ADOPTION BY HOMOSEXUALS: A LOOK AT DIFFERING STATE COURT OPINIONS

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I. INTRODUCTION

During the past two decades, an increasing number of adoption petitions by gay and lesbian couples have been filed in state courts around the country.[1] The increase in adoption petitions is a reflection, in part, of the growing visibility and political strength of gays and lesbians.[2] Gays and lesbians are increasingly willing to judicially fight for custody and adoption rights.[3] This surge of interest by gays and lesbians in adoption is forcing state courts to struggle with the reality of gays and lesbians adopting children.[4]

The issue facing state courts is whether adoption by gay or lesbian adults could serve the best interests of children.[5] There is considerable controversy surrounding this issue,[6] and as a result, the adoption laws pertaining to gays and

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1. *See, e.g.*, In the Matter of the Adoption of Two Children by H.N.R., 666 A.2d 535, 536 (1995). *See also* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L.J. 459 (1990); Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991); Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986).
2. *See* William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbian and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 580 (1996).
3. *See id.* at 581.
4. *See id.* at 579 (citing cases from twenty-seven states).
5. *See* Charlotte J. Patterson, *Adoption of Minor Children By Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995).
6. *See id. See also* David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Facts*, 3 WM. & MARY BILL RTS. J. 345 (1994); Lisa M. Pooley, *Heterosexism and Children's Best Interests: Conflicting Concepts in* Nancy S. v. Michele G., 27 U.S.F. L. REV. 477 (1993); Jack Broom, *Gay-Rights Backers Vow to Deter Adoption Ban*, SEATTLE TIMES, Oct. 6, 1993, at B4; Laurie K. Schenden, *Wins & Losses; Gay Couples Have Made Some Progress on the Adoption Front, With a Growing Number of Judges Allowing Partners to be Co-Parents; But Case Law Continues to be Inconsistent*

lesbians are in flux across the country.[7] Currently, several state courts are open to the idea of gay and lesbian families,[8] and at least nine states currently allow openly gay and lesbian adults to adopt in one form or another.[9] Although adoptions by gays and lesbians occur in many parts of the country, it is still statutorily forbidden in a minority of jurisdictions.[10] These jurisdictions often stigmatize homosexuals as "unfit parents" and consider parenthood incompatible with gay identity.[11] Although the laws across the country range from very conservative to very liberal, the patchwork of state court laws should not prevent one from seeing the historic movement toward recognition of the rights of gay and lesbian families.[12]

This Note explores the recent decisions and attitudes held by state courts regarding the eligibility of homosexuals to adopt children. Section II of this Note discusses the evolution of state court opinions on adoptions by homosexuals.[13] Section III discusses the two general approaches used by state courts in analyzing a parent's sexual orientation.[14] Section IV gives a brief outline of the types of adoptions available to homosexuals.[15] Section V addresses the state court opinions allowing adoptions by homosexuals.[16] Section VI discusses the two state statutes that explicitly bar adoptions by homosexuals.[17] The conclusion considers the outlook on adoptions by homosexuals in the future in light of the current favorable and unfavorable state court opinions.

II. THE EVOLUTION OF ADOPTION LAW

A. Origins of Adoption Laws Generally

Adoption in the United States is a statutory invention of the states.[18] The passing of the first adoption statute did not occur in the United States until 1851 by

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and Confusing, L.A. TIMES, Sept. 22, 1993, at E1.

7. *See* Patterson, *supra* note 5, at 202.

8. *See generally id.* at 191 (stating that "[a]lthough forbidden in some jursidictions, such adoptions have taken place in other parts of the country"). *See also* Adams, *supra* note 2.

9. *See* Patterson, *supra* note 5, at 195–96 (citing District of Columbia, Ohio, California, Alaska, Massachusettes, New Jersey, New York, Pennsylvania, and Vermont).

10. *See* FLA. STAT. ANN. § 63.042(3) (West 1985 & Supp. 1995); N.H. REV. STAT. ANN. §§ 170-B:4; 170-F:6 (1994).

11. *See generally* Patterson, *supra* note 5, at 196–97, (stating, "[t]here is a history of judicial hostility towards lesbian and gay families with children, and negative sterotypes are evident in many state court rulings"). *See also* Marc E. Elovitz, *Adoption By Lesbian and Gay People: The Use and Misuse of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 216 (1995) (stating that until 1973 homosexuality was considered a mental disorder by the American Psychiatric Association).

12. *See* Patterson, *supra* note 5, at 191.

13. *See infra* notes 18–42 and accompanying text.

14. *See infra* notes 43–70 and accompanying text.

15. *See infra* notes 71–109 and accompanying text.

16. *See infra* notes 110–179 and accompanying text.

17. *See infra* notes 180–203 and accompanying text.

