

Homosexual Adoption and the Law

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Discrimination makes people feel powerless and that is exactly how many same-sex couples feel when they are attempting to adopt children. Adoption is generally not an easy undertaking, but when it involves a same-sex couple petitioning to adopt children, the process is daunting. Not only are the laws throughout the fifty states inconsistent as to how adoption decisions are made, but also, in many cases, the court proceedings leave many potential adoptive parents disappointed and frustrated. Therefore, reaching the goal of becoming an adoptive parent is not an easy endeavor for many homosexuals. The adoption process is as complicated for those who are adopting for the first time, as it is for those who are only seeking to become the legal guardian of their partners' children. Those couples who are fortunate enough to become adoptive parents still remain under a cloud of doubt as to their parenting abilities and the effects their non-traditional lifestyle might have on their adoptive children.

It is the intention of my research analysis to examine some of the legal ramifications as well as the challenges that homosexual couples have to confront when trying to adopt children. In order to understand the issues same-sex couples have to face, I will focus my investigation on the following questions:

1. How does the court handle homosexual adoption?
2. How does being raised by homosexual parents affect children?
3. What is the outlook for same-sex couples and their children?

How Does the Court Handle Homosexual Adoption?

The laws in the United States regulating adoption policies are not explicit enough, and when it comes to homosexual couples whose aim is to adopt children, the laws are even more convoluted. According to the article, "Adoption by Homosexuals and Same-sex Couples: A Legal Memorandum," there are an estimated 1.5 to 5 million lesbian mothers and 1 to 3 million gay fathers. In 1990, there were approximately 6 to 14 million children living in homes that have a homosexual parent. As the numbers of homosexual couples continue to increase, so do the children available for adoption and this is why the subject of same-sex adoption has become the focus of many "legal discussion[s]" (1). Lynne Marie Kohm, Professor of Family Law at Regent University School of Law asserts that before any same-sex couples are eligible to adopt children, they must meet two criteria. First, the person(s) petitioning to become the adoptive parent must under-

go thorough judicial scrutiny and meet the court-established guidelines of “who can adopt.” Second, the court needs to evaluate and determine what is in the “child’s best interest” (646). Therefore, as per the state regulations, any prospective adoptive parents should be healthy, economically stable, have no criminal record, have a good family relationship from which the adoptive children can benefit, and finally must explain to the courts the reasons why they would like to become adoptive parents (“Adoption” 3).

Several different types of adoption are available to homosexuals: (i) adoption by a blood relative, (ii) “stranger adoption,” a type of adoption in which the legal parents give up all their rights to the children that are being placed for adoption, and (iii) second-parent adoption, the most common option used by same-sex couples when the children who are being adopted are the biological children of one of the partners, or one partner is already the legal guardian (“Adoption” 2). For example, in an adoption case of this nature, the parent will retain their parental rights of the children who are being petitioned for adoption by the other partner (2). However, according to Angela Xenakis and Alysse M. El Hage of the North Carolina Family Policy Council, in some states like Wisconsin, second-parent adoptions are banned unless the couples are married, and Wisconsin statutes do not allow same-sex unions. This appears to be a way by which the states can control same-sex adoption when they do not have laws directly addressing the issue. As a result, same-sex couples who are planning to become adoptive parents might be better off petitioning to adopt as second-parents, and they might even need to consider moving to a state that allows such types of adoption. The second-parent adoption process is the least scrutinized, as most of the adoption cases are handled by judges and children’s service agencies who are allowed to exercise their own judgment based on facts when making decisions. Xenakis and El Hage also declare, that recently, as a result of either past “courts decisions” or to “correct ambiguities in their own laws,” a number of states have been determined to reevaluate the criteria that are being used to decide adoption cases. However, they remarked that while the changes may be long overdue, these changes might help as well as hinder some homosexual couples in the adoption process (1, 2). As Debra Carrasquillo Hedges points out, some of the states that seem to discourage homosexual adoption appear to be promoting traditional family values (sect. V).

Furthermore, homosexual couples who intend to adopt children should understand some of the factors that influence same-sex adoption cases. In the article “Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in the Same-Sex Adoption Cases,” Timothy Lin concurs with Xenakis and ElHage that each state statute is different when handling homosexual adoptions. Three states, including Florida, ban homosexuals from adopting. But New Jersey set a precedent in a same-sex adoption

by ruling in the couple's favor. Prior to that ruling, same-sex couples had to circumvent the adoption hurdles by allowing one partner to adopt first, then have the other partner apply to become the second parent. Now close to two dozen states have legislation allowing same-sex second-parent adoption and those states that have yet to change their statutes do not condemn homosexual adoptions, but instead deal with the adoption issue on a case-by-case basis (768-69). However, with the exception of states like New Jersey, New York and Massachusetts where same-sex adoptions are encouraged, some states make use of loopholes in the way the court's language is worded to deny adoptions to homosexuals ("Adoption" 4). For example, in 1999, the adoption laws in Arizona clearly stipulated that married, single, and legally separated people are allowed to adopt (4). However, in a 1986 case, the Supreme Court ratified a decision of the lower courts by denying an adoption petition based on the adoptive parent's sexual orientation (5). The words of the court were that the lower court would be in conflict with its own views if it was to "declare homosexual conduct unlawful," and then turn around and approve an adoption that went against the court's traditional values (5). As of this writing, the laws in Arizona have not been changed to support same-sex adoption ("Greater Phoenix").

