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LOFTON V. KEARNEY
157 F. SUPP. 2D 1372 (S.D. FLA. 2001)

FACTS

Steven Lofton, Douglas Houghton, Wayne Larue Smith, and Daniel Skahen ("plaintiffs") are homosexual men who attempted to adopt foster children in their legal care.¹ The State of Florida certified Lofton as a foster parent and entrusted him with the care of three children over a ten-year period.² When Lofton applied to adopt one of the children in his care ("John Doe"), however, the Department of Children and Families ("DCF") rejected his application based on a Florida adoption provision that prevents homosexuals from adopting.³ Houghton, after becoming the legal guardian of a child ("John Roe"), tried to adopt the child when John Roe's father renounced his parental rights.⁴ Following a home study evaluation, the interviewers informed Houghton that his homosexual status would prevent him from filing a petition to adopt John Roe pursuant to the Florida adoption provision against adoption by homosexuals.⁵ Smith and Skahen attempted to adopt three foster children in their care, but the DCF also informed them that their admission on the adoption application of their homosexuality would bar such attempts.⁶

The plaintiffs sued defendants, the Secretary of Florida's DCF, Kathleen Kearney, and the District XI Administrator of Florida's DCF, Charles Auslander, the individuals responsible for upholding the adoption provision.⁷ The plaintiffs allege that the Due Process Clause of the Fourteenth Amendment⁸ protects their fundamental rights to familial privacy, intimate association and family integrity.⁹ According to the plaintiffs, the adoption provision, by impeding upon those rights, violates the Due Process Clause of the Fourteenth Amendment.¹⁰ The plaintiffs also claim that the provision's denial of adoption rights to homosexuals, exclusively, violates the Equal Protection Clause of the Fourteenth Amendment.¹¹

Lofton, Smith, and Skahen began the case along with three other plaintiffs on May 26, 1999, but the court dismissed the other plaintiffs' claims for lack

1. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375-1376 (S.D. Fla. 2001).

2. *Lofton*, 157 F. Supp. 2d 1372, 1375.

3. *Id.* at 1375.

4. *Id.* at 1375-1376.

5. *Id.* at 1376.

6. *Id.*

7. *Id.*

8. U.S. CONST. amend. XIV, § 1; (stating that "No State shall ...deprive any person of life, liberty, or property without due process of law").

9. *Lofton*, 157 F. Supp. 2d at 1377.

10. *Id.*

11. *Id.*

of standing.¹² One year later, Lofton, Smith, and Skahen joined by Houghton, filed an amended complaint that survived the defendants' motion to dismiss for lack of standing.¹³ After issuing its order to deny the defendants' motion, the district court stated it would deal with the defendants' motion for summary judgment.¹⁴

HOLDING

The United States District Court for the Southern District of Florida held that the Florida statute prohibiting adoption by homosexuals did not violate the Due Process Clause of the Fourteenth Amendment because foster parents do not have a protected liberty interest to adopt.¹⁵ Using the rational basis test, the court also found that the statute is valid under the Equal Protection Clause of the Fourteenth Amendment because the statute promotes gender role modeling and minimizes social stigmas, such as societal prejudice from being raised by homosexuals.¹⁶ The state has a legitimate interest in shielding the children from those prejudices as well as providing a stable family environment with parents of both sexes.¹⁷

ANALYSIS

Writing for the court, Judge King examined whether the plaintiffs had raised a genuine issue of material fact to defeat the summary judgment motion made by the defendants.¹⁸ If there is no issue of fact for a reasonable jury to decide upon, then the defendants are entitled to a judgment as a matter of law.¹⁹ The plaintiffs allege that the adoption provision violates the Due Process Clause and the Equal Protection Clause.²⁰ In order for the plaintiffs to prevail, the plaintiffs must show that at least one of the claims raises a fact for the jury to consider.²¹

The court evaluated the plaintiffs' due process claim in terms of fundamental rights that, while not explicitly stated in the Bill of Rights, are

12. *Id.* at 1376-1377.

13. *Id.* at 1377.

14. *Id.*

15. *Id.* at 1380.

16. *Id.* at 1381-1383.

17. *Id.* at 1383.

18. *Id.* at 1377-1378.

19. *Id.* at 1378; FED. R. CIV. P. 50(a)(1).

20. *Lofton*, 157 F. Supp. 2d. at 1377.

