

IN THE DISTRICT COURT OF APPEAL  
FOR THE THIRD DISTRICT  
STATE OF FLORIDA

**FLORIDA DEPARTMENT OF  
CHILDREN AND FAMILIES,**

Appellant,

Appeal No. 3D08-3044

vs.

**IN RE: MATTER OF ADOPTION  
OF: X.X.G. and N.R.G.,**

Appellees.  
\_\_\_\_\_ /

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On Appeal from a Final Order of the Circuit Court of  
the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida,  
Lower Court Case Number 06-033881 FC 04

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**AMICUS CURIAE BRIEF OF THE FAMILY LAW SECTION OF  
THE FLORIDA BAR IN SUPPORT OF APPELLEES**

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## **INTRODUCTION**

The Appellant, Florida Department of Children and Families, is referred to herein as "Appellant." References to the Appellant's Initial Brief shall be indicated by the abbreviation "IB." All emphasis is supplied unless otherwise noted.

### **IDENTITY AND INTEREST OF AMICUS CURIAE**

The Family Law Section of The Florida Bar is a statewide association of over 4,000 marital and family law attorneys and affiliate members throughout Florida who practice in all areas of family law. This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar which consented to its filing on June 18, 2009 consistent with applicable standing board policies. It is tendered solely by the Family Law Section, supported by the separate resources of this voluntary organization – not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee. This Court's order of February 25, 2009 authorized the filing of this Amicus Brief. The interest of the Family Law Section of The Florida Bar is stated in the motion seeking that authorization as follows:

*It has long been the policy of the Family Law Section to encourage and promote the consideration of the interests and needs of children affected by family law proceedings... This case involves a Final Judgment of Adoption entered by the trial court finding Section 63.042(3), Florida Statutes to be an unconstitutional denial of due process and equal protection to two foster children who were the subject of the adoption. The Final*

Judgment specifically recites that the status of the Petitioner seeking to adopt the children as a homosexual was the sole basis for the opposition of the Department of Children and Families to the adoption.... *Under these circumstances, the Family Law Section seeks leave of this Court to submit a brief, as amicus curiae, asserting that application of Section 63.042(3), Florida Statutes, to the facts of this case violates the constitutional rights and best interests of two little boys, and others similarly situated, who want, need, and deserve a parent.*

In accordance with the above statement of interest, this brief will focus upon the rights and interests of the minor petitioners and others similarly situated.

### **SUMMARY OF THE ARGUMENT**

The Florida Bar's Family Law Section has long promoted the consideration and needs of children in family law proceedings. Consistent with that policy, Florida law establishes the best interests of children as the polestar for deciding their welfare. The court correctly found that Section 63.042(3), Florida Statutes (2008), requires a decision contrary to the best interests of the minor petitioners.

The minor petitioners have a fundamental right to equal protection under the Florida Constitution. They also enjoy a right of permanent placement out of foster care into an adoptive family. Children placed with foster parents who are not homosexuals may be adopted by their foster parents if it is in the children's best interests and the parents successfully pass rigorous screening. Children placed with foster parents who are homosexuals may not achieve that permanency despite

the children's best interests and the passage by the foster parents of that screening. Such treatment is a denial of equal protection.

The greater interests of society are served by holding Section 63.042(3), Florida Statutes, unconstitutional on its face. The evidence proves that the blanket prohibition of adoptions by homosexuals does not advance the most important objective in adoption proceedings - the best interests of the child - but actually impedes meeting that objective. Sexual orientation is not a factor in determining parental responsibility in dissolution of marriage or paternity actions absent evidence of detriment. It should have no greater relevance in an adoption.

Children who are unable to be raised by their natural parents have been dealt one blow. Placement in state custody is another. In a perfect world, there would be parents to adopt all of them. Unfortunately, this is not a perfect world. There are far too many children in state custody who will become adults without ever being considered for adoption. There is no justification to ban from adopting a class of persons found by Appellant to be acceptable for long-term foster parenting or guardianship. Florida's children deserve to be adopted by anyone found appropriate by the rigorous screening process—whether the prospective adoptive parent is male, female, black, white, heterosexual or homosexual.

