

# Youth Law News

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## ANALYSIS

*The Florida ruling is a major setback for hundreds of foster children awaiting permanent homes*

## States' Rights at the Cost of Children's Best Interest: Federal Appeals Court Upholds Discriminatory Law

by Katina Ancar

In a unanimous opinion, a three-judge panel of the Court of Appeals of the Eleventh Circuit upheld the constitutionality of a Florida law prohibiting gays and lesbians from adopting children.<sup>1</sup> The ruling is the most recent setback for hundreds of Florida foster children awaiting permanent homes, as well as other children outside the foster care system whose potential adoptive parents are gay or lesbian. The opinion advances an almost exclusively states' rights analysis, ignoring the law's impact on children's immediate needs and interests.

The case stems from the challenge of several children and their caregivers<sup>2</sup> to the constitutionality of a Florida law stating, "No person eligible to adopt under [Florida] statute may adopt if that person is a homosexual."<sup>3</sup> After the federal

district court denied the challenge, the families appealed. On Jan. 28, 2004, the appeals court ruled that the law is constitutional.

In upholding the law, the court concluded that the children and their caregivers have neither a justifiable expectation of, nor a constitutional interest in, becoming a permanent legal family unit. The court further determined that the adoption prohibition does not violate a right to privacy.<sup>4</sup> Finally, the court found that the state had a legitimate interest in denying children adoptive families when their potential parents are gay or lesbian. The opinion is a litany of curious, circular reasoning, and founded on equally puzzling assumptions.

### States' Rights and Rational Basis Review

As troubling as the decision itself is the reasoning the court employed to arrive at its ruling. Inexplicably, the court frames the legal issue not in terms of its implications for children, but as a determination of the parameters of states' rights. According to the court, the purpose of the appeal was not to determine whether the disputed law was constitutional in its impact on children and gay families, but

instead to "decide the states' rights issue" of whether the law was "constitutional as enacted [and] ... enforced."<sup>5</sup>

The court uses this states' rights position to restrict its legal review even further than required. To determine the law's constitutionality, in the final analysis, the court turned to a "rational basis" review. Pursuant to this standard, there must be a rational relationship between a law's legitimate purpose or interest, and the manner in which that law differentiates among citizens. Even under this most lenient of standards, however, the panel fell short of its task. Not only did the court acquiesce to Florida's statement of its interest, but went further and continually redefined the state's interest when initial explanations failed to reinforce the rationale.

The state must both explain its interest in adoption proceedings, and clarify how the adoption prohibition promotes that interest. Initially, the court defined Florida's interest in regulating and limiting adoption as "identifying those individuals whom it deems most capable of parenting ... and providing ... a secure family environment."<sup>6</sup>

<sup>1</sup>See *Lofton v. Secretary of the Dept. of Child. & Fam. Servs.*, \_\_\_ F.3d \_\_\_, 2004 WL 161275 (11th Cir.). Judge Stanley Birch authored the opinion in which Ed Carnes and Proctor Hug (a visiting judge of the United States Court of Appeals for the Ninth Circuit) joined.

<sup>2</sup>For more information about the children and their caregivers, see *Lofton v. Secretary of the Dept. of Child. & Fam. Servs.*, \_\_\_ F.3d \_\_\_, 2004 WL 161275 (11th Cir.) at \*1-2; *Lofton v. Kearney*, 156 F.Supp.2d 1372, 1375 -76 (2001), and Adam Liptar, *Gay Couple Challenges Florida Ban on Homosexual Adoptions*, N.Y. Times, Mar. 2, 2003.

<sup>3</sup>Florida Stats. ch 63.042(3). In interpreting this law, Florida courts define "homosexual" as a person "known to engage in current, voluntary homosexual activity." *Dept. of Health & Rehab. Servs. v. Cox*, 627 So.2d 1210, 1215 (Fla. 1993), *aff'd in part and rev'd in part*, 656 So.2d 902 (Fla. 1995).

<sup>4</sup>The court determined that the Supreme Court's decision in *Lawrence v. Texas*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 2472 (2003) did not create a constitutionally-based right to "private sexual intimacy."

<sup>5</sup>2004 WL 161275 at \*1.

