In Re Adoption of Charles B. - A Tough Act to Follow

Deborah M. Arik

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IN RE ADOPTION OF CHARLES B. - A TOUGH ACT TO FOLLOW

INTRODUCTION

Society has looked upon homosexuals\(^1\) with disgust, anger and fear.\(^2\) In In re Adoption of Charles B.,\(^3\) the Ohio Supreme Court took a giant step toward reducing society’s intolerance and fear of homosexuals. The court held that homosexuals are not, as a matter of law, ineligible to adopt. The court allowed a homosexual male to adopt an eight-year-old boy.\(^4\)

This Note first discusses homosexuality\(^5\) and examines Ohio’s position on adoption,\(^6\) child custody,\(^7\) and custody disputes involving homosexual parents.\(^8\) The Note then reviews other states’ positions on homosexual adoption.\(^9\) The remainder of the Note analyzes the Charles B. decisions\(^10\) and discusses future questions that the Court will need to answer.\(^11\)

BACKGROUND

A Historical Perspective of Homosexuality

In this country, sodomy was a criminal offense at common law.\(^12\) Until 1961, sodomy was outlawed in all 50 states.\(^13\) Today, twenty-four states and the District of Columbia have statutes that outlaw sodomy between consenting adults in private.\(^14\) Twenty-one states have decriminalized sodomy.\(^15\) Two states’ sodomy

\(^1\) In this Note, the term “homosexual” is used to refer to those persons with a preference of sexual and emotional relations with a person of the same sex. See V. Bullough, Homosexuality: A History 7 (1979).


\(^3\) 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

\(^4\) Id. at 90, 552 N.E.2d at 886.

\(^5\) See infra notes 12-24 and accompanying text.

\(^6\) See infra notes 25-43 and accompanying text.

\(^7\) See infra notes 44-48 and accompanying text.

\(^8\) See infra notes 49-64 and accompanying text.

\(^9\) See infra notes 65-78 and accompanying text.

\(^10\) See infra notes 97-177 and accompanying text.

\(^11\) See infra notes 178-180 and accompanying text.

\(^12\) Bowers v. Hardwick, 478 U.S. 186, 192, reh'g denied, 478 U.S. 1039 (1986). In Bowers, the U.S. Supreme Court upheld Georgia’s sodomy statute against a homosexual’s due process challenge. Id. at 196. The nation’s high Court refused to find a fundamental right to engage in homosexual sodomy. Id. at 191.

\(^13\) Id. at 193.

\(^14\) Id.

\(^15\) Sloane, supra note 2 at 10. The American Law Institute’s proposed official draft of the Model Penal Code decriminalized all adult, consensual, private, sexual behavior. See Model Penal Code 213.2 (Proposed Official Draft 1962). The Texas sodomy statute, Tex. Penal Code Ann. § 21.06 (Vernon 1974) was found to be unconstitutional by the United States District Court for the Northern District of Texas, in Baker v. Wade, 553 F. Supp. 1121, opinion supplemented, 106 F.R.D. 526 (1982). The Fifth Circuit Court of Appeals, however, reversed the lower court decision, finding that the statute did not violate the constitu-
statutes have withstood constitutional scrutiny. Two states’ sodomy statutes have been declared unconstitutional. The United States Supreme Court has declared that the United States Constitution does not give homosexuals a fundamental right to engage in sodomy.

At least fifty counties and municipalities have passed legislation that bar discrimination against homosexuals. Thirteen states also have laws that prohibit discrimination against the handicapped, including AIDS victims. By administrative rule, however, the federal government does not recognize homosexuality as a handicap. In the military, homosexual activity can be a court-martial offense under Article 125 of the Uniform Code of Military Justice. Yet, the United States Civil Service Commission’s guidelines forbid discrimination against homosexuals.

In 1973, the American Psychiatric Association unanimously voted to drop homosexuality from the registry of mental illness.