## STANDARD OF REVIEW

A determination of the facial constitutionality of a statute is generally subject to a *de novo* standard of review, as such matters present pure issues of law. *See State v. Sigler*, 967 So.2d 835, 841 (Fla. 2007); *City of Miami v. McGrath*, 824 So.2d 143 (Fla. 2002). On the other hand, where a statute is found unconstitutional after an extensive evidentiary hearing:

A trial court's ruling concerning the constitutionality of a statute following a trial wherein the parties introduce conflicting evidence is generally a mixed question of law and fact. We conclude that the proper standard of review in such cases is as follows: the trial court's ultimate ruling must be subjected to *de novo* review, but the court's factual findings must be sustained if supported by legally sufficient evidence. Legally sufficient evidence is tantamount to competent substantial evidence.

*North Fla. Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 626-627 (Fla. 2003) (footnotes omitted).

In reviewing the order below, this Court is not limited to the rationales or theories relied upon by the trial court as legal justifications. Instead, pursuant to the "tipsy coachman" doctrine, this Court may affirm the order if it can be upheld for any reason consistent with controlling law and the facts, even if the trial court did not actually rely on such reason(s) in entering the order. *See e.g., Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla. 1999); *Robertson v. State*, 829 So.2d 901, 906 (Fla. 2002).

## ARGUMENT

THE TRIAL COURT CORRECTLY HELD SECTION 63.042(3), FLORIDA STATUTES, INVALID AS VIOLATIVE OF THE MINOR PETITIONERS' CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION AND AN INFRINGEMENT OF THEIR FUNDAMENTAL RIGHT OF PERMANENCY

The ruling that Section 63.042(3), Florida Statutes, is a violation of the children's constitutional guarantee of equal protection under the law is consistent with established legal principles and the facts found by the trial court. For that reason and others herein discussed, the trial court should be affirmed.

Assessing the constitutionality of the statute in question in light of the claims of the minor petitioners is a matter of first impression. The statement at the outset of Appellant's Initial Brief - that Section 63.042(3), Florida Statutes, has "survived constitutional challenges" on several previous occasions (IB at 1) - is misleading to the extent it suggests that the judgment below is directly inconsistent with existing Florida precedent. In fact, not one of the decisions cited by Appellant as having "upheld" the statute constitutes binding precedent upon either this Court or the court below regarding the children's equal protection claim.

For instance, Appellant cites *Cox v. Florida Department of Health and Rehabilitative Services*, 656 So.2d 902 (Fla. 1995) as an example of Section 63.042(3), Florida Statutes, "surviving a constitutional challenge." (IB at 1). However, that decision clearly *did not* uphold the validity of the statute as against

an equal protection challenge. To the contrary, the supreme court observed that "[t]he record is insufficient to determine that this statute can be sustained against [such] an attack, ... [and that] a more complete record is necessary in order to determine this issue." 656 So.2d at 903. Hence, *Cox* is not dispositive of the issues raised in this case, where the ruling below was based not on summary judgment but on extensive specific facts found by the trial court, and where those findings of fact are supported by competent substantial evidence.

Furthermore, the instant case involves challenges to the validity of the statute based upon the rights of the *prospective adoptive children* and not the prospective adoptive parents. Claims on behalf of the children were not mentioned in the *Cox* case, in which equal protection challenges were made by the prospective adoptive parent only.

For the foregoing reasons, the *Cox* decision emphasized so heavily in Appellant's Initial Brief is simply not controlling or even relevant to the claims at issue in this case. Similarly, the decision of the Eleventh Circuit Court of Appeals in *Lofton v. Secretary of Department of Children and Families*, 358 F.3d 804 (11th Cir.), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 535 U.S. 1081 (2005), does not constitute binding precedent as federal court decisions are not binding upon any Florida state court, except those decisions of the United States Supreme Court pertaining to issues of federal constitutional or statutory law.

*See, e.g., Carnival Corp. v. Carlisle*, 953 So.2d 461 (Fla. 2007); *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32 (Fla. 2d DCA 2005); *Roland v. Florida E. Coast Ry.*, 873 So.2d 1271 (Fla. 3d DCA 2004). Thus, the *Lofton* decision is not entitled to any precedential weight. It is not even persuasive in that it was decided without any scientific evidence in the record. The Florida Supreme Court has made it clear that a factual record was required to determine whether the statute at issue in this case satisfied the rational basis test. *Cox, supra*, at 902. The Florida state circuit court decision of *Amer v. Johnson*, 4 Fla. L. Weekly Supp. 854b (Fla. 17th Cir. Ct. 1997), which the Initial Brief also references as previous authority upholding Section 63.042(3), Florida Statutes, similarly carries no precedential weight. A decision of a circuit court such as *Amer* is not binding upon other trial courts, *see, State v. Riley*, 698 So.2d 374 (Fla. 2d DCA 1997), and this Court obviously is not bound by it.