<sup>6</sup>*Id.* at \*4.

However, Florida appeared to define its interest somewhat more specifically. Florida asserted that the state maintains an “interest in furthering the best interest of adopted children by placing them in families with married mothers and fathers ... that provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization.”<sup>7</sup>

Despite its asserted interest in placing children for adoption with married couples only,

<sup>7</sup>*Id.* at \*11 (emphasis added).

Florida nonetheless allows adoptions by apparently “sub-optimal” persons – unmarried heterosexual singles and couples. The court sought to resolve the conflict between the state’s rationale and practice by redefining Florida’s defense in a manner more beneficial to the state. Rather than seeking to further children’s best interests through adoption by “stable married heterosexual couples,” the court stated that Florida’s real interest is to place children for adoption in homes “in which there is a heterosexual couple or the potential for one.”<sup>8</sup>

<sup>8</sup>*Id.* at \*15 (emphasis added).

Pursuant to the court’s first rationale, the state seeks the most capable, stable parents, which Florida defines as married heterosexual couples. However, under the second rationale, married heterosexual couples are not the only capable and stable parents. Stable households and good parenting skills also are shared by those who have a “greater probability” of entering into a “stable dual-gender parenting”<sup>9</sup> relationship – unmarried heterosexual couples and singles. According to this reasoning, neither marriage nor two-parent families in and of themselves further children’s interests. Rather, the argument identifies the potential for marriage as fundamental to good parenting and positive child development.

Evidently realizing the gaps in its arguments, the court proffered additional explanations for why heterosexuals make better parents than gays. The court agreed that Florida could reasonably believe that prohibiting gays from adopting would result in an increase in heterosexuals seeking to adopt the state’s foster children. Additionally, Florida could rationally conclude that heterosexual singles or married couples are more adept at providing sex education to children. Moreover, Florida could assume that only heterosexuals can skillfully manage the developmental difficulties that may confront adopted children.<sup>10</sup>

<sup>9</sup>*Id.* at \*13.

<sup>10</sup>*See id.* at \*14.

These explanations are baffling. The asserted assumptions about both children and the capabilities of gay families are unfounded and implausible. Further, in practice, it is apparent that Florida does not believe the stated assumptions. Florida’s foster children are cared for by gay couples and singles. These parental figures assist daily with children’s physical and developmental disabilities, tend to severe medical conditions, soothe the scars of abuse or neglect, and address concerns about sexual development.

Neither Florida nor the court stated that these foster children receive poor parenting care, that their special needs are not met, that their emotional development is stunted, or that they do not receive appropriate sex education “during puberty and the teen-age years” due to their foster parents’ sexual orientation.<sup>11</sup>

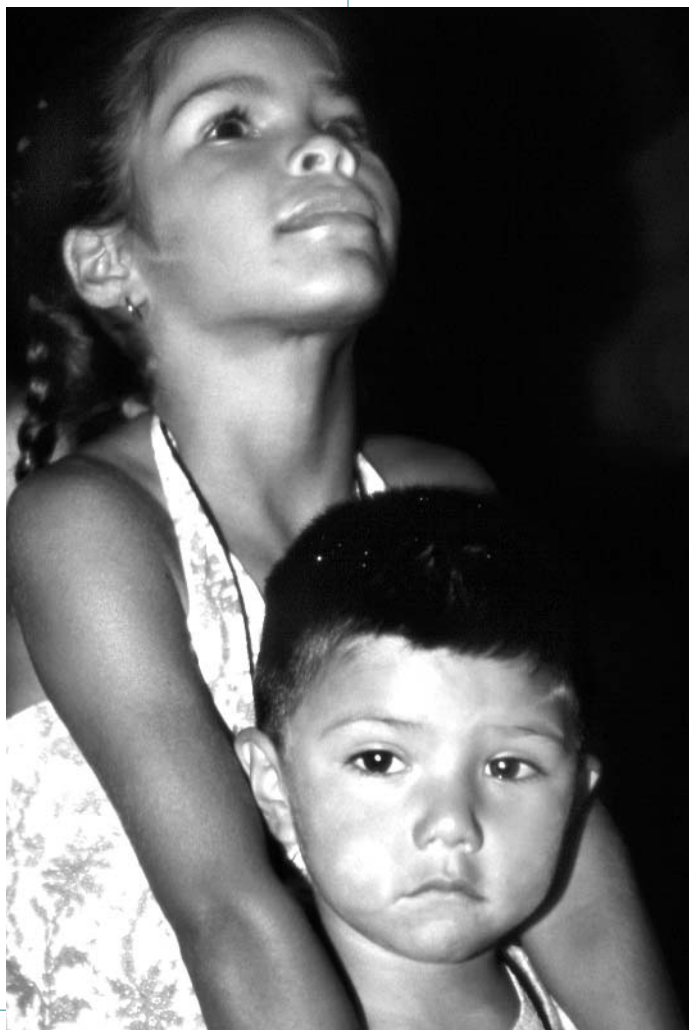
### The Moving Target: In What Is the State Interested?