18. *See* Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 199

the Massachusetts legislature.[19] Originally, state legislatures created adoption procedures so as to provide children with permanent and healthy homes.[20] The biological parent's rights were terminated and conferred on the child's adoptive parents.[21] Usually, the new adoptive parents were a married couple, rather than a single individual parent.[22]

Statutory adoption laws in this country are left to the control of each individual state.[23] Although such control may appear to pose some conflicts between states, the states have generally agreed upon most aspects of adoption and its procedures.[24] The similarity in adoption statutes is a result of each state's adoption policy placing emphasis on the "best interest of the child."[25] However, despite the similarity in state adoption laws over the years, states have diverged sharply with respect to one category of adoption cases—adoption by gays and lesbians.[26]

B. The Development of Adoption Laws Affecting Lesbians and Gays

Prior to 1973, state courts commonly barred gay and lesbian individuals from holding a parenting role, especially through adoption.[27] One reason for this discrimination appears to be that there was a commonly held misconception that homosexuality was a mental disorder.[28] In fact, it was not until 1973 that

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(1990).

19. *See id.*

20. *See* Note, *supra* note 18, at 200.

21. *See id.*

22. *See id.* (citing Rhonda Rivera, *Queer Law: Sexual Orientation Law in the Mid-80's*, 11 U. DAYTON L. REV. 275, 391 (1986)).

23. *See* Devjani Mishra, Note, *The Road To Concord: Resolving the Conflict of Law Over Adoption By Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91 (1996). *See also* 2 AM. JR. 2D Adoption § 7 (1994) ("[O]ne may be legally adopted as the child of another and the relationship of parent and child established between persons who are not so related by nature only by complying with the provisions of the adoption laws of the state in which such relationship purports to have been created....").

24. *See* Mishra, *supra* note 23, at 91.

25. *See id.* at 91–92. *See, e.g.*, ALASKA STAT. § 25.23.005 (1995) (stating that adoption provisions "shall be liberally contrued to the end that the best interests of adopted children are promoted"); ILL. REV. STAT. ch. 40, para. 1525 (1980) ("The best interests and welfare of the persons to be adopted shall be of paramount consideration in the construction and interpretation of this Act."); MONT. CODE ANN. § 40-8-114 (1) (1995) ("It is the policy of the state of Montana to ensure that the best interests of the child are met by adoption proceedings."); N.J. STAT. § 9:3-37 (1993) (stating that adoption provisions "shall be liberally construed to the end that the best interests of the children be promoted"); TENN. CODE. ANN. § 36-1-101(d) (Supp. 1995) ("In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved in favor of the rights and best interests of the child, which interests are hereby recognizd as constitutionally protected and, to that end, this part shall be liberally construed.").

26. *See* Mishra, *supra* note 23, at 91–92.

27. *See generally* Elovitz, *supra* note 11.

28. *See generally id.* at 216.

homosexuality was removed from the American Psychiatric Association's ("APA") list of mental disorders.[29]

Even though some societal barriers have been removed, gays and lesbians still face barriers in the courtroom. For example, a 1985 Virginia state court ruling found a biological father who was gay to be "unfit" as a custodial parent simply because of his sexual orientation.[30] The court stated that the father's sexuality would impose an intolerable burden upon the child, and thus would be harmful.[31]

This case is only one example of the barriers faced by gays and lesbians. If a biological parent cannot get custody of his own child, because he is gay, then it is unlikely that a gay or lesbian individual will be allowed to adopt when there are no biological ties to the child.

Adoption by gay and lesbian persons is a recent phenomenon that has only occurred in the past two decades.[32] The first cases allowing adoptions by openly gay and lesbian persons did not occur until as recently as 1987.[33] Since this landmark opinion, many more such adoptions have taken place in various state courts.[34]

The past twenty years have seen a marked shift in the approach taken towards gays and lesbians.[35] Courts are increasingly unwilling to adopt rules which explicitly disadvantage gay or lesbian parents involved in custody cases.[36] Several courts now hold the opinion that "homosexuality...should not be a bar"[37] to

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29. *See id. See also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980). "This action [removing homosexuals from its list of mental disorders] was taken after the APA's Nomenclature Committee reviewed the most recent research on homosexuality and reported, in the words of one commentator, that there was 'not one objective study, by any researcher, in any country, that substantiates the theory of homosexual pathology.'" Charles Silverstein, *Even Psychiatry Can Profit From Its Past Mistakes*, J. HOMOSEXUALITY, No.2, 1976–77, at 153, 157.

30. *See* Silverstein, *supra* note 29, at 157 (citing Roe v. Roe, 324 S.E.2d 691 (Va. 1985)). *See also* Bottoms v. Bottoms, 444 S.E.2d 276 (Va. App. 1994) (appeals court reversed the trial court's ruling that the natural mother was unfit because of her sexuality).

31. *See* Patterson, *supra* note 5, at 197 (citing *Roe*, 324 S.E.2d at 694). The court in *Roe* assumed that the father's sexuality would have a negative impact on the child, and the court did not cite any evidence to support its finding that the child would suffer as a result of the parent's sexual orientation. *Id.*

32. *See generally id. See also* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 625 (1996).

33. *See generally* Patterson, *supra* note 5, at 191 n.23.

34. *See id.* at 191 (citing cases from eight states). *See, e.g., In re* Adoption of Caitlin, 1994 WL 157949 (Ill. Cir. Cook Cty. Mar. 14, 1994); *In re* Adoption of Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992).

35. *See* Shapiro, *supra* note 32, at 625.