**Ohio Adoption Statutes**

Historically, common law did not recognize the right of adoption. Today, however, adoption is a creature of statute. No adoption is possible unless the parties meet the requirements of the applicable statute. Adoption statutes are strictly construed.
In 1977, the Ohio legislature revamped the statutory scheme. The legislature inserted a new section entitled "Who May Be Adopted." The revision widened the class of persons eligible to adopt. At this time, the legislature could have expressly forbidden homosexuals to adopt. The current version of the statute permits adult adoptions, but effectively prevents a homosexual adult from adopting another homosexual adult.

Ohio Adoption Case Law

Prior to 1977, courts were permitted to consider the respective racial, religious and cultural backgrounds of the parties. However, these factors were not controlling. If the best interests of the child mandated, children were placed in homes with parents of different racial, religious, or cultural backgrounds. Where the age of the parents was the single negative factor amidst other otherwise qualifications, denial of the adoption was arbitrary, capricious and violative of the whole adoptive system.

The best interests of a child are paramount; they supersede procedures such as a formal waiting list for adoptive parents. The Cuyahoga County Court of Appeals overturned a denial of an adoption because the foster parents were not on the agency waiting list. Denial of the adoption would have relegated the child's need to find a home to the parental needs and desires of individuals on agency waiting lists.

In Ohio, relatives have no preferential legal right to adopt.

\[28\ Huitzil, 29\ Ohio App. 3d at 225, 504 N.E.2d at 1176.\]
\[29\ Ohio Rev. Code Ann. § 3107.02 (Baldwin 1988). Former 3107.02 "Who May Adopt" was moved to its current position in 3107.03 and provides in relevant part: "The following persons may adopt: . . . An unmarried adult."\]
\[31\ Ohio Rev. Code Ann. § 3107.02 (Baldwin 1988) (effective September 20, 1984). The Huitzil court examined the legislative history behind the adoption statutes and held that the Ohio legislature clearly did not intend to permit any adult to adopt any other adult. 29 Ohio App. 3d at 225, 504 N.E.2d at 1176.\]
\[32\ One of the conditions of the statute is that a child-foster parent or child step-parent relationship must be established during the adoptee’s minority. See Ohio Rev. Code 3107.02(B)(3) (Baldwin 1988). This type of relationship is not established if the two parties are sexual partners. See In re Adoption of Robert Paul P., 481 N.Y.S.2d 652, 653, 63 N.Y.2d 233, 236, 471 N.E.2d 424, 425 (1984) holding that sexual intimacy is utterly repugnant to the relationship between child and parent in our society. \textit{Id.}\]
\[33\ Ohio Rev. Code § 3107.05(E), repealed by 1976 H 156, effective January 1, 1977.\]
\[34\ State \textit{ex rel} Portage County Welfare Dept. v. Summers, 38 Ohio St.2d 144, 311 N.E.2d 6 (1974).\]
\[35\ In re Doe, 167 N.E.2d 51 (Ohio Juv. 1956).\]
\[36\ In re Adoption of Baker, 117 Ohio App. 26, 185 N.E.2d 51 (1962).\]
\[37\ In re Haun, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).\]
\[38\ In re Harshey, 45 Ohio App. 2d 97, 341 N.E.2d 616 (1975).\]
\[39\ \textit{Id.} at 101, 341 N.E.2d at 619.\]
\[40\ \textit{Id.} at 102, 341 N.E.2d at 619. “The main purpose of adoption is to find homes for children, not to find children for families.” \textit{Id.}\]
\[41\ In re Dickhaus, 41 Ohio Misc. 1, 321 N.E.2d 800 (1974).\]
require children of the same family to be adopted by one set of adoptive parents. The court must consider the rights of the children, not the rights of the relatives.