Homosexual couples who would like to adopt may need to be prepared to overcome some prejudicial sentiments from within the court system. Timothy E. Lin writes that sometimes the decision on a homosexual couple's petition for adoption might depend on the judge's personal belief. For example, in one case, the appellate court recognized that a judge from the lower court acted with bias towards a lesbian mother for her unwillingness to seclude her child from "known homosexual tendencies." The judge's action was so prejudicial that the appeals court's records reflected the following comment: "We are disturbed by the judge's numerous homophobic comments. His belief improperly clouded his judgment..." (763). Despite the biased attitudes that might pervade the courts, Eileen Huff emphasizes that it is the judge's responsibility to maintain an open mind when it comes to making decisions on same-sex adoption cases. She claims that judges should not inject their own personal beliefs, but rather concentrate on the facts that are relevant and the children's best interest when the cases are being decided (715). This is why Lin reasserts his point that it is time for society to stop judging homosexuals from the standpoint of sexuality, for it is inaccurate, demeaning and unsubstantiated, as homosexuals are people who are no different from anyone else (792-93).

In other words, it is time for change. As the number of same-sex couples and the children that are part of these homes grows, it is time for the decision-making process to foster same-sex adoption, rather than to find ways to discourage legal adoption. Children who are cared for by same-sex

couples not only need to have safe and secure homes, but also need to know that they are being protected legally by both parents. It is time for the adoption laws to become equitable and for decisions to be based on facts, not personal characterizations. No one should have to encounter intolerance, much less be subjected to biased attitudes within the judicial system.

How Does Being Raised by Homosexual Parents Affect Children?

It would appear as if same-sex couples are always in an up hill battle against pervasive misconceptions surrounding their suitability as parents. As Lin explains, the general perceptions that most people have about homosexual parents are: (a) homosexuals are oversexed and usually have unstable relationships compared to their heterosexual counterparts, (b) the children under their care are more likely to be sexually molested and are at a higher risk of modeling homosexual behavior and becoming homosexuals themselves, (c) having same-sex partners as parents might heighten the children's risk of being stigmatized (771). It is Lin's opinion that these misguided perceptions not only influence the general public's opinion of same-sex couples, but also have a tremendous negative impact on how the court renders decisions when handling homosexual adoption cases. He also points out that research shows that some judges' decisions are colored by personal biases like "social stereotypes and unsupported assumptions... [lacking] empirical foundation" (772). Lin's argument is further supported by the American Psychological Association [APA] article "Sexual Orientation, Parents and Children," which states that there is an unfounded belief that children who are raised by same-sex couples are molested, shunned, and stigmatized. Studies have shown that regardless of the type of family structure in which children are cared for, the sexual orientation of the parents has little or no impact on children's self concepts and social skills. Therefore, it is totally misleading to suggest that children that are raised in a homosexual environment are more at risk of having a sexual identity crisis than children who are raised in a heterosexual environment. Children who are nurtured by homosexuals are no different in personality or behavior from those who grow up in a heterosexual family (135).

However, there are other reasons to support the arguments that traditional family structure is better. Kohm reiterates that studies show that children who are raised with traditional principles like marriage and a mother and a father are generally more stable emotionally and psychologically, and as a result, tend to do better socially and in school. For these reasons, Kohm disagrees with what she calls the "fairness argument." She insists that the argument that many homosexuals are being treated unfairly is a maneuver to support homosexuals so they can gain ground in areas where they

are being excluded. She points out that the intent is not directed towards the children's welfare, but rather towards the adults' interests and that the arguments underestimate traditional values in which marriage comes before child rearing (656). Gary Glenn, editor and president of the American Family Association of Michigan, agrees with Kohm's argument. He points out that in an interview with Diane Sawyer in 2002, comedienne Rosie O'Donnell acknowledged that her children would be better off if she was heterosexual and that she hoped that her children would make that choice when they become adults. Even more poignant, during the same interview, O'Donnell revealed that her own son admitted: "I want to have a daddy" (53). O'Donnell's admission that being a heterosexual is better and her own son's plea for a father bolster the claim of those who support traditional values. Robert H. Knight, in the article, "Homosexuals Should Not Have the Right to Adopt," states that in a married, heterosexual household, each parent has a distinct natural nurturing ability that comes with their respective gender. This unique approach cannot be duplicated in homes headed by same-sex individuals (142). He also insists that comparative research done by the journal, *Children Australia*, on traditional and non-traditional family settings corroborate the opinions of other studies that children are better off when raised in a heterosexual environment (143).