36. *See id.*

37. *See* S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); Seebol v. Farie, 16 FLA. L. WEEKLY C52 (16th Cir. Ct. 1991) (citing Matter of Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983); Benzio v. Petnaude, 410 N.E.2d 1207 (Mass. 1980)); M.A.B v. R.B., 510 N.Y.S.2d 960 (N.Y. App. Div. 1986).

adoptions by such individuals. Furthermore, some courts are starting to recognize that gay and lesbian households constitute families.[38]

Since their inception, adoption laws have been evolving to meet the needs of children where family patterns are changing.[39] This evolution, in part, is a result of society becoming more open to the idea of gay and lesbian families.[40] However, gay and lesbian couples who wish to adopt a child still face many obstacles in their pursuit.[41]

III. GENERAL APPROACHES USED BY STATE COURTS IN THEIR ANALYSIS OF SEXUALITY AND PARENTING

As previously stated, the goal of virtually every state is to promote the best interests of the child.[42] Although the desire to achieve this goal is nearly unanimous, agreement on the best means of doing so is notably lacking.[43] One of the fundamental questions dividing the courts, legislators, and particularly scholars with general adoption decisions is whether the interests of the children are better served by (1) granting the trial judge broad discretion in assessing the best interests of the child in each case (the nexus test)[44] or by (2) adopting relatively rigid rules that constrain the discretion of the individual judges (the per se rule).

A. The Nexus Test

The nexus test gives the judge broad discretion in assessing the best interests of the child.[45] Using the nexus test, the judge considers a parent's character fitness, parenting ability, and the significance of any other specific characteristics or conduct on an individual basis.[46] When the court is facing a

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38. *See* Note, *supra* note 18, at 203.

39. *See* Conference Announcement of Note, *Joint Adoption by Gay and Lesbian Couples: A Proposal for Legislative Reform*, 11 PROB. L.J. 328 (1993).

40. *See id.* at 329.

41. *See id.* There is still prejudice and discrimination facing openly gay and lesbian individuals who wish to adopt.

42. *See generally* Note, *supra* note 18. *See also supra* text accompanying note 25; Patterson, *supra* note 5, at 196, 198 ("Despite the occurrence of adoptions by lesbian and gay parents and despite discussion and publicity of issues surrounding these adoptions, the social science literature contains no published studies examining the development of children adopted by openly lesbian or gay adults...." *Id.* However, there has been research on children born to lesbian and gay parents. *Id.* at 197. "In fact, in study after study, children of lesbian mothers have been found to develop normally." *Id.* at 197.).

43. *See* Shapiro, *supra* note 32, at 632.

44. *See id.*

45. *See id.* at 636.

46. *See id.* at 633 n.60:

> Under a case-by-case analysis, many different approaches are possible. For example, instead of determining whether the parental conduct is harmful to the child, the court could determine whether, without regard to impact on the child, the parental conduct warrants some sanction. It could then determine that the appropriate sanction might be to deny or

homosexual parent, it generally examines whether the parent's sexuality or sexual conduct will adversely impact the child.[47] If there are no signs of adverse impact, then sexuality is not pertinent to determining the best interests of the child and sexual preference is irrelevant.[48] Thus, a nexus or causal connection must exist between an individual parent's homosexuality and harm to the particular child in question before the parent's homosexuality is considered relevant to the adoption or custody determination.[49]

Courts in the majority of jurisdictions that have considered adoptions by gays and lesbians within the past twenty years have expressed approval of the basic principles of the nexus test.[50] This approval is the general family law principle that most parental characteristics are relevant only if they can be shown to have a negative impact on the child.[51] Furthermore, the nexus test requires an individualized determination of parental fitness for each case and does not dictate any particular result in any case.[52]

This broad discretion of the trial court leads to both the strength of the test as well as to its weaknesses.[53] The strength of this test is that lesbians and gay will not be automatically disqualified from adopting. On the other hand, the weaknesses of the nexus test, most notably that a court's judicial discretion is used, leads a minority of disagreeing jurisdictions to consider alternative theories or approaches when looking at adoptions by gays and lesbians. Thus, the discretion leads to a lack of consistency among state jurisdictions.

B. The Per Se Rule

The alternative approach to the nexus test is the per se rule.[54] This approach divests the trial court of any discretion to grant custody to particular individuals.[55] For example, all prospective parents falling into a particular category—such as being gay or lesbian, or cohabiting with another adult to whom they are not married—are necessarily considered unfit or undesirable.[56] If the

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restrict that parent's custody of the child. Under this alaysis, the restrictions might or might not be in the child's best interests.

47. *See id.* at 636.

48. *See id.*

49. *See id.*

50. *See id.* at 635 (stating that courts in twenty-seven states have adopted the nexus test: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusettes, Michigan, Missiouri, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennesee, Utah, Vermont, and Washington. The District of Columbia has adopted the nexus test as well).

51. *See id.*

52. *See id.* at 636.

53. *See id.*

54. *See id.* at 633.

55. *See id.* at 634.