Child Custody Disputes

Ohio courts resolve custody disputes under the "child's best interest" standard. A parent's nonmarital sexual conduct is relevant and will affect a court's custody determination only where a preponderance of the evidence shows that the conduct is having or is probably having a harmful effect upon the child. Cohabitation with a person of the opposite sex is not enough to warrant a change of custody. However, either violating a criminal adultery statute or bearing an illegitimate child is sufficient.

Custody Disputes Involving a Homosexual Parent

The same "child's best interest" standard applies when the parent's nonmarital sexual conduct is homosexual. If the conduct has a harmful effect upon the child, then the court has denied custody or has limited visitation rights. In Roberts v. Roberts, the evidence reflected only that the minor children would be significantly harmed if they learned of their father's homosexuality. In Townend v. Townend, the trial court granted custody to the grandmother because the mother was involved in a lesbian relationship. The lesbian practices were "clearly to the neglect of the children." The Eleventh District Court of Appeals found the trial court's determination of the mother's unsuitability to be amply supported by the evidence.

42 Id.
43 Id. at 3, 321 N.E.2d at 802.
44 OHIO REV. CODE ANN. § 3109.04(B)(1) (Baldwin 1988).
45 Gishwiller v. Dodez, 4 Ohio St. 615 (1855).
47 Id.
48 Beamer v. Beamer, 17 Ohio App.2d 89, 244 N.E.2d 775 (1969). Mrs. Beamer bore an illegitimate child to a married man. The court found her conduct to be in violation of a criminal statute and an improper role model for her children. Id. at 97, 244 N.E.2d at 781.
51 Id.
52 The Franklin County Court of Appeals remanded the case to determine if visitation restrictions would adequately protect the interests of the young children or if visitation should be terminated until the children reach an age at which they wouldn't be harmed by the knowledge of their father's homosexuality. Id. at 129, 489 N.E.2d at 1070.
54 Id. at 2. The women had exchanged vows of love, had granted television and newspaper interviews and were active in the Gay Liberation Movement. Id. at 3.
55 Id. The court listed examples of lack of supervision and proper clothing for the children. Id. at 2, 5.
56 Id. at 5. The children lacked supervision, in part because the mother "had been so active in the gay movement that it had engulfed her entire daily activities." Id. at 8. The court also expressed disapproval of the presence of the two older children at interviews where the "entire subject of lesbianism [was] extensively discussed in minute detail." Id. at 11.
Ohio courts do not expect parents to be perfect, however. When dealing with domestic relations cases, the courts must "recognize that all parents have faults[.] [The court must] look not to the faults of the parents, but to the needs of the child."

The court may not consider the societal unpopularity of homosexuals. The Townend court followed Alaska's lead in applying Palmore v. Sidoti to a lesbian mother custody case. In Palmore, the United States Supreme Court noted, "The Court cannot control such prejudices but neither can it tolerate them." The law may not be able to regulate private biases, but it cannot give them effect either directly or indirectly. Social stigma, whether real or imagined, cannot be a basis for determining the best interests of the child.

Homosexual Adoption in Other States

Homosexuals are statutorily excluded from being eligible to adopt in New Hampshire and Florida. In 1986, the Massachusetts Department of Social Services initiated a policy that placed foster children only in "traditional settings." New York and California explicitly allow homosexuals to adopt. New York Department of Social Services Regulations prohibit discrimination against adoptive parents based upon their sexual orientation. California considers homosexuality as only one factor in determining the child's best interests.

