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**Finstuen v. Crutcher: The Tenth Circuit Delivers a Significant Victory for Same-Sex Parents with Adopted Children**

# *FINSTUEN V. CRUTCHER*: THE TENTH CIRCUIT DELIVERS A SIGNIFICANT VICTORY FOR SAME-SEX PARENTS WITH ADOPTED CHILDREN

## INTRODUCTION

Though the estimates vary, there are roughly 250,000 children being raised by same-sex couples in the United States today.<sup>1</sup> Further, there are children in approximately one-third of all lesbian and one-fifth of all gay male households.<sup>2</sup> While some of these children are biologically related to at least one parent, many are adopted.<sup>3</sup> However, numerous states do not grant the rights that accompany adoptions by heterosexual couples to both parents in a same-sex couple.<sup>4</sup>

In states where parents in a same-sex couple are not both recognized as legal parents, the parent without legal rights is treated by the law as a stranger to the child.<sup>5</sup> Thus, the non-legal parent cannot make medical decisions, sign school permission slips, and the child cannot inherit or receive social security benefits upon the parent's death.<sup>6</sup> In addition, should a separation occur, the non-legal parent is not obligated to pay child support, and may also be denied visitation or custodial rights, creating an unfair situation for both parents and, more importantly, their children.<sup>7</sup>

Because some states allow same-sex couples to adopt, a new conflicts of law quagmire has emerged. If both parents are legally recognized as the parents of an adopted child in one state and then travel or move to another state, is their legal status still enforceable in the foreign state? The Tenth Circuit Court of Appeals provided an answer to this debate in the recent case of *Finstuen v. Crutcher*,<sup>8</sup> finding that adoptions created in one state must be recognized nationwide under the Full Faith and Credit Clause.

Part I of this comment provides a broad look at the current laws that affect same-sex adoptions in the nation. Part II discusses the Tenth Cir-

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1. LambdaLegal.com, Adoption and Parenting, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting/> (last visited Jan. 30, 2008).

2. Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 74 (2006).

3. *Id.*

4. DENNIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES, 79-80 (Emily Doskow, ed., 14th ed. 2007).

5. *Id.* at 80.

6. *See id.* at 79-80.

7. Rosato, *supra* note 2, at 76.

8. 496 F.3d 1139 (10th Cir. 2007).

cuit Court of Appeal's decision in *Finstuen*. Finally, Part III examines the true impact of *Finstuen*, and what the future holds for this battle.

## I. BACKGROUND

### A. *The Full Faith and Credit Clause*

*"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings in every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."*<sup>9</sup>

The Full Faith and Credit Clause was included in the Constitution to ensure that the fifty states could operate as a unified nation.<sup>10</sup> Therefore, according to the first sentence of the Clause, judgments rendered in one state court are enforceable in all other states, ending possible re-litigation of the same issue in different forums.<sup>11</sup>

The Supreme Court has made it clear that judgments are treated differently than the statutory laws of other states under the Full Faith and Credit Clause.<sup>12</sup> With respect to recognition of another state's judgments, the Full Faith and Credit Clause creates an "exacting" obligation on states to accept the judgment of another state's court.<sup>13</sup> The issue may not be re-litigated.<sup>14</sup> Conversely, statutes of other states do not have to be enforced in the forum state if the forum state has a strong public policy against recognizing the statute.<sup>15</sup>

The second sentence of the Full Faith and Credit Clause is called the "Effects Clause."<sup>16</sup> Under this provision, Congress is able to determine what effects the judgments and statutes of one state would have in sister states.<sup>17</sup> Thus, while the Full Faith and Credit Clause generally requires states to recognize the judgments of other states, using the Effects Clause, Congress can pass laws to narrow the general rule that judgments in one state are entitled to the same effect nationwide.<sup>18</sup>

The Full Faith and Credit Clause has emerged as a powerful tool for both sides of the gay rights debate. The Defense of Marriage Act was passed using the Effects Clause, curtailing the impact of same-sex mar-

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9. U.S. CONST. art. IV, § 1.

10. Lisa S. Chen, Comment, *Second Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171, 179 (2005).

11. *Martino v. Cottman Trans. Sys., Inc.*, 554 N.W.2d 17, 20 (Mich. Ct. App. 1996).

12. Mark Strasser, *When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 317 (2001).

13. *Id.*

14. *See id.*

15. *Id.*

16. Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 393 (2005).

17. *Id.*

18. *Id.* at 393-94.

riages nationwide.<sup>19</sup> Conversely, the Tenth Circuit Court of Appeals in *Finstuen* used the Full Faith and Credit Clause to create a powerful victory for same-sex parents and their adopted children.<sup>20</sup>

### *B. The Current State of the Law Regarding Same-Sex Couples and Adoption*

Because the topic of same-sex relationships is so controversial, it is not surprising that state laws regarding same-sex couples vary widely. This patchwork of laws can have serious ramifications on a same-sex couple's adoption rights.