To address this concern, the court again attempted to redefine Florida’s interest and rationale for the law. The state’s interest, the court asserted, “is not simply to place children ... as quickly as possible” into an adoptive home, but to place children in an “optimal” adoptive home.<sup>12</sup> However, the

*(continued on p. 18)*

<sup>11</sup>*Id.* at \*13-14 (quoting *Dept. of Health and Rehab. Servs. v. Cox*, 627 So.2d 1210, 1220 (1993)).

<sup>12</sup>*Id.* at \*15.



Ian Vorster

(continued from p. 17)

## Discriminatory Law Upheld

court assumes that the definition of an “optimal” adoptive home is a home in which the parent is not gay. Although the offered explanation is that heterosexuals possess better parenting skills, there is no basis for this belief.

Although Florida is permitted to set forth generalizations and use assumptions in crafting a “best estimate” law to further its interests, its arguments about the needs of children and the deficiencies of gay parents border on the absurd. There is no rational basis for the state’s belief that gays cannot be positive “parental figures,” or help children successfully “learn about the world and their place in it.”<sup>13</sup> In their duties as informal caregivers, foster parents and guardians, gays and lesbians throughout the country already direct children’s personal and social development.<sup>14</sup>

The court agreed with Florida that guardianship and foster

<sup>13</sup>2004 WL 161275 at \*11. Due to the amount of space spent discussing teenage sexual development and puberty, the unspoken assumption behind the notion that gays cannot be good parents may be the fear that a gay parent will teach, convince, or “recruit” a child to become gay.

<sup>14</sup>In an *amicus* brief, NCYL discussed the social science research and the ability of gay parents to meet children’s needs. See Brief of Amici Curiae in Support of Plaintiffs-Appellants, *Lofton v. Kearney* (01-16723-DD) (Feb. 20, 2002), pp. 24-34. Philip Graham, Jr. of the Law Firm of Sullivan & Cromwell served as counsel to amici curiae NCYL, the Child Welfare League of America, Children’s Rights, Inc., and the Evan B. Donaldson Adoption Institute. Justin A. Deabler, Marc De Leeuw, Stacey R. Friedman, and Jeffrey T. Scott served as of counsel.



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care are incremental solutions, structured to meet different needs than those addressed by adoption. In doing so, the court willfully misconstrues the care provided to children pursuant to these three care-giving arrangements, as well as the needs of children. Although the legal relationship is different among the three arrangements, the day-to-day care and support is the same. Children need permanent, legal families because they require the emotional and legal stability that a permanent relationship offers, not because adoption provides markedly different types of care. Many Florida children cared for by gays and lesbians (such as the plaintiffs in *Lofton*), remain in foster care and guardianships because these are the most permanent arrangements the state allows, not because it is the most permanent option for meeting their needs.