In Arizona, an adoption applicant's bisexuality does not, by itself, make him or her unfit to be a parent. The Arizona Court of Appeals has held that the sexual orientation of an applicant will not be the deciding factor in denying an adoption. The court distinguished between bisexuality, which is not unlawful, and homosexu-

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57 Conkel, 31 Ohio App.3d at 171-72, 509 N.E.2d at 985.
58 Id. at 171-72, 509 N.E.2d at 986.
59 Id. at 173, 509 N.E.2d at 987.
60 466 U.S. 429 (1984). The Supreme Court reversed this case where a white child was removed from her natural mother's custody because the woman was cohabiting with a black man. Id. at 434.
63 Id.
66 FLA. STAT. ANN. § 63.042(3) (West 1985) (1977 amendment).
67 Comment, Homosexual Parenting: Child Custody and Adoption, 22 U. CAL. DAVIS L. REV. 1009, 1027, n.123 (1989) (authored by Shaista-Parveen Ali) [hereinafter, Comment, Homosexual Parenting]. This policy sets the order for placing children in homes as (1) with married couples with experience in childraising, (2) married couples without experience in childraising, (3) single parents or unmarried couples, and (4) gay and lesbian couples or single. The foster-care applicant must also reveal his or her sexual orientation. Id.
69 Comment, Homosexual Parenting, supra note 65, at 1029.
70 In Riverside, California, a 29 year-old homosexual, David Frater, was permitted to adopt his 17 year-old foster son, Kevin, in 1983. 69 ABA Journal 152 (Feb. 1983).
72 Division 2, Department A.
ality, which violates Arizona law.\(^{75}\)

The exact number of homosexuals who adopt is unknown.\(^{76}\) Some homosexuals do not reveal their sexual orientation.\(^{77}\) Those who do reveal their sexual orientation and have been rejected as adoptive parents may not want the publicity or expense of an appeal. Some states permit such adoptions, and those cases in which adoption is permitted are not always reported or publicized.\(^{78}\)

**FACTS**

Charles B. was born June 17, 1981.\(^{79}\) He was eight years old at the time of the adoption proceedings.\(^{80}\) He suffers from leukemia, which was in remission at the time of the hearing, a low I.Q. and a speech disorder.\(^{81}\) He also has impaired fine and gross motor skills\(^{82}\) and has some stigmata or facial features suggestive of fetal alcohol syndrome.\(^{83}\) The Licking County Department of Human Services\(^{84}\) gained permanent custody of Charles when he was three years old.\(^{85}\) The agency placed Charles in at least four different foster homes, but no suitable family was willing to adopt him.\(^{86}\)

Mr. B. first met Charles in July, 1986, when the agency recommended that Mr. B. counsel Charles.\(^{87}\) Mr. B. and Charles developed a close, personal relationship through the counseling.\(^{88}\) The agency permitted Mr. B. to take Charles home during several weekends and a long holiday period.\(^{89}\)

\(^{74}\) Appeal in Pima Cty, 727 P.2d at 834, 151 Ariz. at 339.


\(^{76}\) Rivera, supra note 69, at 391.

\(^{77}\) See H. Curry and D. Clifford, A Legal Guide For Lesbian and Gay Couples 7:19 (1989). (Suggesting that it may be more difficult to persuade the court that the adoption is in the best interests of the child if "your sexual orientation is revealed.")

\(^{78}\) Comment, Homosexual Parenting, supra note 67, at 1032, n.158.

\(^{79}\) Charles B., 50 Ohio St.3d at 88, 552 N.E.2d at 884.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Brief of Petitioner-Appellant, Mr. B. at 2.

\(^{84}\) Hereinafter referred to as the "agency."

\(^{85}\) Charles B., 50 Ohio St.3d at 88, 552 N.E.2d at 884.

\(^{86}\) Id. Charles’ mental and physical problems make him less adoptable than other children. Id. at 88, 552 N.E.2d at 885. The agency registered Charles for adoption with several different exchanges for adoptive children. Brief of Respondent-Appellee, Licking County Department of Human Services at 1.

\(^{87}\) Charles B., 50 Ohio St.3d at 88, 552 N.E.2d at 885. Mr. B. is a psychological counselor with a bachelor’s degree in childhood and adolescent psychology from Ohio State University and a master’s degree in family life education and human sexuality from New York University. He has one-third of the work completed for a doctorate in psychology. Mr. B. lives with Mr. K., a research scientist. Id.