#### 1. Methods of Adoption for Same-Sex Couples

Currently, there are three situations where the law recognizes both members of a same-sex couple as legal parents of a child. First, in states that allow gays and lesbians to marry or enter into civil unions, children born into the marriage are automatically treated as children of both parents, even though one parent may not be biologically related to the child.<sup>21</sup> No adoption proceeding is necessary.<sup>22</sup> In addition to parental rights created by virtue of marriages or civil unions, at least nine states, and the District of Columbia, currently allow same-sex couples to adopt through a one step adoption process.<sup>23</sup> Through this process, a court proceeding is required where a judge signs a final order granting the adoption.<sup>24</sup>

Finally, at least twenty-seven states allow same-sex second parent adoptions in all or some circumstances.<sup>25</sup> A second parent adoption is used for non-biological or legally recognized parents to adopt their partner's child.<sup>26</sup> As in the single adoption process, second parent adoptions also conclude with a court proceeding.<sup>27</sup> After the court has ruled on the

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19. See *infra* notes 37-51 and accompanying text.

20. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1152-56 (10th Cir. 2007).

21. CLIFFORD ET AL., *supra* note 4, at 80-81. Current states that allow same-sex marriage or civil unions include Massachusetts, California, Connecticut, Vermont, and New Jersey. *Id.* at 79-80.

22. See *id.*

23. BRETT MCWHORTER SEMBER, *GAY & LESBIAN PARENTING CHOICES 22* (Gina Talucci, ed., Career Press 2006). Along with the District of Columbia, the states that allow same-sex couples to adopt through a one step adoption process include Vermont, New Jersey, California, Connecticut, Illinois, New Mexico, New York, Oregon, and Massachusetts. *Id.*

24. *Id.* at 51. Of note for same-sex couples, however, is that private adoption agencies generally are allowed to use marital status and sexual orientation as reasons to deny an adoption, no matter what a state's law is, and therefore there are still some hurdles for gay couples wishing to adopt in these states. *Id.* at 36.

25. *Id.* at 54. For an up to date list of state cases on second-parent adoption, visit the National Center for Lesbian Rights, [www.nclrights.org](http://www.nclrights.org).

26. SEMBER, *supra* note 23, at 53. Thus, in a second parent adoption situation, at least one parent already has legal control over the child, either by virtue of being the biological parent, or because they previously adopted the child through the single adoption process.

27. CLIFFORD ET AL., *supra* note 4, at 82, 84. This process can also involve home studies and inspections by the adoption agency to judge the fitness of the second parent, as well as consent by any other living biological parent. SEMBER, *supra* note 23, at 56-57.

adoption, the final step often involves amending the child's birth certificate to list both parents.<sup>28</sup>

## 2. Limitations on the Adoption Rights of Same-Sex Couples

There are currently only a small handful of states that specifically ban adoptions by same-sex couples. Florida is the only state that explicitly bans all homosexuals, either single or in a couple, from adopting.<sup>29</sup> Mississippi bans adoptions for gay couples, and Utah restricts adoptions to married couples only, effectively banning same-sex couples from adopting because gays cannot marry in Utah.<sup>30</sup> In addition, the Attorney General of the state of Michigan announced in 2004 that "gay adoption is against Michigan law and that, as a matter of policy, Michigan will not recognize adoptions performed in other states."<sup>31</sup>

Also looming on the horizon are possible state constitutional amendments aimed at banning same-sex couples from adopting.<sup>32</sup> In 2006 alone, sixteen states considered putting such amendments on the ballot.<sup>33</sup> Conservative groups see this as the next logical step in the ongoing battle over gay rights.<sup>34</sup> While none of these amendments were actually placed on the ballot, activists in Arkansas are already preparing a ban for the 2008 election.<sup>35</sup> However, these bans have not gained the same amount of traction as the same-sex marriage bans, and even conservative presidential candidates such as Mitt Romney have conceded that same-sex couples have an interest in adopting in some circumstances.<sup>36</sup> Nevertheless, the drastic impact these bans could have on the adoption rights of same-sex couples cannot be understated.

## 3. The Impact of DOMA

While not expressly aimed at same-sex adoptions, the Federal Defense of Marriage Act<sup>37</sup> ("DOMA") has created even more problems for

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28. CLIFFORD ET AL., *supra* note 4, at 85.

29. Dyana Bagby, *Only One State Now Facing Gay Adoption Ban*, SOUTHERN VOICE, Feb. 24, 2006, available at <http://www.southernvoice.com/2006/2-24/news/national/nat1.cfm>.

30. *Id.*

31. Staff Editorial, *Parenting Prejudice: Gay Adoption Decision Unmerited*, MICH. DAILY, Sept. 21, 2004, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2004/09/21/Opinioneditorials/From-The.Daily.Parenting.Prejudice-1425120.shtml>. This policy will likely be susceptible to attack using the arguments in *Finstuen*, however.

32. Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 20, 2006, at 1A, available at [http://www.usatoday.com/news/nation/2006-02-20-gay-adoption\\_x.htm](http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm).

33. *Id.* Bills were drafted or discussed in the following states: Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and West Virginia. *Id.*

34. *Id.*

35. *Gay Adoption Ban Proposal Submitted to Arkansas A.G.*, 365GAY.COM, Aug. 24, 2007, <http://www.365gay.com/Newscon07/08/082407ark.htm>.

36. Glen Johnson, *Romney Seeks Gay-Adoption Exemption*, ASSOCIATED PRESS, Mar. 14, 2006, available at <http://www.gay.com/news/article.html?2006/03/14/1>.

37. Defense of Marriage Act, 28 U.S.C.A. § 1738C (2008).

same-sex parents. DOMA was signed into law by President Bill Clinton on September 21, 1996.<sup>38</sup> DOMA contains two provisions: the first part reserves the term “marriage” exclusively for couples composed of one man and one woman; the second, and more controversial part, gives the option to refuse to recognize same-sex marriages performed in other states.<sup>39</sup> Congress passed DOMA using its powers under the “Effects Clause” of the Full Faith and Credit Clause,<sup>40</sup> allowing states to deny full faith and credit to other state’s decisions granting same-sex marriages.<sup>41</sup> Thus, in addition to a basic same-sex marriage ceremony, declaratory judgments granted in one state recognizing a same-sex marriage do not have to be recognized in other states under DOMA.<sup>42</sup>

Using this authority granted to them by section two of DOMA, at least forty states<sup>43</sup> have also passed their own version of DOMA, often called “mini-DOMAs.”<sup>44</sup> However, not all of these mini-DOMAs are created equal, resulting in three categories. The most lenient category is the basic mini-DOMAs that simply define marriage as between “one man and one woman” and refuse to recognize marriages celebrated in other states between same-sex couples.<sup>45</sup> The second category consists of states that not only refuse to recognize out of state same-sex marriages, but also refuse to recognize any other rights arising out of the marriage.<sup>46</sup>

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38. Oren Goldhaber, “*I Want My Mommies*”: *The Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 290 (2007).

39. *Id.* (referring to 1 U.S.C.A. § 7 (2008)). Section two of DOMA states:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C.A. § 1738C (2008).

40. *See supra* notes 16-18 and accompanying text. While there are numerous arguments debating whether Congress has the power under the Full Faith and Credit Clause to create DOMA under the Effects Clause, it is beyond the scope of this comment.

41. Wardle, *supra* note 16, at 387. It is important to recognize that DOMA allows states to choose whether to recognize same-sex marriages in other states; it does not actually require them to take any action one way or another. *Id.*

42. *Id.* at 388.

43. For an up-to-date list of what states have passed laws or amended their state constitutions with mini-DOMAs, visit *Human Rights Campaign, Statewide Marriage Laws*, available at <http://www.hrc.org/issues/5594.htm> (last visited Jan. 30, 2008).

44. Strasser, *supra* note 12, at 305.

45. *Id.* at 305-06. For example, North Carolina’s DOMA states that “marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.” N.C. GEN. STAT. ANN. § 51-1.2 (West 2008); *see also* 23 PA. CONS. STAT. ANN. § 1704 (West 2008) (“It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.”).

46. Strasser, *supra* note 12, at 305-06. Arkansas’ DOMA, for example, refuses to recognize any rights or obligations created by any contract arising out of the marriage, including divorce proceedings. ARK. CODE ANN. § 9-11-208(b) (West 2008) (making obligations such as child support not enforceable in Arkansas); *see also* MINN. STAT. ANN. § 517.03(4)(b) (West 2008) (“A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by

The third category consists of the most extreme states which not only ban same-sex marriages, but also civil unions and any other rights that may arise out of a legally created same-sex relationship.<sup>47</sup>

The second and third categories of mini-DOMAs can have a drastic impact on same-sex adoptions. In these states, because contractual obligations that arise out of the legally created relationship are not recognized, any adoptions recognized by virtue of the marriage or legal union may not have to be recognized in the mini-DOMA state.<sup>48</sup> Thus, in the states that automatically make both parents of a child born into their marriage or civil union legal parents,<sup>49</sup> the non-biological parent's rights are stripped away because these parental rights were created as a result of the marriage/civil union.<sup>50</sup> In addition, any obligations created in a divorce proceeding cannot be enforced in these states, such as child support or visitation rights.<sup>51</sup> For example, if one mother in a same-sex civil union in Vermont had a daughter, Vermont would recognize the non-biological parent as a legal parent because of the civil union. If the family subsequently moves to Florida, however, Florida would not have to recognize the non-biological mother as a legal parent because the state would not recognize the underlying civil union. Thus, DOMA and the many classifications of mini-DOMAs have greatly altered the legal landscape for same-sex parents.