Thus, none of the cases cited in the Initial Brief as precedent addressing the specific claims in this case actually qualifies as such. *Cox* did not decide the equal protection issue presented in that case or any claims of the children. The other cases cited (*Lofton* and *Amer*) are not binding authority upon either this Court or the trial court below. Indeed, they are not entitled to any greater weight before this Court than the recent decisions in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (in which the Supreme Court of Iowa held that a statutory classification based on

sexual orientation was a quasi-suspect classification, requiring heightened scrutiny) or *In the Matter of the Adoption of John Doe*, 2008 WL 5070056 (Fla. 16th Cir. Ct. Aug. 29, 2008) [holding § 63.042(3), FLA. STAT. to be unconstitutional on several grounds, predicated upon finding that statute was punitive measure targeted against homosexuals]. This Court is not compelled to follow *any* of these decisions.

In short, there is no binding precedent addressing the particular issues raised in this case, contrary to the suggestion in Appellant's Initial Brief. Moreover, the trial court below was not the first Florida circuit court to conclude that Section 63.042(3), Florida Statutes, is constitutionally invalid. In addition to the trial court in the *Cox* case, other circuit court rulings to this effect include *In the Matter of the Adoption of John Doe, supra*, and *Seebol v. Farie*, 16 Fla. L. Weekly C52 (Fla. 16th Cir. Ct. 1991). Thus, the ruling below is neither aberrational nor directly contrary to existing precedent.

Rather, the ruling below constitutes a correct application of equal protection principles to the facts of this case, as found by the trial court on the basis of the evidence submitted by the parties, including extensive scientific evidence. The trial court correctly concluded, based on the facts found, that the minor children's claims in this case implicated rights of permanency which qualified as "fundamental" [although the court did not use such determination as a basis for applying "strict scrutiny" to the equal protection analysis of Section 63.042(3)],

and that depriving the children of their right of permanency could not be justified by any connection between the statutory classification and the asserted state interests offered as justifications for that classification, even under the "rational basis" inquiry.

The findings of fact upon which the trial judge predicated her conclusions of law may not be disturbed by this Court unless they are wholly unsupported by competent, substantial evidence. *See, North Fla. Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 626-27 (Fla. 2003).

The trial judge was clearly within her rights to place little weight on the testimony of Appellant's expert witnesses. *See, Weygant v. Ft. Myers Lincoln Mercury, Inc.*, 640 So.2d 1092, 1094 (Fla. 1994) (trier of fact may disregard expert testimony); *Easkold v. Rhodes*, 614 So.2d 495, 498 (Fla. 1993) (same); § 90.608, FLA. STAT. (2008) (bias as ground to impeach witness).

In reaching her ultimate conclusion that the statutory classification created by the statute could not be justified under the rational basis test, the court analyzed in detail all of the purported justifications offered by the state to support such classification, and deemed the classification not rationally related to such objectives. Most significantly, the trial judge found that the proffered justification of promoting the well-being of children was not advanced, and in fact was actually undermined, by the categorical exclusion of all homosexuals from adopting. In

this case specifically, the effect of such exclusion was to prevent the adoption of the parentless minor children by the very person who was found by Appellant to be best able to provide the care and support the children needed (Final Jgmt., p. 44). She noted that such a result was contrary not only to the individual best interests of the minor children, but also society's "compelling interest in providing stable and permanent homes for adoptive children" [as stated in *G.S. v. T.B.*, 985 So.2d 978, 982 (Fla. 2008)]. In addition, the court also concluded that the other purported justifications for the statute did not serve to demonstrate its rationality.

In light of the court's findings and the evidentiary record that supports them, the Final Judgment must be affirmed, at a minimum on the basis that it correctly held Section 63.042(3), Florida Statutes, to be an unconstitutional deprivation of the children's due process right to permanency as applied to the facts of this case.