\(^{88}\) Id.

\(^{89}\) Id. at 89, 552 N.E.2d at 883. The agency knew of the relationship between Mr. B. and Mr. K. prior to
Mr. B. filed for adoption of Charles on January 15, 1988. One day before the adoption hearing, the agency submitted a non-consent statement to the court. At the hearing, six witnesses testified in support of the adoption. Only one witness testified on behalf of the agency. The court-appointed guardian recommended approval of the adoption. The court found the adoption to be in Charles’ best interest and granted an interlocutory adoption order. The agency appealed on May 25, 1988, and Charles was placed in a foster home pending disposition of the appeal.

Court of Appeals Opinion

The court of appeals reversed the trial court and found that, as a matter of law, “it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers.” Charles would not pass as the natural child of the adoptive parents and would not “adapt to the community by quietly blending in free from controversy and stigma.” This court found the concepts of homosexuality and adoption to be so “inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision.” In stating that the basic purpose for adoption is to provide a child with the closest possible approximation to a birth family, the court ignored past precedent that approved multi-ethnic adoptions. The court declared the gay lifestyle to be “incompatible with the manifest spirit, purpose and goals of adoption.”

Judge Wise wrote a strong dissent. Like the majority, he did not sanction or encourage homosexual adoption. However, he noted that the record contained “no

allowing the visitations. Brief of Petitioner-Appellant Mr. B. at 3.

See infra note 120 and accompanying text.

See infra notes 121-124 and accompanying text.

Brief of Guardian Ad Litem, at 2.

Id. at 2.


Charles B., 1988 LEXIS 4435 at 1.

Id. at 1-2.

Id. at 2.

Id. at 6.

See supra notes 36, 38, and accompanying text.

The court did not specify any evidence in the record to support a finding of such a lifestyle. In fact, a reading of the record shows that Mr. B. and Mr. K. have engaged in a long-term, monogamous relationship.

Charles B., 1988 LEXIS 4435 at 8.
evidence from which the trial court could find the best interests of this particular child would not be served by granting this adoption.”

In fact, if the trial court had denied the adoption, the court of appeals would “be constrained that such a decision was against the manifest weight of the evidence.”

Judge Wise pointed out that all adult male homosexuals do not pursue a “‘gay-lifestyle’ anymore than all adult male heterosexuals pursue a ‘swinger’s-life-style.’” The focus must be upon whether the prospective parent’s lifestyle is detrimental to the best interests of the child. Homosexuality does not defeat the goals of adoption simply because homosexuality negates procreation. The inability to have children is one of the reasons for adoption. One of the goals of the adoption statutes is to remove children from long term foster care and place them into a permanent environment.

Ohio Supreme Court Opinion

Upon review of the Ohio adoption statute, the Ohio Supreme Court noted that any minor may be adopted and that an unmarried adult may adopt. Therefore, since Charles and Mr. B. each fit within the respective statutes, Mr. B. is statutorily permitted to adopt Charles. The court was quick to note that the right to adopt is permissive and not absolute. The polestar is the best interest of the adopted child, which is assessed on a case-by-case basis. The trial court must decide adoption matters through the “able exercise of discretion... giving due consideration to all known factors in determining what is in the best interest of the person to be adopted.”

Mr. B.’s interest in adopting Charles never diminished, even when the agency found a potential adoptive home for Charles. Mr. B. understood and was prepared to meet Charles’ physical and emotional needs. Six witnesses testified to Mr. B.’s...
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qualifications as a parent. Only one witness testified on behalf of the agency. The agency’s witness was their Administrator of Social Services, who had no formal education in either social work or psychology. She had only one one-hour meeting with Charles and had not observed Charles and Mr. B. together. She testified that Mr. B. did not meet the agency’s “characteristic profile of preferred adoptive placement.”