On the other hand, while the legal rights of parents in marriages or unions can be voided by mini-DOMAs, what about second-parent adoptions? Is this a more reliable method for same-sex couples to ensure their parental rights will be recognized in mini-DOMA states? The Tenth Circuit Court of Appeals recently addressed this question in *Finstuen v. Crutcher*.

## II. *FINSTUEN V. CRUTCHER*

### A. *Facts*

Lucy and Jennifer Doel, two women in a relationship, resided in Oklahoma with their adopted child E, who was born in Oklahoma.<sup>52</sup>

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another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”).

47. Strasser, *supra* note 12, at 305-06. The language of Florida's statute prohibits recognition of any same-sex marriages, as well as any “relationships between persons of the same sex which are treated as marriages in any jurisdiction,” thus negating legally created civil unions as well as marriages. See FLA. STAT. ANN. § 741.212(1) (West 2008); see also W. VA. CODE ANN. § 48-2-603 (West 2008) (“A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of any other state . . . shall not be given effect by this state.”).

48. See Goldhaber, *supra* note 38, at 287.

49. CLIFFORD ET AL., *supra* note 4, at 79-80 (including Massachusetts, California, Connecticut, Vermont, and New Jersey).

50. See Strasser, *supra* note 12, at 306.

51. See *id.*

52. *Finstuen v. Crutcher*, 496 F.3d 1139, 1142 (10th Cir. 2007).



Neither parent was the biological parent of E.<sup>53</sup> Lucy officially adopted E in California in January of 2002.<sup>54</sup> Six months later, through California's second parent adoption process, Jennifer also adopted E.<sup>55</sup> Upon return to Oklahoma, the Oklahoma State Department of Health ("OSDH") refused to issue a birth certificate with both Lucy and Jennifer listed as parents, instead only naming Lucy as E's mother.<sup>56</sup> Despite repeated requests for a corrected birth certificate, OSDH refused.<sup>57</sup>

Prior to the filing of the case, the Oklahoma Attorney General's Office issued an opinion stating that, under Oklahoma's current laws, the state would have to recognize out-of-state adoptions by homosexual couples.<sup>58</sup> While the Doels' request for an amended birth certificate was pending, the Oklahoma state legislature amended the state's adoption statute in response to the Attorney General's opinion, explicitly denying recognition to out-of-state adoptions by homosexual couples.<sup>59</sup> The amended statute read in full:

The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. *Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.*<sup>60</sup>

In order to justify the denial of the revised birth certificate to the Doels, OSDH relied on this amended statute forbidding the recognition of adoptions by same-sex couples.<sup>61</sup>

The Doels, along with two other same-sex couples with adopted children, filed suit against the State of Oklahoma in the United States District Court for the Western District of Oklahoma, seeking to enjoin

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1146.

58. *Id.*

59. *Id.*

60. OKLA. STAT. ANN. tit. 10 § 7502-1.4(A) (West 2008) (emphasis added). Commentators have interpreted the statute to be so broad and overarching that a child of a same-sex couple would legally become an orphan if traveling through the state of Oklahoma, if neither parent was the biological parent. See Press Release, Lambda Legal, Lambda Legal Celebrates Oklahoma Decision Not to Appeal 10th Circuit Court Gay Parent Adoption Decision (Aug. 17, 2007), <http://www.lambdalegal.org/news/pr/oklahoma-not-to-appeal.html>.

61. *Finstuen*, 496 F.3d at 1146.

enforcement of the amendment.<sup>62</sup> The defendants in the suit were the Governor of Oklahoma, the Oklahoma Attorney General, and the Commissioner of OSDH.<sup>63</sup> The plaintiffs alleged that the amendment violated three constitutional provisions: the Full Faith and Credit Clause; the Equal Protection Clause; and the Due Process Clause.<sup>64</sup> After finding that the Doels and one other couple had constitutional standing to challenge the statute, the district court granted summary judgment to the plaintiffs on all three claims.<sup>65</sup> Only the OSDH Commissioner appealed to the Tenth Circuit Court of Appeals.<sup>66</sup>

### B. Decision<sup>67</sup>

The Tenth Circuit Court of Appeals held that the Oklahoma adoption statute was unconstitutional because it violated the Full Faith and Credit Clause.<sup>68</sup> The Court states, "The Constitution states that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state.'"<sup>69</sup> The purpose behind the Clause is to make all of the states "integral parts of a single nation"

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62. *Id.* at 1142. Because the Tenth Circuit Court of Appeals found that the other two couples lacked constitutional standing, the facts of their claims are omitted. *Id.* at 1143-45.

63. *Id.* at 1142.

64. *Id.* at 1143.