21. *Id.* at 1378.

implicit in historical traditions and common notions of liberty and justice.²² The Supreme Court says that there is a protected liberty interest in how parents decide to raise their children.²³ While fundamental liberty interests of the family sustain the rights of parents, the court did not recognize the same rights associated with foster parents.²⁴ The Supreme Court has stated that foster parents do not have a constitutionally protected right because the state creates their parent-child relationship; thus, there is no justifiable expectation that the family unit will continue to exist.²⁵ The plaintiffs understood that the relationship was subject to state approval.²⁶ Notwithstanding the emotional support and medical care given by the men to the children, the Court did not acknowledge that a permanent relationship exists among the plaintiffs.²⁷ Thus, once the plaintiffs conceded the foster status there was no question as to the nature of the relationship.²⁸

The court evaluates equal protection claims by using three standards of review.²⁹ The court has established various criteria for determining which standard applies to each situation based upon the classification of the individual or group involved.³⁰ Under strict scrutiny analysis, which is the highest standard of review, the government must show that the law is necessary to achieve a compelling state interest and that the law is narrowly tailored to protect that interest.³¹ This standard only applies to an individual or a group that is part of a suspect class, such as race or alienage or if there has been a violation of a fundamental right.³² The rationale of the strict scrutiny standard is that a violation of a right to a member of a suspect class will not be tolerated and therefore any government action interfering with those rights must be evaluated rigorously.³³

When a statute or other government action involves a quasi-suspect class, such as gender or illegitimacy, the court invokes the intermediate scrutiny standard.³⁴ The intermediate scrutiny standard states that the law must be substantially related to an important government interest.³⁵ This standard of

22. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

23. *Id.* (citing *Troxel v. Granville*, 530 U.S. 57 (2000) (stating that mother has due process right to decide visitation of her children)).

24. *Id.* at 1379.

25. *Id.* (citing *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844 (1977)).

26. *Id.* at 1380.

27. *Id.*

28. *Id.* at 1381-1382.

29. *Id.*

30. *Id.* at 1381.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

review is not the same heightened analysis required under strict scrutiny; rather intermediate scrutiny analysis usually finds the governmental interest insufficient and invalidates the law under review, especially in the instance of a statute that burdens or stereotypes women.³⁶

Rational basis review is the least restrictive of the equal protection standards.³⁷ If the state action is rationally related to a legitimate state interest, then the court will generally uphold the statute.³⁸ Under this standard the government can suggest any interest, as long as it is not arbitrary, that the law purports to address and the court will most likely uphold the statute.³⁹

Using the rational basis test, the court concluded that the plaintiffs failed to assert an equal protection claim.⁴⁰ The plaintiffs did not fall within the suspect class as recognized by the Supreme Court and the court declined to use strict scrutiny because it determined that the plaintiffs had no fundamental rights as foster parents and legal guardians.⁴¹ The plaintiffs contend that the adoption provision should be analyzed under the strict scrutiny test or at least the intermediate scrutiny test.⁴² The Supreme Court decided not to view homosexuals as a suspect or quasi-suspect group and instead applied the rational basis test to decide the equal protection claim.⁴³ The Supreme Court had previously used the rational basis test to evaluate the classification of homosexual.⁴⁴

The court stated that under the rational basis test, the adoption provision will be upheld if the provision is rationally related to a legitimate state interest.⁴⁵ Under this test the presumption is in favor of upholding the provision, so the burden rests with the plaintiff to invalidate any rational reason for the provision.⁴⁶ The defendants asserted two reasons behind the adoption provision.⁴⁷ The court dismissed the state's interest in registering the moral disapproval of homosexuals as a legitimate reason for the adoption provision.⁴⁸ The state also asserted that in order to serve the best interests of the children homosexuals should not be allowed to adopt.⁴⁹ Despite the

36. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Rostker v. Goldberg*, 453 U.S. 57 (1981).

37. *Lofton*, 157 F. Supp. 2d at 1381.

38. *Id.*

39. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1995).

40. *Lofton*, 157 F. Supp. 2d at 1381.

41. *Id.*

42. *Id.*

43. *Id.* at 1381-1382.

44. *Id.* at 1381-1382 (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

45. *Id.* at 1382.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1383.

plaintiffs' allegations that the state's legitimate government interest is a pretext for an underlying motive, the court held that the possible motive is irrelevant as long as a reasonable and legitimate state interest exists.⁵⁰ The court also found relevant the plaintiffs' failure to disagree with the state's second assertion.⁵¹ The plaintiffs failed to offer any evidence that a homosexual family environment would provide the same stable home and proper gender roles that a married heterosexual family provides leaving the court with no option other than to find the state's assertion valid.⁵²

The court upheld the adoption provision because the state had a legitimate interest in barring homosexual adoption.⁵³ In concluding that the plaintiffs also failed to assert a genuine issue of material fact, the court granted the defendants' summary judgment motion.⁵⁴

CONCLUSION

By using the rational basis review standard, the court condemned the plaintiffs to fail on their equal protection claim. In most cases using this standard, the court defers to the government's reasons to justify the state action and finds that the government action is legitimate and rationally related to the purposes behind that action.⁵⁵ Almost any reason will serve to uphold the government action under the rational basis standard.