However, there are still some who disagree that children are only better off when they grow up in a conventional family setting. For instance, Huff points out that the courts sometimes should allow children to speak for themselves when decisions are being made about their future because they are able to tell the courts first hand about their own experiences being reared in homosexual families. She continues by stating that it is time for the courts to merge studies that support homosexual child rearing with children's narratives so that the courts can get a better idea of how the family way of life for same-sex couples is no different from that of heterosexuals. For example, she describes Joshua, who is fourteen years old and whose mother is a lesbian who has always lived in a gay community. His relationships extend to both homosexual and heterosexual groups and he is at ease in both settings. Also, he states that he has an honest and open relationship with his mother, and he claims that his mother's lifestyle has no effect on who he is as an individual. As a matter of fact, he is "proud" of her, for she has been very supportive emotionally and financially, and he states with certainty: "I'm damn lucky to have a mom like mine" (708). Yet Knight disagrees with Huff's assertion. He emphasizes that the courts should neither allow homosexuals to rear children, nor allow children's personal accounts to become part of the decision process when determining placement. Knight reasons against children speaking out in court on behalf of their parents, or their parent's partner, in a placement case because he believes that when children

are young, they are immature and can easily be influenced.

The question is: Is a traditional family structure the only way to raise healthy children? It is Huff's viewpoint that structure doesn't really matter because households headed by same-sex couples are no different from those of heterosexual families. She argues that when children are nurtured in homes that are headed by same-sex couples who have an "intimate and loving relationship," there is no evidence of the children having any adverse psychosocial development. She also points out that studies have demonstrated that same-sex couples' children do as well as the children of heterosexual couples as long as: the parents are upfront with their sexuality, the parents have open communication with their children, out reach programs are available, and the partners are in a committed relationship (714-15). Hedges brings up something even more profound. She states that children whose parents are homosexuals have no choice about the setting in which they are born and reared. Therefore, for the rules governing society to punish them for being born, or being, as they say, on "the wrong side of the tracks," in terms of their living situation is discriminatory and unfair. Furthermore, any attempt to undermine the nurturing abilities same-sex couples are able to provide is not only unjust, but immoral (Hedges).

Regardless of the disagreement as to which family structure is best for rearing children, what children should have is a safe and nurturing environment in which to grow. Consequently, it might be time for those who oppose non-traditional family structures to be open-minded and recognize that society's structure is also changing. Children who are products of these social changes should not be blamed; rather, their parents' struggles and their challenges should be embraced in ways that will help the laws become receptive to their needs. These children have the right not only to bloom in an environment that is safe, secure and loving, but also to have their legal rights protected.

What Is The Outlook for Same-Sex Couples and Their Children?

For now, same-sex couples as well as their children can only remain steadfast as they continue to fight for changes in the laws to protect their rights. According to the article, "Homosexuals Should Have the Right to Adopt," written by Adam Pertman, contrary to some of the other states who have not openly embraced homosexual issues, the state of Vermont has laws that support same-sex civil unions. As a result, domestic partners are now entitled to some of the same privileges that heterosexual couples have. Also, as a result of this bill, benefit protections such as: inheritance, social security and death awards, child support, and visitation rights in the case of separation or divorce, have been extended to the children of same-sex

partners. Pertman says it is imperative that a comprehensive “mandate exist nationally,” to protect the rights of the children whose parents are same-sex couples (136). This legislation by the state of Vermont seems groundbreaking, but legal rights for the children of same-sex couples are in fact overdue. For the children of homosexual parents who are still struggling to achieve their legal rights, Hedges states that the courts should apply to the children of same-sex parents the same logic afforded to “illegitimate” children—that they have no control over their birth, and therefore should be equally entitled to receive benefits from the persons who are their adoptive parents, just as is the case for the children of married couples. Courts should do this instead of making their decisions on a case-by-case basis because this is such an important issue (Hedges).

It is encouraging to observe that there are some changes in the way the courts are beginning to handle the issues that have to do with homosexual rights, yet the debate continues and bias remains a problem. For example, the article “Adoption” explains that Massachusetts is one of the states that have laws that favor second-parent adoption. However, in one case two judges refused to handle a same-sex couple adoption case in the lower court and it was transferred to the Supreme Judicial Court (12). The higher court decided in favor of the couple using the child’s best interest standard because of the financial benefits available to the child as a result of being adopted. The two judges from the lower court disagreed with the decision (12). Judge Lynch’s argument against the decision was that Massachusetts’s law does not allow unmarried couples to adopt and although Judge Nolan agreed with the ruling, he was critical of the women’s sexual orientation (13). This case shows that while some of the courts are becoming more open-minded, others have yet to adapt to society’s shifts. Kohm declares that as society begins to change, so will the social norms; therefore it is necessary for rules to be in place to dictate the standards by which people should live (663). It is Huff’s belief that it is time for society to change its mindset about same-sex partners and their children and accept them for who they are (716).

Finally, it appears that the laws are slowly changing to address some of the issues that affect same-sex couples and their children. This is certainly a move in the right direction, but more needs to be done. Not until the laws become uniform will homosexuals be assured that they have finally gained their rightful place in a society free of discrimination and stereotypical attitudes.

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