65. *Id.*

66. *Id.*

67. Before addressing the substantive issues of the case, the Tenth Circuit addressed whether the couples had constitutional standing to bring the case and whether it was moot. The Hampel-Swaya family lacked standing because they did not live in Oklahoma, and the court held that the threat of visiting the child's birth mother in Oklahoma without any scheduled visits did not give them an injury-in-fact, especially since they already had an adoption certificate from their home state of Washington with both fathers listed as parents. *Id.* at 1144. The Finstuen-Magro family also lacked standing because they could not identify any encounters with state officials that could demonstrate that the amended statute had caused them direct harm, and therefore also could not identify an injury-in-fact. *Id.* at 1145. The Doels, however, did have standing. First, OSDH had refused to issue a new birth certificate with both mothers listed as parents, creating an injury-in-fact. *Id.* Moreover, during a medical emergency for their child, the ambulance and emergency room told them that only "the mother" could accompany the child, further solidifying the injury-in-fact. *Id.* Secondly, the court held that OSDH had directly caused this injury, and that the adoption amendment was, at least in part, OSDH's justification for refusing to issue an amended birth certificate, satisfying the causation prong of standing. *Id.* at 1145-46. Finally, the court recognized that invalidating the amendment and ordering OSDH to issue a new birth certificate would redress the injury. *Id.* at 1147.

The court also found that the case was not moot. *Id.* at 1149-51. At the lower court level, OSDH "conceded" that the adoption amendment would not apply to the Doels, since under the department's interpretation of the statute, same-sex parents who adopted through a two-step process (such as second parent adoptions) would not be impacted, because the language of the statute refers only to single adoptions. *Id.* at 1149; *see also supra* notes 21-23 and accompanying text for a discussion of the single adoption process. Thus, OSDH argued that the case was moot since the department had agreed to give the Doels what they wanted. *Finstuen*, 496 F.3d at 1150. The Court refused OSDH's interpretation of the statute, finding that the public policy behind the amendment applied to *all* same-sex adoptions, and the alleged concession by OSDH to issue a new birth certificate in this particular instance did not render the case moot, especially since OSDH had yet to issue a new birth certificate. *Id.* at 1149-51. In the concurrence/dissent, however, Justice Hartz seemed to agree with OSDH's interpretation of the statute. *See infra* note 88.

68. *Finstuen*, 496 F.3d at 1151-56.

69. *Id.* at 1152 (citing U.S. CONST. art. IV, § 1).

where a remedy obtained in one state may be enforced in every other state.<sup>70</sup> Therefore, the Court states “If in its application local policy must at times be required to give way, such is part of the price of our federal system.”<sup>71</sup>

However, the court noted that the Clause treats statutes and judgments of other states differently.<sup>72</sup> Regarding foreign statutes, full faith and credit is not always required, and occasionally a state may choose not to enforce another state’s laws if the forum state’s public policy is contrary to the policy behind the foreign state’s law.<sup>73</sup> Conversely, with respect to judgments of other states, “it is clear there is no ‘public policy’ exception to the Full Faith and Credit Clause.”<sup>74</sup> Judgments made in other states create an “exacting” obligation on all other states to recognize the judgment, giving it nationwide force.<sup>75</sup>

In the case at hand, the Tenth Circuit accordingly held that “[a] California court made the decision, in its own state and under its own laws, as to whether Jennifer Doel could adopt child E. That decision is final.”<sup>76</sup> Because Oklahoma has a statute providing for supplemental birth certificates for adopted children, it must therefore issue the Doels’ requested amended birth certificate.<sup>77</sup>

OSDH made two counterarguments to this decision. First, it argued “that requiring Oklahoma to recognize an out-of-state adoption judgment would [give another] state control over the effect of its judgment in Oklahoma.”<sup>78</sup> For example, OSDH argued that all of the rights that are synonymous with adoption in Oklahoma would flow to the Doels, such as the right to inherit private property, making Oklahoma apply California law within its own state.<sup>79</sup> The court responded that while a state must recognize another state’s judgment, the forum state is then free to decide how to enforce that judgment.<sup>80</sup> Thus, the actual adoption judgment is the only California decision that Oklahoma must recognize.<sup>81</sup> Otherwise, the court found, Oklahoma’s adoption laws govern<sup>82</sup> and “Whatever rights may be afforded to the Doels based on their status as

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70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* (implying that a public policy exception does apply to statutes because they are treated differently than judgments, to which a public policy exception does not apply).

74. *Id.* at 1153. *But see State ex rel. Smith v. Smith*, 662 N.E.2d 366, 369 (Ohio 1996) (holding that a forum state’s public policy could be used to void a foreign adoption).

75. *Finstuen*, 496 F.3d at 1153 (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)).

76. *Id.*

77. *See id.*

78. *Id.* at 1153.

79. *Id.*

80. *Id.* at 1153-54.

81. *See id.* at 1154.