While the court may have been correct in holding that the plaintiffs failed to demonstrate a fundamental right under a due process claim, the equal protection holding is less defensible. As homosexuals, the plaintiffs are specifically targeted and denied a right to adopt based only upon their homosexual orientation. In equal protection cases where there is a history of discrimination against a class, such as race, the court recognizes that distinction as warranting heightened scrutiny of state action.⁵⁶ The Supreme Court has yet to classify homosexuals as a quasi-suspect or suspect class deserving heightened scrutiny.⁵⁷

It has been asserted that sexual orientation is deserving of a heightened

50. *Id.*

51. *Id.* at 1383-1384.

52. *Id.*

53. *Id.* at 1384.

54. *Id.*

55. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1995); *FCC v. Beach Communications, Inc.*, 507 U.S. 307 (1993); *Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985); *Heller v. Doe by Doe*, 509 U.S. 312 (1993).

56. *Contractors Ass'n of Eastern Pa., Inc. v. Philadelphia*, 91 F.3d 586, 606 (3rd Cir. 1996); *Anderson v. State Univ. of N.Y.*, 107 F. Supp. 2d 158, 161 (N.D.N.Y. 2000).

57. *Romer v. Evans*, 517 U.S. 620 (1996).

scrutiny analysis on the grounds that discrimination of gays, lesbians and bisexuals is another form of sexual discrimination.⁵⁸ The sex discrimination argument states that "laws which discriminate on the basis of sexual orientation constitute a form of sexual discrimination."⁵⁹ Laws, such as sodomy, that prohibit particular sexual behavior between members of the same sex, are permitted between members of the opposite sex.⁶⁰ Unfortunately, the dual method of interpreting the statutes involving classifications based on sexual orientation, either as statutes which treat men and women equally or as statutes that treat men and women differently, weakens the sex discrimination argument.⁶¹ The opponents of the sex discrimination argument can use the interpretation that the statutes treat men and women equally to defeat claims of sex discrimination.⁶² Although the argument is not a strong one in the fight for lesbian and gay rights, it does hope to convince courts to end the rational basis review of laws implicating sexual orientation and to apply the same heightened scrutiny as in cases involving gender discrimination.⁶³

Advocates of the sex discrimination argument analogize the argument to the case of *Loving v. Virginia*,⁶⁴ where the Supreme Court held a statute that prohibited men and women of different races from marrying as unconstitutional.⁶⁵ This application of *Loving* to the sexual discrimination argument suggests that the same analysis applied in *Loving* can be applied to sexual orientation.⁶⁶ In *Loving*, the state of Virginia argued that the statute applied equally to individuals of all races and therefore did not violate the Equal Protection Clause.⁶⁷ The Court explained that the distinctions made in the statute based upon race need to be justified by a compelling government interest, which Virginia failed to accomplish.⁶⁸ The *Loving* analogy supports the argument that the mere equal application of a statute is not enough to avoid violating the Equal Protection Clause.⁶⁹ The analogy also helps to support the argument for likening sexual orientation to a suspect or quasi-suspect class deserving heightened scrutiny. Unfortunately, until the courts recognize sexual orientation as a suspect class, the courts will use only the rational basis

58. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 472 (2001).

59. *Id.* at 472.

60. *Id.* at 487.

61. *Id.* at 490.

62. *Id.*

63. *Id.* at 487-488.

64. 388 U.S. 1 (1967).

65. *Loving v. Virginia*, 388 U.S. 1 (1967).

66. Stein, *supra* note 58, at 491.

67. *Id.*

68. *Id.* at 492.

69. *Id.*

standard to analyze this type of discrimination.

An unfortunate consequence of this decision is a message to government that any action taken against homosexuals will be upheld under equal protection standards as long as the government provides some legitimate reason that rationally relates to the state action. Upholding discriminatory state action only perpetuates the stereotypes associated with homosexuals and makes it more difficult for homosexuals to be treated equally.

The decision also reaffirms the State of Florida's family values argument that homosexuals cannot provide the proper environment in which to raise children.⁷⁰ The plaintiffs clearly demonstrated that they provided a loving and nurturing home for the children;⁷¹ so it seems unfair to deny these children the opportunity to be in an environment that is equally within the state's interest to provide, just because of the foster parents' sexual orientation. Many children with medical problems or psychological scars are living without a stable home. These same children are often unwanted because of those problems. Should we deny these children the opportunity to live in a safe, loving home because the people who would like to care for them don't comport with our traditional notions of a family? There are many non-traditional families in existence: single mothers and fathers, grandparents raising grandchildren, older siblings raising younger siblings. The only difference between these examples and the plaintiffs in this case are that the plaintiffs' version of a non-traditional family involves a controversial issue. The State of Florida is unwilling to accept this new form of non-traditional family because it does not coincide with what the State believes is in the best interest of the children. The State should reevaluate which interest is more important to uphold, a loving, supportive home or one free of social stigmas.

Summary and Analysis Prepared by:
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70. *Lofton*, 157 F. Supp. 2d at 1383.

71. *Id.* at 1375-1376.