56. *See id.* at 633.

adopting individual falls into any of the undesirable categories, the trial court does not need to examine the case's specific facts relating to that individual.[57]

Using the per se rule, the outcome is always going to be the same for lesbians and gays.[58] Any open gay or lesbian individual will fall into a prohibited category and will automatically be disqualified as a potential parent. This rule assumes that gay and lesbian parenting never furthers the best interests of the child.[59]

The per se rule is quite rare,[60] and its use is becoming increasingly unpopular.[61] There are many commentators criticizing the rule's assumption that gay and lesbian parents invariably harm their children.[62] There is also substantial opposition to this rule by society, since cultural and societal attitudes toward nonmarital sex and toward homosexuals have shifted over the past twenty-five years, with large sectors of the public expressing increased tolerance.[63] For whatever reasons, the courts seem to be moving away from the per se rule and towards the nexus approach.[64] Furthermore, some courts that have previously applied per se rules are reinterpreting cases to narrow or revise previous holdings to allow gays or lesbians to adopt.[65]

IV. TYPES OF ADOPTIONS

State adoption laws generally provide for three types of adoptions: (1) a blood relative adoption, (2) a statutory adoption of a child for whom the parental rights of both biological parents have been terminated (stranger adoptions), and (3) a step-parent adoption by the legally married spouse of the biological parent.[66] Legal adoptions of minor children by lesbian or gay adults fall into the latter two categories: stranger adoptions and second-parent adoptions (a variation of the traditional step-parent adoption).[67] Although state adoption laws vary across the

57. *See id.* at 634.

58. *See generally id.* at 637. *See also* Roe v. Roe, 324 S.E.2d 691 (Va. 1985). The court holds that because the father is a homosexual, he is automatically deemed unfit. No reasons were given, other than his sexual orientation. The court also found that the child was happy living with the father, and there was no evidence that the father's sexual orientation had any adverse effect on the child.

59. *See* Shapiro, *supra* note 32, at 637.

60. *See id.* at 634.

61. *See id.* at 638.

62. *See id.*

63. *See id.* at 639.

64. *See id.*

65. *See id.*

66. *See* Jennifer E. Crouteau, Comment, *In re* Baby Z: *Manipulating The Law To Allow Adoption Of A Child By The Same Sex Partner Of The Biological Parent*, 11 QUINNIPIAC PROB. L.J. 99 (1997).

67. *See generally* Patterson, *supra* note 5, at 195. The author uses "second-parent adoptions" in the place of "step-parent adoptions" because step-parent adoptions are made when the adopting couple is married, and the step-parent wants to adopt the biological child of their married partner. However, gay and lesbian couples are not allowed to get

country, both stranger adoptions and second-parent adoptions by openly gay or lesbian adults have occurred in numerous jurisdictions.[68]

Stranger adoptions usually occur because the biological parents are unable or unwilling to care for a child and there is an adoptive parent offering to do so.[69] In these cases, courts dissolve the existing legal bonds and create new legal relationships between the child and the adoptive parent.[70]

On the other hand, second-parent adoptions "are pursued by gay or lesbian couples who raise a child together, although only one member of the couple, the biological or legal adoptive parent, is the legal parent. These couples desire legal recognition of the relationship between the other parent and the child."[71] Courts in many jurisdictions have granted second-parent adoptions to gay and lesbian couples by relying on the step-parent analogy.[72]

State adoption laws have presented numerous legal hurdles for lesbian and gays wanting to adopt.[73] Statutes, while they provide for adoptions for single parents, generally show a preference for two legal married parents.[74] Thus, since gay or lesbian couples cannot marry in any state, they are often not able to adopt under the step-parent adoption method and are "caught in a no-win situation."[75] Although gay or lesbian persons have been able to adopt in many jurisdictions, it is not without numerous obstacles.[76]

A. Stranger Adoptions

A stranger adoption by openly gay or lesbian adults can provide one route to parenthood if the petitioner is fortunate enough to live in a state that allows adoptions by gay and lesbian adults.[77] Openly gay and lesbian adults have completed stranger adoptions in the District of Columbia, Ohio, and California.[78] Although no statistics are available regarding single parents, it is not uncommon for gays or lesbians to adopt as individual parents.[79] Undoubtedly, many stranger adoptions by gays or lesbians have occurred in numerous jurisdictions throughout

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married, and therefore, the only option for such a couple to adopt a child is in the form of a second-parent adoption.

68. *See id. See also supra* text accompanying note 35.

69. *See id.*

70. *See id.*

71. *See* Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233 (1995) ("Although written as a model brief for lesbian and gay second parent adoptions, many of the arguments presented are relevant to heterosexual second parent adoptions as well.").

72. *See id.*

73. *See generally id.* at 234.

74. *See* Conference Announcement of Note, *supra* note 39, at 329.

75. *See id.* (quoting Note, *supra* note 18, at 213).

76. *See generally id. See also* Patterson, *supra* note 5, at 195.

77. Patterson, *supra* note 5, at 193.

78. *Id.* at 195.