82. *Id.*

parent and child, those rights flow from an application of Oklahoma law, not California law.”<sup>83</sup> Because Oklahoma’s adoption statutes grant inheritance and other rights to *all* adopted children, these rights would naturally flow to the Doel family by virtue of the California adoption.<sup>84</sup>

Second, OSDH argued that it is not bound to recognize out-of-state judgments in which it was not a party.<sup>85</sup> The court swiftly disposed of this argument, stating that “[t]he Doels do not seek to *enforce* their adoption order *against* Dr. Crutcher in his official capacity;” rather, they simply want Oklahoma to recognize their out-of-state adoption as adjudicated by California.<sup>86</sup> In conclusion, the court stated:

We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause. Therefore, Oklahoma’s adoption amendment is unconstitutional in its refusal to recognize adoption orders of other states that permit adoption by same-sex couples.<sup>87</sup>

Because the court decided the issue using the Full Faith and Credit Clause, it did not address whether the adoption amendment infringed the Doels’ due process or equal protection rights.<sup>88</sup>

### III. LOOKING FORWARD

#### *A. The Doomsday Scenario: A Narrow Reading of the Finstuen Holding*

Complying with long-standing precedent, the *Finstuen* court held that adoptions are judgments; as such, the Full Faith and Credit Clause<sup>89</sup>

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1155.

87. *Id.* at 1156.

88. *Id.* Judge Harris Hartz filed a brief concurrence/dissent, stating that the court should not address any constitutional issues because “[t]he OSDH concedes in its brief that the statute challenged by the Doel plaintiffs does not preclude issuance of the birth certificates they seek,” based on OSDH’s interpretation of the statute. *Id.* at 1156-57 (Hartz, J., concurring and dissenting). As a result, according to Judge Hartz, the district court’s order should have been affirmed without discussion of the Full Faith and Credit Clause. *Id.* at 1157.

89. While not the focus of this comment, the *Finstuen* court did not address numerous other legal arguments that could have been used to strike down the Oklahoma law. In addition to the equal protection and due process arguments that the court did not address, the plaintiffs also advanced a constitutional right to travel argument that was dismissed by the district court. Appellee’s Principal Brief at 2, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (No. 06-6213).

In addition, the Parental Kidnapping and Prevention Act (“PKPA”), 28 U.S.C. § 1738A (2000), which Congress added as an addendum to the Full Faith and Credit Clause, also could be used as an argument against the validity of the Oklahoma law. The PKPA was enacted in order to ensure that states would respect the custody decrees of other states, creating stability for children nationwide. Wardle, *supra* note 16, at 407. The heading of the PKPA, for example, states: “Full faith and credit given to child custody determinations.” § 1738A. A recent Virginia decision, *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), held that the PKPA required Virginia to recognize a custody decree between a same-sex couple adjudicated in Vermont, even though Virginia’s mini-DOMA would not recognize the civil union between the parties in Vermont that created the parental rights for the non-biological parent in the couple. *Id.* at 337.

requires recognition of adoption decrees nationwide.<sup>90</sup> However, while the court was decisive in its reiteration that adoptions are judgments, it may have left a window open for Oklahoma to still modify its adoption laws for the purposes of treating same-sex adoptive parents differently:

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanism for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.<sup>91</sup>

Read plainly, these sentences still allow Oklahoma to modify all of its existing adoption laws and narrow the rights that flow from an adoption to be given only to heterosexual couples. This case only requires Oklahoma to re-issue a birth certificate, because a state statute allows for adoptive parents to ask for supplementary birth certificates.<sup>92</sup> As the Court said, "Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship."<sup>93</sup> Because Oklahoma's adoption statutes do not distinguish based on sexual orientation, these rights flow to the adoptive children.<sup>94</sup> However, Oklahoma apparently could amend all of these statutes to explicitly deny these rights to homosexual couples. Alternatively, the state could amend its adoption statutes to state that the child may inherit from its

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An argument using the PKPA has not been advanced yet in the context of same-sex adoptions. Is an adoption a "custody determination," within the meaning of the PKPA? The act defines a "custody determination" as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." § 1738A(b)(3). Several courts have already held that the PKPA applies to heterosexual adoption proceedings, and the common sense interpretation of the statute implies that it covers all adoptions. *E.g.*, In the Matter of B.B.R., 566 A.2d 1032, 1034 (D.C. 1989); see also Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467, 472-74 (2005). No courts have ruled that the PKPA does not apply to adoption proceedings. Spector, *supra* at 474. Thus, if the plaintiffs in *Finstuen* had argued for the application of the PKPA, the Oklahoma statute would have to be found unconstitutional because Congress has ordered all states to recognize the adoptions adjudicated in other states. *Id.*

90. *Finstuen*, 496 F.3d at 1156; see also RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 290 (1971) ("An adoption rendered in a state having judicial jurisdiction . . . will usually be given the same effect in another state as is given by the other state to a decree of adoption rendered by its own courts. The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law."). Some analysts have argued that adoptions are not "judgments" for the purposes of the Full Faith and Credit Clause because adoptions do not involve adversarial proceedings. See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561, 583-84 (2005). However, there is no legal authority supporting such a contention.

91. *Finstuen*, 496 F.3d at 1153-54 (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998)).