The supreme court reviewed Ohio case law concerning child custody, and although it distinguished these cases, it found that the “best interest of the child” touchstone was a common thread. Permanent placement of a child is “clearly preferable to confining the child to an institution or relegating the child to a life of transience. . . .” The court approvingly cited an appellate court holding that extraordinary emphasis on a single negative factor amidst otherwise outstanding qualifications is unreasonable, arbitrary and capricious. The supreme court concluded that the trial court had not abused its broad discretion in determining that the adoption was in Charles’ best interest. The court reinstated the trial court’s judgment and allowed the adoption.

Agreeing with the majority, Judge Resnick found that existing Ohio law does not, as a matter of law, bar homosexuals from adopting children. However, she insisted that it was not in the best interest of a child suffering from leukemia to be placed with a person who falls within the high risk population for AIDS.

19 Id.
20 Mr. B.’s witnesses included: Dr. Joseph Shannon, a licensed psychologist, who holds a Ph.D. in psychology; Dr. Victoria Blubaugh, a licensed psychologist; Mr. B.’s mother and sister; Carol Menge, vice-president of Lutheran Social Services; and the guardian ad litem.  
21 Id. at 93, 552 N.E.2d at 888-89.
22 Charles B., 50 Ohio St.3d at 93, 552 N.E.2d at 888. The agency did not offer the testimony of the social workers who had worked with Charles over the years, his foster home mothers, psychologists or other experts. Nor did the agency offer the testimony of Russell Payne, the Executive Director, who authored the agency’s “non-consent” to the adoption. Brief of Petitioner-Appellant at 4.
23 Id. at 92, 552 N.E.2d at 888. The Court approvingly cited Whaley v. Whaley, 61 Ohio App.2d at 118, 399 N.E.2d at 1275 (1978) where Ohio’s position is 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.” Charles B., 50 Ohio St.3d at 92, 552 N.E.2d at 888.
24 Id.
25 Id. at 91, 552 N.E.2d at 887. The requirements were: “a family of two parents with older siblings, at least one of which would be male; a family with a child-centered life style; a couple with definite parenting experience, preferably with adoption experience; parents with proven ability to handle behavior disorder issues; a family that is open to counseling; and a family that demonstrates an ability to deal with learning disabilities, speech problems and medical problems.” Id. In the words of the Supreme Court, “a tall order, indeed.” Id. at 92, 552 N.E.2d at 888. The Court approvingly cited State ex rel. Portage County Welfare Dept. v. Summers, 38 Ohio St.2d 144, 154, 311 N.E.2d 6, 13 (1974)).
26 Id. at 94, 552 N.E.2d at 890. (Resnick, J., dissenting). Mr. B. tested negative for AIDS. AIDS is preventable and can be controlled by personal behavior, such as a monogamous relationship with an
While an adoptive parent’s homosexuality is not a determinative factor, it cannot be ignored. In Judge Resnick’s view, the trial court must have sufficient evidence to find that the prospective parent’s homosexuality will not have an adverse effect upon the minor. This will require the prospective parent to demonstrate that the homosexuality will not harm the child. The party who opposes the adoption should also offer evidence which establishes that the homosexuality has or will have an adverse effect upon the child.

**ANALYSIS**

**Relevance of Sexual Orientation**

The Ohio Supreme Court has followed precedent in considering the sexual conduct of a prospective adoptive parent only if it has an adverse effect upon the child. The best interest of the child, and not the adoptive parent, is the court’s polestar. The cases are decided on a case-by-case basis. The age and sex of the children, the discreetness or blatency of the sexual activity and the amount of additional homosexually-oriented activities are major considerations. Ohio courts recognize that denial of custody or adoption rights cannot be used as a punishment for the parent’s conduct. Courts cannot force their idea of morals onto parents. With social norms constantly changing, the court must refrain from inquiring into competing moral value systems.