79. *See* Note, *supra* note 18, at 202. The courts and adoptive agencies usually are not aware of the adoptive parent's sexuality.

the country without their sexual orientation becoming an issue in the adoption[80] or where the sexual preference of the adoptive parent is not revealed to the court.[81]

Although a gay or lesbian individual may face difficulties in adopting because of their sexual orientation, another barrier facing homosexuals is that stranger adoptions are expensive, arduous and time-consuming.[82] In the case of *In re Adoption of Charles B.*,[83] the gay petitioner filed his petition to adopt Charles B. on January 15, 1988, and the case was not finalized before the Supreme Court of Ohio until March 28, 1990.[84]

Another complication occurs when a gay or lesbian "couple" is wishing to adopt a child as a couple. Every state currently limits adoption to only one partner of a cohabiting couple, either by statute or by administrative policy.[85] This limitation exists for both unmarried cohabiting heterosexual couples and homosexual couples.[86] However, "heterosexual couple[s] can marry in order to adopt together, [whereas] lesbian and gay couples cannot."[87] As a result, almost every jurisdiction in the country will not allow a homosexual couple to adopt a child together as a couple. Therefore, since gay and lesbian couples are restricted from adopting together, the only alternative is for one partner in the relationship to adopt via a stranger adoption.[88]

Even though there is a broad exclusion among the states against unmarried couples adopting a child under the stranger adoption rule, one jurisdiction has said that it would extend stranger adoptions to heterosexual and homosexual unmarried co-habitating couples.[89] In *In re M.M.D.*,[90] the District of Columbia Court of Appeals held that "unmarried couples, whether same-sex or opposite-sex, who are living together in a committed personal relationship, are eligible to file petitions for adoption under D.C. Code §16-305."[91] The District of Columbia court came to this decision, even though the D.C. Code does not explicitly provide for adoptions by unmarried couples.[92] The court stated that "adoption petitions by unmarried couples shall be granted or rejected on a case-by-case basis" looking at whether it would serve "the best interest of the child" and

80. *See generally* Elovitz, *supra* note 11, at 209.
81. *See* Note, *supra* note 18, at 202.
82. Patterson, *supra* note 5, at 193.
83. 552 N.E.2d 884 (Ohio 1990).
84. *See* Patterson, *supra* note 5, at 192–93 (discussing *In re* Adoption of Charles B.).
85. Conference Announcement of Note, *supra* note 39, at 328.
86. *See* Shapiro, *supra* note 32, at 625–26.
87. Conference Announcement of Note, *supra* note 39, at 328.
88. *See id.*
89. The District of Columbia Court of Appeals announced in *In re M.M.D. & B.H.M.*, 662 A.2d 837, 840 (1995), that an unmarried couple, such as a homosexual couple living together in committed personal relationship, may adopt a child.
90. 662 A.2d 837 (1995).
91. *Id.* at 859. D.C. CODE § 16-302 expressly authorizes adoptions by "any person" without limitation. D.C.Code § 305, refers generally to adoptions by "more than one petitioner."
92. 662 A.2d 837, 848–49 (1995).

whether no other affected interests will be ill-served by granting the adoption.[93] The court granted the adoption to the homosexual parents as a couple.[94] The District of Columbia court is the only court to allow gays and lesbians to adopt as family units. Although it is only one court, it gives gays and lesbians some hope for future changes among the state courts.

B. Second-Parent Adoptions

The step-parent adoption method generally allows step-parents to adopt a biological child of his or her spouse.[95] This method is provided via state statutes. However, since gays and lesbians are not allowed to get married in any state jurisdictions, the step-parent adoption procedure is not a viable option for those individuals.[96] However, another type of adoption has developed in lieu of the step-parent adoption. This type of adoption is called the second-parent adoption.

The second-parent adoption is a judicial creation that is derived from the step-parent adoption.[97] Some liberal courts have extended step-parent adoptions to allow unmarried heterosexual couples and homosexual couples to adopt.[98] The "second parent adoption refers to the adoption of a child by his or her legal parent's non-marital partner, without requiring the first partner to give up any parental rights or responsibilities."[99] The child is already living in the home with the homosexual couple and will continue to live there if the court is unwilling to allow the second parent to adopt.[100] The couple merely wishes to provide some stability for the child and to be recognized as a family.[101]

When a court is faced with a second-parent adoption petition, a court must initially decide: (1) whether state law prohibits the two parents from filing a joint adoption petition and (2) whether granting the adoption requires the court to terminate the legal parent's existing parental rights.[102] An answer in the affirmative to either question will result in the adoption being denied. However, once those "hurdles have been overcome, the primary issue before the court is whether the adoption is in the child's best interest."[103]

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93. *See id.* at 859.
94. *See id.*
95. *See id.*
96. *See supra* note 34.
97. "By statute or administrative policy, every state limits adoption to only one partner of a cohabitating couple." Note, *supra* note 18, at 197–98.
98. Patterson, *supra* note 5, at 195–96 (stating that second parent adoptions have been granted in Alaska, the District of Columbia, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont).
99. Bryant, *supra* note 71, at 233.
100. *See id.*
101. *See id.*
102. *See id.* at 234.
103. *See id.*

1. Treatment by States Under the Second-Parent Adoption Approach

Since the "child's best interest is always paramount, courts enjoy broad discretion in granting adoptions."[104] However, even though there is broad discretion, a few states still do not allow second-parent adoptions.[105] A recent case that denies one partner of the same sex the right to adopt her partner's biological children is the Colorado case, *In re Adoption of T.K.J. & K.A.K.*[106] In this case, the court held that the petitioners were not entitled to a hearing, dismissal did not violate the children's rights to equal protection, and the adoption statutes were rationally related to the goal of achieving the best interests of the children.[107] The court further noted that the only way the adoption would be permitted is if the biological mother's rights were terminated.[108] The court was reluctant to apply the step-parent adoption to the instant case.[109]

