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## LGBT Adoptions in the US & South Africa

Samantha Moore

### **Introduction**

Lesbian, Gay, Bisexual and Transgender, most commonly referred to as LGBT, have become a subject of controversy over the past decade. LGBT adoptions may not seem important to someone who does not identify themselves in this category, but it is a crucial topic of discussion. This topic is particularly relevant in today's society because gay relationships and unions are becoming more common, whereas back in the 1950's and 1960's, having a gay relationship was considered tumultuous and an ultimate sin. With the increased commonality of gay relationships and unions, there is a growing conversation about adoption, and whether or not LGBT people are able to care for a child the same way a heterosexual man and/or woman can. The purpose of this paper is not to sway your opinion of LGBT adoptions, but instead, to simply lay out the realities of the issue.

Before I get into the mechanics of LGBT adoptions, the types of adoptions should be recognized. There are currently three different types of LGBT adoptions; they are as follows, individual adoptions, joint adoptions and second-parent adoptions. Individual adoption is when a gay or lesbian individual wishes to adopt a child. Joint adoption is described as a gay or lesbian couple choosing to adopt a child. Lastly, a second-parent adoption is when the partner of a gay or lesbian parent wishes to adopt their partners child, thus making them their step-child (National Adoption Center 2012).

According to the ACLU (American Civil Liberties Union), there are currently thirty-four states that lack statewide legislation, case law, or department regulation addressing LGBT

adoption. In those thirty-four states, it is up to the judge, the adoption agency, and the individual social worker to decide whether the LGBT adoption should occur, meaning that those three people determine if a non-traditional (LGBT) family will be able to adopt. This lack of statewide legislation makes the issue of LGBT adoptions crucial to understand in order to figure out what can be done to allow more LGBT adoptions to take place. Since discretion is left up to the judge, the adoption agency, and the social worker, discrimination will without a doubt ensue. If a gay couple wanted to adopt a child in Texas, which is one of the thirty-four states who lack LGBT adoption legislation, they would almost immediately be turned down and dismissed. The reasoning behind it is simply because Texas is opposed to homosexual relationships, unions, and adoptions. If Texas were to allow LGBT adoptions, it would violate the state ban against adoption by unmarried couples. The thirty-four states that lack legislation make it incredibly difficult for LGBT people to adopt because those states base their opinions of LGBT adoptions on a pure bias, which is further fueled by gay discrimination.

The National Gay and Lesbian Task Force provide an insightful look into anti-adoption laws. As of April 21 2011, there are five states that restrict LGBT adoptions, those states are Florida, Nebraska, Mississippi, Michigan, and Utah. Mississippi, Nebraska, and Florida have legislation that strictly prohibits adoption in any form by same-sex couples. Michigan has legislation that prohibits same-sex couples who are married to jointly adopt. Utah's legislation prohibits adoption by a person who is cohabitating in a relationship that is not a legally valid and binding marriage.

Lambda Legal, a national organization known worldwide for providing equality and recognition for LGBT persons, states that there are roughly 250,000 children being raised by same-sex couples. While 250,000 may not seem like a staggering number, considering we have

cities throughout the United States with much larger populations, it is, in many ways, a milestone. In a recent court case, which has not yet been heard by the Supreme Court, *Adar v Smith (2011)*, describes a same-sex male couple that legally adopted a child, but were denied a new birth certificate that would list both parents as the child's father because Louisiana doesn't recognize adoption by unmarried parents. The Fifth Circuit Court sided with the couple when the panel of three judges all agreed unanimously that both adoptive men be listed as parents. When the defendant's attorney asked for a rehearing, the Fifth Circuit Court reversed their decision and this case has now been referred to the Supreme Court (Denniston 2011). LGBT couples reach milestones, but sometimes, they don't always follow through. This case is a prime example of LGBT rights being accepted, to only then be brought back down. There are 250,000 same-sex couples as parents, but those 250,000 same-sex couples who are parents and did not have a child biologically, have to fight incredibly hard to gain their parental rights.

Richman discusses the positions and problems with LGBT adoptions and LGBT custody. She states that:

“When extended to the arena of family law, the characterization of rights as all important is problematized. While rights are generally invoked on the individual level, a family is by definition relational. This dichotomy is particularly at issue here, as the gay rights movement has often been typified by citizenship claims connoted by individual privacy rights, as in the struggle to decriminalize sodomy and the *Lawrence v. Texas* (2003) decision. Furthermore, gay men and lesbians have often, in public discourse, assumed to be uninterested in or incapable of family life-thus emphasizing the personal and individualistic appearance of gay rights claims.”

Richman makes a viable point in her argument; she argues that gay and lesbian rights are under shadowed by those of heterosexual orientation, and that we have preconceived notions that LGBT persons are incapable of being able to have a family. Sadly, she is correct in her arguments, which aren't just limited to the United States, but also stretch across the country as well.