92. *Id.*

93. *Id.*

94. *Id.*

adoptive "father" and/or "mother."<sup>95</sup> This language could be interpreted to restrict the statute to only one father or mother per child, effectively excluding children with two mothers or fathers.<sup>96</sup> The only thing that Oklahoma cannot do, according to this case, is pass a statute explicitly refusing to recognize adoptions of same-sex couples in foreign states.<sup>97</sup> Oklahoma can, however, strip these foreign adoptions of practically all effect if it wishes to do so.<sup>98</sup>

As the court pointed out, the Full Faith and Credit Clause is only truly binding with respect to judgments.<sup>99</sup> With regard to statutes, however, states are often allowed to use their public policy as a guide when deciding whether to apply a foreign state's statutory laws.<sup>100</sup> For example, the right to make medical decisions for an adopted child or allow an adopted child to inherit property are based on the statutes of the state granting the adoption.<sup>101</sup> These rights, according to the *Finstuen* decision, are not at issue in the adoption proceeding. Because these rights were not granted in any official court proceeding involving a judgment, every other state has the power to determine whether these rights should also be granted under its own statutory laws.

This decision is fully in line with other Full Faith and Credit Clause interpretations. The United States Supreme Court's rulings have consistently stated that states are free to choose the "time, manner, and mechanisms" for enforcing other states' judgments.<sup>102</sup> Inheritance rights for adopted children, for example, have long presented a conflict of laws question. For example, if a child is adopted in State A, which allows adopted children to inherit property, but the child's adoptive parents have a house in State B that does not allow adoptive children to inherit, the law of State B will control whether the child can inherit the house.<sup>103</sup> In

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95. *Id.*

96. See Carissa R. Trast, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 HOFSTRA L. REV. 857, 889 (2006).

97. See *Finstuen*, 496 F.3d at 1156.

98. See *id.*

99. *Id.* at 1152.

100. See *id.* at 1152-53 (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998)).

101. See *infra* note 106 and accompanying text.

102. *Baker*, 522 U.S. at 235.

103. See *In re Crossley's Estate*, 7 A.2d. 539, 540 (Pa. Super. Ct. 1939); see also C. C. Marvel, Annotation, *Conflict of Laws as to Adoption as Affecting Descent and Distribution of Decedent's Estate*, 87 A.L.R.2d 1240, § 8 (1963); RESTATEMENT, *supra* note 90. But see *McNamara v. McNamara*, 135 N.E. 410, 412 (Ill. 1922) (holding that the status, including the rights and duties between parent and adopted child, are established by the law of the domicile); *Shick v. Howe*, 114 N.W. 916, 916 (Iowa 1908) (finding that the status and legal relationship between adopted child and parent is fixed by the law of their domicile); *Barrett v. Delmore*, 54 N.E.2d 789, 790 (Ohio 1944) ("Generally, the status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law."); *Slattery v. Hartford-Connecticut Trust Co.*, 161 A. 79, 80 (Conn. 1932) (ruling that an adopted child's ability to inherit is governed by the laws of the state of adoption).

addition to inheritance rights, other rights not including real property, such as the right of a parent to discipline a child in a certain manner, are governed by the state in which the parent and child are located, not where the adoption occurred.<sup>104</sup> The only issue that the Full Faith and Credit Clause protects in the adoption context is preventing one party to the suit from bringing the exact same suit in another state to try and reach a different result (i.e., whether the adoption itself is valid).<sup>105</sup>

Under this narrow reading of the court's language in *Finstuen*, this doomsday scenario for same-sex couples seems possible. However, should Oklahoma attempt to change the statutory rights that accompany adoptions to exclude gay couples, the state would expose itself to a wind-fall of legal problems.

### *B. Can Oklahoma Really Try to Deny State Statutory Adoption Rights to Gay Couples?*

While the language of *Finstuen* and traditional recognitions of statutorily granted rights to adopted children could paint a bleak picture of the true impact of *Finstuen*, Oklahoma would have an uphill battle if it specifically tried to deny statutory rights to adopted children of same-sex couples. Using either the Full Faith and Credit Clause or Equal Protection Clause, it is clear that *Finstuen* is much more than a hollow victory for gay rights supporters.

#### 1. The Full Faith and Credit Clause

The Full Faith and Credit Clause does not allow a state to ignore the laws of other states arbitrarily. There must be a strong public policy against the application of foreign law before declining to apply it.<sup>106</sup> Under a public policy analysis, would it really be in the best interests of the child to take away its adoptive parents' parental rights?

Unlike the debate over whether to recognize same-sex marriages and similar unions, this is a debate concerning the rights of a child, and is therefore much more difficult to attack.<sup>107</sup> *Finstuen* makes clear that the actual adoption cannot be questioned, and thus there is nothing the court can do to actually take the child away from the parents. In any case concerning adopted children, the legal standard in determining custody is what is in the "best interest of the child."<sup>108</sup> Without the option to literally remove the child, courts are likely to concede that the parents should therefore at least be granted rights over the child. If the child has been raised for multiple years by same-sex parents, it cannot be better to sud-

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104. Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 807 (2003).