Although some states are reluctant, a few state courts have evolved over the years to allow second-parent adoptions. Second-parent adoptions have been granted in "Alaska, the District of Columbia, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont."[110]

a. Second-Parent Adoptions Among Heterosexuals

"During the past two decades, an increasing number of individuals have chosen to live together as unmarried heterosexual couples" or as other non-traditional family groups.[111] This increase has sparked an increase in adoption petitions by such non-traditional family groups with the goal being to "create the utmost support and legal security for the child."[112] Some courts have addressed the issue of adoptions by unmarried cohabiting heterosexual couples by construing the state "adoption statutes liberally and grant[ing] heterosexual second parent adoptions to protect a child's existing family structure."[113] The result was to allow unmarried cohabiting heterosexual couples to adopt via the second-parent adoption method. The second-parent adoption extends adoption to cohabiting heterosexual couples who are in a committed relationship, but who are not married.[114]

In the case *In re Adoption of a Child by A.R.*,[115] the New Jersey court in 1977 allowed an adoption by a non-legal parent without terminating the right of the biological parent.[116] Even though "the parents were not legally married, the court

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104. *See id.* at 236.
105. *See* Note, *supra* note 18, at 197 n.55.
106. 931 P.2d 488 (Colo. App. 1996).
107. *See id.*
108. *See id.* at 493.
109. *See id.*
110. Patterson, *supra* note 5, at 195–96.
111. *See* Note, *supra* note 18, at 197.
112. *See* Bryant, *supra* note 71, at 235.
113. *See id.* at 236.
114. *See generally id.*
115. 378 A.2d 87 (N.J. Super. Ct. Pro. Div. 1977).
116. *See id.* at 88.

approved the adoption without terminating the mother's rights."[117] The court, thus, did not require the parents to marry before granting the adoption.[118]

In another jurisdiction, New York allowed a similar adoption by a heterosexual couple. In *In re A.J.J.*,[119] the court did not follow the strict New York Statute.[120] Under the New York statute, "unless the adoption is by a step-parent, the biological parent must relinquish parental rights prior to the adoption."[121] In making its decision, the court said that "[s]ociety changes and, with it so do mores."[122] The court further stated that a child should not be denied the privilege of legitimacy because the parents refuse to marry, and the policy of fostering the child's best interests is paramount.[123]

The foregoing cases focus on the best interest of the child, without regard to whether the parents are married or unmarried. However, even though these courts have been favorable to unmarried heterosexuals, it is "not surprising that some courts that have deprived lesbians and gay men of custody...may have been much more generous in cases involving heterosexual parents."[124] With regard to the majority of other courts that do not recognize such exceptions for unmarried couples, discrimination against unmarried cohabiting heterosexual couples still exists, although it is far less widespread than discrimination against gays and lesbians.[125]

b. Second-Parent Adoptions by Lesbians and Gays

Courts in numerous jurisdictions throughout this country have granted second-parent adoptions.[126] In fact, "the highest courts in Massachusetts and Vermont held that neither state's adoption statutes expressly prohibit two unmarried cohabitants from jointly petitioning for adoption."[127] These courts and others have allowed legal recognition of an existing family unit using a liberal interpretation of state statutes.[128]

In 1992, New York decided *In re Evan*, the state's first reported same-sex adoption case.[129] In *Evan*, the New York court cited *In re A.J.J.*[130] In *In re A.J.J.*, the court looked at the best interests of the child and allowed a non-married

117. *See* Bryant, *supra* note 71, at 236.
118. *See generally In re Adoption of a Child by A.R.*, 378 A.2d 87.
119. 438 N.Y.S.2d 444 (Sup. Ct. 1981).
120. N.Y. DOM. REL. LAW §110 (McKinney 1970) (amended 1984); § 117 (McKinney 1988 & Supp. 1994).
121. *See* Bryant, *supra* note 71, at 236.
122. *See id.*
123. *In re* A.J.J., 438 N.Y.S.2d 444, 466 (Sur. Ct. 1981).
124. Shapiro, *supra* note 32, at 626.
125. *See id.* at 625–26.
126. *See supra* text accompanying note 112.
127. *See* Bryant, *supra* note 71, at 237.
128. *See id.*
129. 583 N.Y.S.2d 997 (N.Y. Co. Sur. Ct. 1992).
130. 438 N.Y.S.2d 444 (N.Y. Co. Sur. Ct. 1981).

heterosexual couple to adopt via second-parent adoptions.[131] The *Evan* court applied the theory of the *A.J.J.* court and held that adoption by two loving mothers that had a loving relationship would serve the child's best interest.[132] Further, the court ignored the effect of the state's restrictive Domestic Relations Law §117(1)(a),[133] so it could avoid an "absurd outcome."[134] The absurd outcome would be the termination of the biological mother's rights.