Finally, the adoption prohibition does not simply affect chil-

dren who are in state custody. Both formal and informal kinship care have increased in the past two decades. The Florida law prevents, for example, a gay aunt or uncle from adopting a

## Permanent Families for Children

Sadly, neither the court nor Florida engaged in a discussion about children’s true interests, or the very real benefits that flow from adoption. Although adoption may not serve the best interests of every child, the benefits for many children can be substantial. The most important advantage is the physical stability, and emotional and psychological security, that children gain from knowing they have a family – parents, grandparents, and extended family – to call their own. The crucial role of stability in a child’s life cannot be overstated. Children also gain financial stability through adoption, by way of inheritance rights, insurance

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*There is no rational basis for believing that gays and lesbians cannot be good parents.*

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niece or nephew when the parents have died or are unable to care for the children. Similarly, as exemplified by *Lofton* plaintiffs Douglas Houghton, Jr. and John Roe, even when a living parent believes a child will fare better with another adult and agrees to give up parental rights, the state can categorically forbid the adoption – but only if the prospective parent is gay or lesbian.<sup>15</sup>

<sup>15</sup>Plaintiff child John Roe was cared for by guardian Houghton for several years at the request of Roe’s father who was plagued with substance abuse problems and difficulties getting work. When Roe’s father agreed to ter-

and social security survivor’s benefits, among others.

For children in foster care, the state gains financially as well. In most cases, adoption permits the state to cease payment of monthly foster care payments. It also releases the state from responsibility for the child’s health care needs, as children would then be eligible for any insurance plan in which the adoptive parents participate. In

minate his parental rights in favor of Houghton, Florida denied the adoption because Houghton is gay. See 2004 WL 161275 at \*1.

cases where “special needs” children are adopted, but remain eligible for monthly Adoption Assistance Program payments, the child’s release from state custody relieves the state of responsibility for legal oversight.

Despite children’s real-world needs, and despite admissions that the state does not permit only the “best” or “optimal” people to adopt children, the panel

<sup>16</sup>2004 WL 161275 at \*11.

*The court allows the state to brand an entire group of people as bad parents, with absolutely no support for such an assumption.*

defends the Florida law by saying that it is best for children to be adopted into a home “anchored by both a father and a mother.”<sup>16</sup> Disappointingly, the court relinquishes an opportunity to protect children’s interests in favor of advancing the states’ rights argument, to misinterpret and obfuscate the state’s interest in finding permanent homes for children. Finally, the court allows the state to

brand an entire group of people as bad parents, with absolutely no support for such an assumption. As such, the court concludes that the purpose of Florida’s law is to prevent gays from adopting children who desperately need permanent, stable, and loving families.

With 3,000 of Florida’s foster children waiting for permanent families, it is a simple fact that

too few people step forward to care for children, let alone propose to become their legal parents. No law should deter those willing to provide children with a safe and caring home from doing so. The Eleventh Circuit has permitted Florida to do just that.

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## NCYL Seeks Child Advocate

### Position:

The National Center for Youth Law (NCYL) seeks an experienced attorney or policy advocate prepared to play a key role in shaping and conducting its advocacy on behalf of low-income children and adolescents. It is important that the person have expertise in at least one of NCYL’s priority areas: economic security, foster care/child welfare, juvenile justice, or health. NCYL is particularly interested in expertise in the following: governmental benefit programs for low-income children and adolescents, such as TANE, SSI, Title IV-E, including Adoption Assistance; Workforce Investment Act/workforce readiness; mental health and disability.

### Qualifications:

Applicants must have a law degree or other relevant graduate education. Attorneys must be admitted to practice in at least one state. Demonstrated commitment to advocacy for low-income people, excellent writing and analytic skills, and a willingness to do some travel are also required. Significant litigation and policy advocacy experience are preferred.

### Salary and Benefits:

Salary is based on experience and is comparable to similar organizations in the San Francisco area. NCYL provides health, dental, life, and long-term disability insurance, good vacation benefits, and an employer contribution to a retirement plan.

### Applications:

Position open until filled. Please mail or email a cover letter, resume, three professional references, and a writing sample to:

Maria Salzano, Office Manager  
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The National Center for Youth Law is a national advocacy organization which uses the law to protect children and adolescents from the harms caused by poverty and to improve the lives of children living in poverty. The Center provides support to advocates representing low-income children and adolescents by responding to requests for assistance, conducting training, and writing and publishing analyses of issues affecting poor youth. NCYL also conducts administrative and legislative advocacy on the state and federal levels, and engages in state and federal litigation.

Website: <http://www.youthlaw.org>

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