**Effect of Charles B.**

Although homosexuals now have a right to adopt a child in Ohio, this case, uninfected partner. The court can recognize that such moral standards do exist and that children are harmed by being raised in immoral surroundings. Id. However, the court must...
if read narrowly, could have little effect. In fact, evidence of this treatment became evident within three months of the decision. The Brown County Court of Appeals was faced with a custody dispute involving a bisexual father. The court discussed In re Adoption of Charles B., and stated:

Although not specifically mentioned in the supreme court’s decision, a relevant factor in that case was the total lack of any viable alternatives to the petitioner’s adoption. It obviously could not be said that the proposed adoption was against the child’s best interest when the only alternative to adoption was permanent placement with the county and a future consisting of repeated movements between foster homes and a total lack of constancy in the child’s life.

If courts continue to distinguish cases on this basis, the effect of Charles B. will be dramatically curtailed.

In addition, few people will be able to duplicate the distinctive facts of this case: (1) the highly qualified adoptive parent; (2) the special-needs child who desires the adoption; (3) the support system from the partner; and (4) other role models in the extended family. Future courts must determine whether these factors are of equal weight and whether an adoption will be granted if any of the factors are missing.

In theory, more adoptive homes will be available, and fewer children should be “unplaceable” and therefore, relegated to a life of foster or institutional care. An increasing number of older homosexual children who have run away or been kicked out of their homes may now find a family to accept them as they are.

This case will not allow adult adoptions as a means of formalizing relationships between homosexual partners. Cases such as In re Adoption of Huitzil will continue to prohibit adult adoptions that do not meet the statutory guidelines. The legislature may confront the problem and incorporate New York’s new definition of “family” into family law.

examine the child’s interests, not the moral values of the parents. Id.

146 Glover, 1990 LEXIS 2291 at 14.
147 Charles B., 50 Ohio St.3d at 88, 552 N.E.2d at 885.
148 Id. at 88, 552 N.E.2d at 884-85.
149 Brief of Petitioner-Appellant, Mr. B. at 3.
150 Charles B., 50 Ohio St.3d at 93, 552 N.E.2d at 889. Mr. B.’s mother and sister testified that they had built a grandmother-grandchild and aunt-nephew relationship with Charles. Id.
151 Which factors are mandatory? Would two factors be enough?
153 H. CURRY AND D. CLIFFORD, supra note 77, at 7:25.
155 See supra notes 31-32 and accompanying text.
Legislative Intent

On the other hand, the legislature may follow Florida and New Hampshire and amend the adoption statute to explicitly preclude homosexuals from adopting. The Licking County Court of Appeals judges disagreed on the legislative intent behind the 1977 adoption statute reform. The majority felt that "the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision." The dissenting judge felt that "the legislature was expressing its disapproval of adult homosexuals adopting one another" by inserting a new section which covered persons who may be adopted. This view is more realistic because it recognizes that the legislature was aware of the homosexual adult adoption issue, but chose to sidestep it.

Tolerance of Minimal Homosexual Activity

The Ohio Supreme Court justices were less judgmental toward homosexuals. Even the dissenting justice agreed that homosexuals can be effective parents. By defusing such stereotypes as all homosexuals molest children, live a gay lifestyle, raise homosexual children and are mentally ill, Ohio has taken an active step toward reducing social intolerance of homosexuals. As society has become more tolerant of cultural and ethnic differences, so, too, will it become more tolerant of atypical sexual orientation. The law should acknowledge a tolerance of minimal homosexual activity. Since the legislature is often unwilling to champion "gay rights," the courts should develop and protect these rights.