The New York state courts have continued to allow homosexuals to adopt in second-parent adoptions.[135] Two relevant cases represent the court's liberal view towards gays and lesbians adopting: *In re Jacob* [136] and *In re Adoption of Caitlin.*[137] In *In re Jacob,* the court was called upon to answer the question of whether "the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption."[138] The *Jacob* court extended the step-parent type adoptions to a lesbian couple.[139] The court did note that their decision in this case "does not mandate judicial approval of second-parent adoptions in all situations, but simply permits them to take place when appropriate."[140] The appellate court held that the lesbian couple had standing to adopt under New York law, and it remitted the matter to the family court to determine if this adoption would be in the best interests of the child.[141] The child would be "irrevocably deprived of the benefits and entitlements of having [as] legal parents the two individuals who have already assumed that role in her life, simply as a consequence of her mother's orientation."[142] The court concluded that although the New York statute[143] governing adoptions may not have envisioned such non-traditional families,[144] this statute was nonetheless designed "to protect new adoptive families" and not to "prohibit otherwise beneficial intrafamily adoptions by second parents."[145]

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131. *See generally id.*

132. *See generally In re* Adoption of Caitlin, 622 N.Y.S.2d 835, 838 (Fam. Ct. 1994) (citing *In re* Evan, 583 N.Y.S.2d 997 (N.Y. Co. Sur. Ct. 1992)).

133. N.Y. DOM. REL. LAW §117(1)(a) (McKinney 1988) provides that "the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child....".

134. *In re Adoption of Caitlin,* 622 N.Y.S.2d at 838 (citing *In re Evan,* 583 N.Y.S.2d at 1002).

135. Two second-parent adoption cases since the *Evan* case have been allowed. *See In re* Jacob, 86 N.Y.2d 651 (1995); *In re Adoption of Caitlin,* 662 N.Y.S.2d 835.

136. 86 N.Y.2d 651.

137. 662 N.Y.S.2d 835.

138. *In re Jacob,* 86 N.Y.2d at 656.

139. *See id.*

140. *Id.* at 667 n.4.

141. *See generally id.* at 657.

142. *Id.* at 668.

143. N.Y. DOM. REL. LAW §117 (McKinney 1988) (enacted 1938).

144. *See In re Jacob,* 86 N.Y.2d at 669.

145. *Id.* at 669.

A New York family court also looked at the same issue in *In re Adoption of Caitlin*.[146] The family court held that the adoptions were in the "best interest" of the children, and New York law did not prohibit second-parent adoptions.[147] The *Caitlin* court looked at the relationship of lesbian life partners.[148] The couple had been committed to each other for nine years and there was a clear indication that they would be together for many more years.[149] The couple's committed relationship was a persuading factor that the court examined in making its determination.[150] The *Caitlin* court concluded that allowing a caring lesbian couple to adopt pursuant to the second-parent adoption method would further the best interests of the child.[151]

Vermont, which has a similar statute to that of New York, also allows second-parent adoptions.[152] In *Adoptions of B.L.V.B and E.L.V.B.*,[153] the Vermont Supreme court recognized that Deborah Lashman and her partner, Jane Van Buren, were co-parents for their children.[154] The Supreme Court of Vermont held that "where the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary."[155] Further, the court stated that the Vermont Legislature likely did not consider the "adoption by same-sex partners when the section of law was enacted in 1947, or amended in 1963."[156] The Supreme Court of Vermont believed that "[t]he intent of the legislature was to protect the security of family units," and this would insure the best interests of the child.[157]

Similarly, in *Adoption of Tammy*[158] the "Massachusetts highest court granted a joint adoption petition by the child's biological mother and the child's female co-parent."[159] The court held that "the legislature did not intend to terminate a parent's rights when that parent was one of the adopting petitioners."[160]

New Jersey holds the same view of second-parent adoptions as New York and Vermont. In *In re Adoption of Two Children by H.N.R.*,[161] the court held that an adoption by a lesbian partner would not terminate the birth mother's right.[162]

146. 662 N.Y.S.2d 835 (1994).
147. *See id.* at 835.
148. *See generally id.* at 837–38.
149. *See id.* at 837.
150. *See generally id.* at 841.
151. *See id.*
152. *See id.* at 839.
153. 628 A.2d 1271 (1993).
154. *See id.* at 1272.
155. *Id.*
156. *See id.* at 1273.
157. *Id.*
158. 619 N.E.2d 315 (Mass. 1993).
159. Bryant, *supra* note 71, at 238.
160. *Id.* at 238.
161. 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).
162. *See generally id.*

The court's conclusion was that "the stepparent exception should be broadly construed."[163]

In *In re M.M.D. & B.H.M.*,[164] the District of Columbia Court held that under the step-parent exception, a parent's rights are not cut off when the child is adopted by that parent's partner.[165] The court said that a liberal, rather than strict, construction of the adoption statute should be applied, which would allow unmarried couples to adopt.[166]

Another approach is offered by an Alaskan court. In *In re Adoption of A.O.L.*,[167] the court accepted the argument that all parties to an adoption proceeding could waive a statute which appeared to require the termination of the biological parent's rights.[168]

V. STATUTORY BAR ON ADOPTIONS BY HOMOSEXUALS

"Although gays and lesbians are increasingly winning cases in a variety of areas, including family law,"[169] some courts resist recognizing scientific evidence and society's changing mores. Two states, Florida and New Hampshire, explicitly bar homosexuals from the adoption process in their state statutes.[170]

Florida has the oldest statute in the country barring homosexuals from adopting or becoming foster parents.[171] In 1977, Florida added the provision that "[n]o person eligible to adopt under this statute may adopt if that person is a *homosexual*."[172] Since this amendment, appellate courts in Florida have heard very few cases regarding the eligibility of homosexuals to adopt.[173]