Existing Florida law clearly recognizes that a statute may operate in an unconstitutionally discriminatory manner as applied to certain persons and circumstances notwithstanding an appearance of facial validity. *See, In re Fuller*, 255 So.2d 1, 3 (Fla. 1971); *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282, 284 (1914); *Lightfoot v. State*, 64 So.2d 261, 265 (Fla. 1953). The ultimate ruling of the lower court was based upon facts specific to the statute's impact on the minor petitioners' right to permanency, as well as facts pertaining to the general operation or overall purpose behind adoption of Section 63.042(3), Florida

Statutes. The trial court gave great weight to the fact that the minor petitioners had been placed by Appellant in a home with homosexual foster parents with whom they had resided for an extended period of time, and with whom they had bonded to such an extent that removal would be "devastating" to the children. The court correctly concluded that the statutory ban against adoptions by homosexuals did not serve any proffered justification for the statute, but rather operated in a manner contrary to the best interests of the children and as an obstacle to accomplishing the goals for children in foster care.

In view of the detailed discussion of the facts, and the emphasis properly given to the rights, needs and best interests of these children, who had previously been placed by Appellant in a homosexual foster home and then denied the stated goal of a permanent adoptive relationship, the Final Judgment below must be affirmed at a minimum on the basis that application of the statute to the facts of this case violates the children's substantive due process right to permanency. In so holding, this Court could emphasize the specific factual circumstances in this case as a basis for holding on due process grounds that children in foster care who have bonded significantly with homosexual foster parents cannot be denied permanency through adoption. However, the greater interests of society would be served if the Court holds the statute facially unconstitutional based on an equal protection violation.

The trial court's analysis of the statute's validity, though grounded largely upon the specific facts of this case, correctly characterizes the way in which Section 63.042(3), Florida Statutes, operates in general. The evidence introduced at the trial below demonstrates, on a sort of micro-level, the reasons why Section 63.042(3) is not rationally related to the justifications offered in its defense. It is conceded by all that the welfare and best interests of the children are the polestar considerations in adoption proceedings. *See, e.g., G.S. v. T.B.*, 985 So.2d 978, 982 (Fla. 2008). In order to insure that adoption proceedings protect the child's best interests, the process involves a complicated evaluation of prospective adoptive parents that takes into consideration numerous factors on an individualized, case-by-case basis. The trial court correctly held that Section 63.042(3), Florida Statutes, is not rationally related to children's welfare because it operates not to advance, but to prevent, accomplishment of the stated objective where the absolute categorical exclusion of homosexuals from adopting serves to prevent the person who the individualized, multi-factor evaluation process indicates would be the best adoptive parent from actually adopting the child. Such a result fails to serve the interests of the particular child involved or society as a whole.

Best interests of the child is the polestar consideration in determining parental responsibility as well as in adoption proceedings. In parental responsibility decisions for dissolution of marriage and paternity cases, Section

61.13, Florida Statutes, lists several factors to assist the court in determining the best interests of the children. Needless to say, the sexual orientation of one of the parents is not an enumerated factor to be considered. In fact, to consider sexual orientation at all on the issue of parental responsibility, the conduct must have a direct effect or impact on the children. *Jacoby v. Jacoby*, 763 So.2d 410 (Fla. 2d DCA 2000). The mere possibility of negative impact is not enough. The connection between the conduct and the harm to the children must have an evidentiary basis; it cannot be assumed. *Jacoby, supra; Maradie v. Maradie*, 680 So.2d 538 (Fla. 1<sup>st</sup> DCA 1996).

The children in dissolution of marriage and paternity cases are not physically in the custody of the state; however, the state's role as *parens patriae* is similar to its role in dependency cases. A parent's homosexuality is not a basis to terminate his or her parental rights. It is not a basis to deny that parent residential responsibility for his or her child or time-sharing with that child. Similarly, a person's homosexuality does not prevent that person from serving as a foster parent or as a guardian for a child. The only role that is precluded is that of adoptive parent. Clearly, this is a distinction without a difference.