### **Comparative Case Study Analysis**

LGBT adoptions aren't just an issue within the United States, in fact, they spread throughout the world. LGBT adoptions in other countries also have three main types of adoptions; individual adoptions, joint adoptions and second-parent adoptions. However, not every country accepts LGBT adoptions, in fact, in Africa alone; the only country who fully accepts LGBT adoptions wholeheartedly is South Africa.

According to Oswin, the lobbying efforts in South Africa through the NCGLE (National Coalition for Gay and Lesbian Equality), has had the following result:

“As a result of this lobbying effort, South Africa became the first country in the world to constitutionally entrench the rights of homosexuals, and the Coalition could lay claim to the rather unique distinction of having included gay and lesbian issues in a liberation struggle.”

Oswin recognizes that through the lobbying of the NCGLE, South Africa has gained tremendous rights for LGBT people, and it is the first country throughout Africa to do so. The lobbying efforts of the NCGLE is not the only reason why South Africa has rights for LGBT people, but, it also has to do with the Children's Act of 2005 and the court case, *Du Toit and Another v Minister of Welfare and Population Development and Others (2002)*. In the court case, *Du Toit*, Suzanne du Toit and Anna-Marie de Vos, had been partners since 1989 and adopted two

children in 1995, but, because South African law at the time did not allow unmarried partners to adopt, de Vos was the children's only legal parent. The decision of this case came down from the Constitutional Court of South Africa which established that same-sex couples have the ability to jointly adopt children. LGBT people had already been able to adopt children individually, but only married couples could adopt jointly. This case paved the way for LGBT parents to be able to adopt in South Africa, it also allowed non married couples to adopt, instead of just married couples. The Children's Act was enacted as a way to protect child rights, which included child trafficking and making sure a child was placed into a suitable home. This Act did not discriminate against LGBT couples/individuals, but instead embraced them and heterosexuals as equals when it comes to adoption.

I chose South Africa as my country for my comparative study because it was one of the few countries that fully accepted and embraced LGBT adoptions. It not only had acts and court cases regarding the issue, but, it also had the lobbying group, NCGLE, which I thought provided an interesting and unique perspective on how the LGBT movement came about in South Africa. Not only is South Africa the only country in Africa to allow LGBT adoptions, it is one of the few countries throughout the world that allows LGBT adoptions in all aspects, whether it be individual adoptions, joint adoptions and second-parent adoptions, whereas in other countries, they only allow either individual adoptions or only allow joint adoptions under marriage.

### **Analysis and Conclusion**

When comparing South Africa to the United States, we see a very stark contrast in LGBT rights in regards to adoption. South Africa takes into account LGBT rights within its entire country, whereas in the United States, only some states have laws against LGBT adoptions and the states without opposition; leave the ruling up to a third party. In various countries some

allow LGBT adoptions, but only in certain jurisdictions, and the United States tends to lean the same way. In Mississippi, LGBT adoption is strictly prohibited, but in Vermont, LGBT adoptions could be allowed depending on the judge in charge of the adoption case. Mississippi does not allow same-sex adoption because of their state constitution ruling it unconstitutional. They also have no discrimination or hate crime protections against LGBT persons. Vermont allows petitions to adopt because they have a different state constitution. South Africa allows LGBT adoptions in their country, but in the United States, it is difficult to determine an enforced set of policies unless dealing with the five states that have policies preventing it.

I think that the events leading up to LGBT adoption and LGBT rights in general, in South Africa, have been of great importance in today's society, but, in the United States, there have been lobbying groups and even some state policies that prohibit LGBT adoption and they haven't made a huge impact to the country as a whole. If LGBT adoption rights are to be recognized like they are in South Africa, then LGBT rights need to be written into our Constitution and not just determined by state. If that were to happen, the argument can be made that South Africa is the only country in Africa that has full LGBT adoption rights and is similar to states who are lobbying for full LGBT adoption rights and states who prohibit it. LGBT adoption rights are difficult to define for the entire country, and are being decided by states and other countries as well.

No one approach is better than the other; they are too similar in nature to determine if one is better than the other. LGBT adoptions are going to be a hot topic issue for an extended period of time, and until drastic measures are taken, such as, writing LGBT adoptions into our Constitution, it will always be an issue. According to *Matter of Adoption of Camilla, 1994*, as quoted in Kimberly Richman's article, a valid conclusion is offered,

“To suggest that adoption petitions may not be filed by unmarried partners of the same or opposite sex because the legislature has only expressed a desire for these adoptions to occur in the traditional nuclear family constellation of the 1930’s ignores the reality of what is happening in the population” (p. 285).

This quote sums up LGBT adoptions almost flawlessly, it concludes that LGBT adoptions are happening and are an issue that will change the previous nuclear family dynamic. LGBT adoptions are not going to go away or wither out, but instead, may very well become the new traditional family.



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