> Moreover, courts in Florida should interpret the amended provision to mean that same-sex couples shall not be denied the opportunity to adopt children unless there is clear and convincing evidence that the applicant would not be a suitable adoptive parent and/or that adoption would not be in the child's best interests. Consequently, *Lofton* would be overruled and subsection 3 would be repealed.

More than twelve years ago, a New Jersey court recognized that the concept of the family unit had changed in a way that required the courts to change their view of families:

This case arises at a time of great change and a time of recognition that, while the families of the past may have seemed simple formations repeated with uniformity (the so called "traditional family") families

408. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004).

409. *Id.*

410. *Id.* (quoting *Thomasson v. Perry*, 80 F.3d 915, 923 (4th Cir. 1996)).

411. See ACLU Policy Memo, *supra*, note 236, at 9-10 which proposes two clauses:

All adoption placements will be made on a case-by-case basis, in the best interest of the child in need of placement. Adoption placement decisions will take into account all factors that may be relevant to the needs of the individual child, including the likelihood of placing the child in another adoptive home if the placement under study is rejected . . . . All home studies conducted in connection with a possible adoption placement will consider the sexual orientation of the prospective parent(s) and will evaluate what, if any, effect parental sexual orientation is likely to have on the child. Any home study report that finds that parental sexual orientation is likely to have a deleterious effect on the child will explain the bases for this finding and will balance said effect against the likelihood and effects of the child remaining in foster care.



have always been complex, multifaceted, and often idealized. This court recognizes that families differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.<sup>412</sup>

Florida's emphasis on forming traditional nuclear families is laudable but outdated. Its implementation of adoption laws does not reflect the present or the future for its children. They do not reflect Florida's interest in the best interests of children who are assigned to its child welfare system.

Florida should adopt the Child Welfare League of America's standard against discrimination as a practice in adoption proceedings and investigations. According to the Child Welfare League of America, "[a]pplicants should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child at the point of the adoption and in the future."<sup>413</sup> The State should not assume that all gays and lesbians who form non-traditional family units would cause harm to a child. Instead, each same-sex applicant's suitability should be adjudged on a case-by-case basis. Indeed, just as some heterosexual applicants should never be entrusted with a child's care, some same-sex applicants should never be entrusted with a child's care. When a same-sex applicant's lifestyle would be harmful to a child, a thorough background check will disclose that fact. Whenever there is sufficient evidence that the applicant's lifestyle would result in adverse effects that would be harmful to a child's mental or physical well-being, that applicant's petition should be denied regardless of whether the applicant is same-sex or heterosexual.

Whenever the gay and lesbian applicant, like the applicant in *Charles B.*, and the *Lofton* applicants, is adjudged suitable to adopt under the standard set forth and the adoption would be in the child's best interests, then that person's petition should be granted. Alternatively, as a start to dismantle Florida's archaic laws, Representative McInvale's bill should become law. If the legislature refuses to act on its own, in the best interests of children and the society in which they will become adults, Floridians, the legislators' constituents, should demand legislative action or elect legislators who will support an amendment.

412. *In re Adoption by J.M.G.*, 632 A.2d 550, 554-55 (N.J. Ch. 1993) (concluding the non-traditional lesbian family before it should be commended for the "secure, stable and nurturing environment" that it was providing for a child).

413. Child Welfare League of America, Standards of Excellence for Adoption Services, ¶ 4.7 (2004).