Appellant attempts to defend the absolute exclusion by arguing that homosexuals present "statistically different probabilities" of developing certain negative conditions or problems in the future, as compared with other groups, and

without knowing whether or not such conditions or problems will actually arise in the future, the legislature was permitted to draw distinctions on the basis of the "statistically different probabilities" themselves. These "differing statistical probabilities" have been claimed as the justification for the absolute ban against homosexual adoptions. However, the classification drawn by the statute simply is not rational in relation to the perceived problems. On the one hand, homosexuals make up the *only group affected* by the categorical exclusion, even though, as the court found, *all demographic groups present some degree of potentiality* for acquiring the condition or status offered as the justification for the statutory classification, and even though there are *other demographic groups* that present a *greater* potential risk of many of these perceived dangers than homosexuals. Moreover, with respect to the *only* group affected, the statute imposes an absolute, inflexible disqualification, even though *most* individuals fitting within that group will *never* develop the feared conditions or problems. The statutory classification is thus, not merely "under-inclusive"; the exclusion is so disconnected from this purpose that it cannot justify the statute even under the rational basis test. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (the law is "so removed from [the asserted] justifications that [it is] impossible to credit them").

Insofar as the statute "conclusively presumes" the lack of fitness to adopt of all homosexuals, this is itself a violation of the constitution. Case law establishes that the validity of a conclusive presumption created by statute

must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) ***whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.***

*Markham v. Fogg*, 458 So.2d 1122, 1125 (Fla. 1984), quoting *Bass v. General Dev. Corp.*, 374 So.2d 479, 484 (Fla. 1979). In the instant case, even if it is assumed that the first two requirements of this test were met, it is clear that the third factor is not satisfied; *the state already conducts extensive, individualized, case-by-case evaluations of particular applicants for adoption*, in which the potential of a specific individual to develop objectionable or problematic conditions in the future may be, and is, considered. The existence of such an intensive investigative process demonstrates that the conclusive presumption of lack of fitness that is created by the statute is unnecessary, and indeed, often counterproductive (as in this case). Thus, the statutory classification constitutes an unconstitutional conclusive presumption. *See also, In the Matter of the Adoption of John Doe, supra.*

Whether deemed a blanket exclusion or a conclusive presumption, one thing is clear: barring homosexuals from adopting results in more of Florida's children having no family at all. At any given point, there are approximately 1,000 children in Florida who need adoptive parents to be recruited for them. (R.693). Appellant stipulated at trial that the shortage of adoptive parents is a "serious problem." (R.694). It admitted that the exclusion does not promote children's welfare (R.697) and that the exclusion is contrary to well-established best practices in the field of child welfare. (R.4346-47). It admitted that the statute does not promote the best interest of children or benefit children in any way and that eliminating the ban would serve children's interests as it would be able to get some children adopted out of foster care. (R.4339-40, 4349-52, 4374-78, 4380). Appellant even went so far as to admit that gay people and heterosexuals make equally good parents! These admissions coupled with the expression of legislative intent contained in Section 63.022(2), Florida Statutes, that in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination make it inconceivable that homosexuals can constitutionally be precluded from adopting a child in Florida in each and every case regardless of the child's best interests.

Affirming the judgment below will advance the interests of children in need of adoptive families and society generally, without interfering with the accomplishment of any genuine governmental objectives. This Court therefore

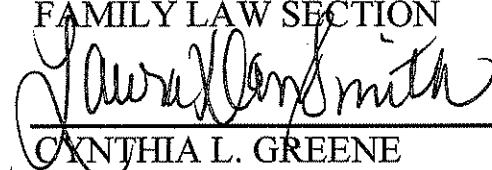
should hold Section 63.042(3), Florida Statutes, to be an unconstitutional denial of equal protection, as well as the children's right to permanency.

**CONCLUSION**

For the reasons discussed above, the final judgment below should be affirmed in its entirety. In the alternative, the judgment should be affirmed to the extent it holds Section 63.042(3), Florida Statutes, to be an unconstitutional deprivation of the children's due process right to permanency as applied to the facts of this case.

Respectfully submitted,

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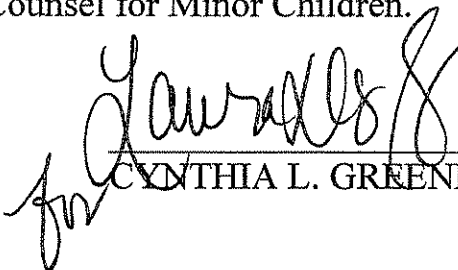
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail to the following persons this 22 day of June, 2009:  
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**CERTIFICATE OF COMPLIANCE**

In accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, Amicus Curiae, The Family Law Section of the Florida Bar, certifies that it has used a 14-point Times New Roman font throughout this brief.

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CYNTHIA L. GREENE