105. See *id.* at 805-10.

106. See Strasser, *supra* note 12, and accompanying text.

107. See Johnson, *supra* note 36, and accompanying text.

108. See Chen, *supra* note 10, at 194.

denly deny those parents the right to sign a permission slip for the child or to make medical decisions on the child's behalf. In addition, the psychological damage that the child would suffer from being separated from its parents alone would weigh against upholding any amended statutes. Further, in an increasingly mobile age, where travel is often a necessity, no policy should favor stripping same-sex parents of all adoptive rights simply because they have to travel through one state to reach their eventual destination. This would create chaos in the legal system from state to state, which certainly is what the authors of the Constitution were trying to prevent when passing the Full Faith and Credit Clause.<sup>109</sup>

## 2. Equal Protection Clause

In addition to the Full Faith and Credit Clause, a court would be much more likely to entertain an equal protection argument if Oklahoma were suddenly to amend multiple statutes denying parental rights to same-sex couples with adopted children.

The Equal Protection Clause of the Fourteenth Amendment establishes that all persons are created equally under the law and should not be discriminated against for arbitrary reasons.<sup>110</sup> In an equal protection analysis, a court must choose a level of scrutiny to apply to the affected class, ranging from heightened scrutiny for racial or suspect discrimination to the rational basis level of scrutiny for unprotected classes.<sup>111</sup> Despite strong arguments for applying a heightened standard of scrutiny to homosexuals, the Supreme Court has consistently applied a rational basis level of scrutiny in cases involving laws allegedly discriminating against gays and lesbians.<sup>112</sup> Under the rational basis test, the government must prove that a challenged law "bears a rational relationship to some legitimate end."<sup>113</sup>

In *Romer v. Evans*, the United States Supreme Court held that an amendment to the Colorado State Constitution denying protection to homosexuals under anti-discrimination laws was irrational, and therefore unconstitutional, because it was "born of animosity toward the class of persons affected."<sup>114</sup> In addition, the Court held that the sole "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" even under the lowest level of scrutiny.<sup>115</sup>

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109. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007).

110. See CONST. amend. XIV, § 1.

111. See, e.g., *Pace Memb. Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997).

112. See *Romer v. Evans*, 517 U.S. 629, 631-32 (1996); see also *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring). While the analyzed scenario would almost certainly be struck down under a higher level of scrutiny, it would also lose under the rational basis level and thus the application of the higher levels of scrutiny is beyond the scope of this article.

113. *Romer*, 517 U.S. at 631.

114. *Id.* at 634.

115. *Id.* (emphasis in original).



Even though some question whether an equal protection argument would have been successful in *Finstuen*,<sup>116</sup> it would certainly prevail if Oklahoma were to amend the statutory rights granted to adopted children by denying those rights specifically to adopted children of gay couples. Similar to *Romer*, statutes amended specifically to deny rights to homosexuals would be based on animosity towards homosexuals. While it could be argued that the state would do this to protect the children from being raised in a “non-traditional” household that could damage their development, the true impact of the law would be to rip children away from the same-sex parents that raised them, or at least to significantly reduce the rights they have over their children. Gay couples already cannot adopt in Oklahoma. Therefore, arguing that the amended laws would prevent gay adoptions in the state is a moot point. The only people impacted by these new laws would be pre-existing same-sex families who have since traveled or moved to Oklahoma. Voiding the parental rights of these foreign residents would not be in the best interests of the children nor would it be a legitimate government interest, especially considering the psychological damage that children would endure as a result. Such blatant discrimination would almost surely fail under an Equal Protection Clause analysis.

Thus, despite the language of *Finstuen*, it would be difficult for Oklahoma to deny the rights California granted to adopted children, even though they are statutorily granted. Both the Full Faith and Credit and Equal Protection Clauses create a strong argument protecting same-sex families with adopted children from such a doomsday scenario. As a result, the holding in *Finstuen* is a crucial victory for protecting the rights of same-sex couples and their adopted children.

#### CONCLUSION

Despite the victory in *Finstuen*, it is clear that same-sex couples will continue to face legal hurdles in the future, whether it be a lack of explicit legal protection or an outright ban on same-sex adoptions. The patchwork of current laws, both for and against homosexuals, will continue to result in interstate conflicts of laws, and possibly create splits between the circuits on how to best address the issues.

Regardless, *Finstuen* will be persuasive authority nationwide, and binding in the Tenth Circuit, ensuring some protections for same-sex couples traveling or moving into states that do not allow same-sex couples to adopt. In addition, both the Full Faith and Credit and Equal Protection Clauses provide security for gay couples who fear the possibility that states might amend specific statutes to deny parental rights to them. While gay rights advocates will continue to have numerous battles for

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116. See Spector, *supra* note 88, at 468 n.4.

the foreseeable future, it should be comforting to know that children of gay couples are entitled to the same protection as all others.

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