Social Harassment

Unlike the court of appeals, the supreme court failed to address the contro-
versy and stigma that a child adopted by a homosexual parent must face. The court of appeals described its dilemma:

How will [Charlie] adapt to his community and respond positively to its government when he matures, understands and fully comprehends what was done to him by this adoption? On the other hand, what will be his reaction if and when he discovers the law did not permit him to be adopted by the only person who was willing to take him with all of his problems?\(^{169}\)

Opponents of child custody awards to homosexuals argue that other children ostracize and harass these children.\(^{170}\) Courts easily counter this argument in custody cases by noting that the harassment exists because the child has a homosexual parent, not because the child is living with the parent.\(^{171}\) Therefore, barring custody does not solve the problem.\(^{172}\)

Although this rationale does not apply to the adoption situation, two other counterarguments can be made. First, harassment may not be as prevalent as feared.\(^{173}\) Certain neighborhoods are more willing to accept divergent lifestyles. Children are more tolerant than adults and are being taught to respect individual differences. Second, courts must not give effect to private bias or prejudice.\(^{174}\) Ohio courts have refused to consider the unpopularity of homosexuality when fulfilling their duty to “facilitate and guard a fundamental parent-child relationship.”\(^{175}\) This rationale can be extended to the adoption situation. Few individuals go through life without suffering the “slings and arrows of a disapproving society.”\(^{176}\) The benefits of a loving, caring home clearly outweigh any social ridicule which may occur.\(^{177}\)

Questions Yet to be Determined

If the courts decide that all four factors\(^{178}\) are not necessary, they must determine which factors are controlling. Will only highly-educated homosexuals be able to adopt? Will homosexual couples be allowed to adopt only those children who are otherwise hard to place?\(^{179}\) Will a court allow an infant to be placed in a gay

\(^{168}\) Charles B., 1988 LEXIS 4435 at 2.

\(^{169}\) Id. at 6. The court of appeals resolved this dilemma by concluding that “homosexuals must be ineligible to adopt in any case.” Id.

\(^{170}\) Id. at 6.

\(^{171}\) Comment, Out of the Closet, supra note 162, at 417.

\(^{172}\) Id.

\(^{173}\) See Miller, supra note 165, at 159.


\(^{175}\) Conkel v. Conkel, 31 Ohio App.3d at 173, 509 N.E.2d at 987.

\(^{176}\) Id.

\(^{177}\) Comment, Out of the Closet, supra note 162, at 417.

\(^{178}\) See supra notes 147-150 and accompanying text.

\(^{179}\) The chance of a homosexual adopting a non-handicapped infant is “slim.” H. CURRY AND D. CLIFORD, supra note 77, at 7:20.
"family?" Will the court mandate that the child know or be told of the homosexuality of the adoptive parent?

These are only a few of the questions that courts will face in future adoptions. As the number of eligible adoptive children decreases due to increased birth control, abortion, and more mothers keeping their illegitimate children, adoptive children are increasingly in demand. Adoption waiting lists are already notoriously long. There are simply not enough children to go around. Somebody is going to be disappointed. In determining the best interests of the child, the courts must focus upon the child’s best interests, not the prospective adoptive parent’s sexual orientation.

CONCLUSION

A cry of alarm was heard in some neighborhoods when the Ohio Supreme Court decided In re Adoption of Charles B. Couples who had been on adoption waiting lists for years were appalled that a homosexual would “get a child” before they did. However, these complaining couples forgot that Charlie is the type of child whom they had once rejected or refused to consider because of his various problems. When the best interests of the child permit an adoption that does not match middle America’s idea of the “normal family,” shock waves abound.

Ohioans have slowly come to accept racial and ethnic differences. However, to many, homosexuals are still at the bottom of the ladder. In giving homosexuals the right to be a parent, the Ohio Supreme Court has taken an affirmative step in changing society’s attitude toward homosexuals.

Charles B. found the family for whom he had been looking. He now has a caring, loving home that will provide the emotional support he needs. Ohio must continue this trend by not confining the Charles B. decision too narrowly to its facts. It is unlikely that this fact pattern can ever be duplicated. But, on a case-by-case basis, other adoptions can be granted and other “Charlies” can find home.

DEBORAH MARIK