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Opinion No. 07-140

Adoptions by Same Sex Couples

QUESTION

Pursuant to the Tennessee statutes relating to adoptions and the Tennessee Constitution, is it legal to permit an adoption by a same sex couple?

OPINION

Assuming the adoption is found to be in the best interest of the child, there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple.

ANALYSIS

The right of adoption is not a natural right and was unknown to the common law. *Delamotte v. Stout*, 207 Tenn. 406, 340 S.W.2d 894 (1960). Rather, the right to adopt is governed solely by statute. *Id.* As such, the adoption statutes must be strictly construed. *Id.* At the same time, courts have a duty to construe the adoption law so as to achieve the primary result of "the adoption of children under circumstances and conditions most likely to be for their best welfare." *In re Adoption of Parsons*, 766 S.W.2d 196, 200 (Tenn. App. 1988).

The primary purpose of Tennessee's adoption law is to provide means and procedures for the adoption of children and adults. Tenn. Code Ann. §36-1-101(a). While the adoptive process is intended to protect the rights of all persons affected, the adoption must be in the best interest of the child. *Id.* Indeed, the legislature has specifically stated that, when the best interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child. Tenn. Code Ann. §36-1-101(d).

There is nothing on the face of the adoption statutes which precludes the joint adoption of a child by a same sex couple. Under Tennessee law, any person over the age of 18 years old, who has physical custody of a child or can establish a right to custody, may file an adoption petition. Tenn. Code Ann. §36-1-115. Although the singular "person" is used, it is a legislatively mandated rule of statutory construction that "singular includes the plural and the plural the singular, except

when the contrary intention is manifest." Tenn. Code Ann. §1-3-104(c). If the petitioner has a spouse, competent to join the petition, such spouse must join in the petition. Tenn. Code Ann. §36-1-115(c). It is not necessary, however, that a petitioner be married. Tenn. Code Ann. §36-1-107(b).

Further, the definition of "parent" for purposes of adoption proceedings does not exclude same sex couples. As provided in Tenn. Code Ann. §36-1-102(36), "'parent(s)' means any biological, legal or adoptive parent(s) or, for purposes of §§36-1-127--36-1-141, stepparents." "Biological parents" are defined as the woman and man who physically or genetically conceived the child. Tenn. Code Ann. §36-1-102(10). "Legal parent" is defined as the biological mother; a man married to the biological mother if the child was born during the marriage or within 300 days after termination of the marriage; a man adjudicated to be the legal father or who has signed a voluntary acknowledgment of paternity; or an adoptive parent of a child or adult. Tenn. Code Ann. §36-1-102(28). "Adoptive parents" are defined as "the person(s) who have been made the legal parents of a child by the entry of an order or adoption under this part or under the provisions of the laws of any state, territory or foreign country." Tenn. Code Ann. §36-1-102(7). Finally, "prospective adoptive parents" are defined to include:

> a non-agency person or persons who are seeking to adopt a child and who have made application with a licensed child-placing agency or licensed clinical social worker or the department for approval, or who have been previously approved, to receive a child for adoption, or who have received or expect to receive a surrender of a child, or who have filed a petition for termination or for adoption.

Tenn. Code Ann. §36-1-102(41).

No reported Tennessee cases directly addressing this issue were found. The majority of other jurisdictions, however, have upheld the right of same-sex couples to adopt under statutes similar to Tennessee statutes. *See In re Infant Girl W.*, 845 N.E.2d 229 (Ind. App. 2006); *In re F.W.*, 870 A.2d 82 (D.C. 2005); *In re Adoption of R.B.F.*, 569 Pa. 269, 803 A.2d 1195 (2002); *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001); *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993); *Adoption of B.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (1993).

Under Tennessee law, a surrender or parental consent may be made or given to any prospective adoptive parent who is at least 18 years of age, the department, or a licensed child-placing agency. Tenn. Code Ann. §36-1-111. Prior to entering a final order of adoption, however, the trial court must find that the petitioners are fit persons to have the care and custody of the child and that the adoption is in the best interest of the child. Tenn. Code Ann. §36-1-120. The Tennessee Court of Appeals has recognized that the lifestyle of a proposed adoptive parent is a factor the trial court should consider in determining whether a proposed adoption is in the best interest of a child. *In re Adoption of M.J.S.*, 44 S.W.3d 41 (Tenn. Ct. App. 2000) (evidence supported adoption by lesbian mother as in best interest of child). Accordingly, assuming the adoption is found to be in the best interest of the child who is the subject of the adoption, there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple.

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