Even though appellate courts have accepted few cases regarding a homosexual's eligibility to adopt, one recent case stands out in the Florida state court system. *State v. Cox*[174] is a recent case that challenges the constitutionality of

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163. *Id.* at 539.
164. 662 A.2d 837 (D.C. 1995).
165. *See id.*
166. *See id.*
167. *In re* Adoption of A.O.L., No. 1JU-85-25-P/A (Alaska Super. Ct., July 23, 1985).
168. *See id.* at 837.
169. *See* Adams, *supra* note 2, at 621.
170. FLA. STAT. ANN. § 63.042 (West 1997); N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994).
171. *See* Tiffani G. Lee, Cox v. Dept. of Health and Rehabilitative Services*: A Challenge To Florida's Homosexual Adoption Ban*, 51 U. MIAMI L. REV. 151 (1996) ("In 1977, Florida became the first state to enact a statutory ban on adoptions by gay or lesbian adults.").
172. FLA. STAT. ANN. § 63.042(3) (emphasis added).
173. This statute went unchallenged until 1991, when in *Seebol v. Farie*, 16 Fla. L. Weekly C52 (Cir. Ct. 1991), the circuit court ruled the statute unconstitutional. *See* Lee, *supra* note 171, at 151.
174. 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), *rev. granted*, 637 So. 2d 234 (1994).

the adoption statute. The trial court in *Cox* held that the statute was unconstitutional for several reasons: it is void for vagueness, it violates homosexuals' right of privacy and it violates homosexuals' equal protection.[175] The State of Florida appealed this decision. On appeal, the trial court holding was reversed in favor of the legislative history of the restrictive adoption statute.[176] The Court of Appeals stated that adoption by homosexuals was a political question and that the "legislature is the proper forum" to prohibit such adoptions.[177] Thus, the appellate courts have not strayed from the intent of the Florida legislature.

Even if the Florida state appellate courts have followed the legislative intent, the lower courts have not strictly conformed to the prohibitive statute. The *Cox* trial court cited a Florida trial court case, *Seebol v. Farie*,[178] in which the court found that the Florida adoption statute violates homosexuals' rights of privacy and equal protection.[179] The *Seebol* circuit court stated that "unforeseen circumstances have occurred" since the enactment of the 1977 Florida adoption statute.[180] Also, the *Seebol* court stated that "society has become increasingly knowledgeable of homosexual behavior and more tolerant of this sexual orientation."[181] The court proceeded to grant the adoption by a homosexual.

Another noteworthy Florida trial court case is *In Re Pearlman*.[182] In this case, the court granted custody of a child to her deceased mother's homosexual partner.[183] The court adopted the "nexus approach" and held that the mother's partner's sexual preference has no detrimental effect on the child.[184] This case was not appealed and the adoption remained in place. Therefore, even with such a strict statute, apparently some judges in the Florida state trial court do not agree with the constrictive meaning and have allowed adoptions by homosexuals.

A similarly conservative statute has been enacted in New Hampshire.[185] In July 1987, the State Legislature in New Hampshire amended their state's statute governing "who may adopt"[186] to add the phrase "and not a homosexual."[187] The New Hampshire State Legislature still uses the "best interest of the child" test; however, the legislature stated that a child's best interest is served by the child not living in a home with a homosexual.[188] The Legislature further stated that homosexuals do not provide a healthy environment for children and that

175. *See* 627 So. 2d at 1212.
176. *See id.*
177. *Id.*
178. Seebol v. Farie, 16 Fla. L. Weekly C52 (Cir. Ct. 1991).
179. *See Cox*, 627 So. 2d at 1212.
180. *Seebol*, 16 Fla. L. Weekly C52, at 1221.
181. *Id.*
182. No. 87-24926 DA (Fla. Cir. Ct. 1989).
183. *See generally id.*
184. *See id.*
185. N.H. REV. STAT. ANN. § 170-B:4 (1994).
186. *Id.*
187. *Id.* (legislative history).
188. *See generally In re* Opinion of the Justices, 530 A.2d 21, 22–23 (N.H. 1987).

homosexuals are not proper role models.[189] Since the statute was amended in July 1987, the New Hampshire court of appeals has only addressed the issue of the eligibility of gays and lesbians to adopt in one case, *Stuart v. State*.[190]

In *Stuart*,[191] the court held that Stuart could not file for renewal of foster care and that the Division for Children and Youth Services was not required to comply since Stuart was homosexual. Thus, the result of the legislative amendment to the New Hampshire statute is that it has effectively stopped homosexuals from adopting in any way, shape or form.

Another state, Connecticut, does not explicitly bar homosexuals from adoption, but the Connecticut statute implies that the "the Commissioner of Children and Families or child-placing agencies" may bar homosexuals from adopting a child.[192] Although this statute does not explicitly bar homosexuals from adoption, it has had the same effect.

These types of conservative statutes pose the biggest obstacles for lesbians and gays wishing to adopt. Despite such obstacles, the Florida lower court cases show that homosexuals may still be able to adopt in such a conservative state. On the other hand, these states are in the minority, which is very fortunate for the millions of homosexuals in the United States today.

VI. CONCLUSION

During the past two decades, the structure of the traditional family in the United States has changed dramatically.[193] However, the adoption laws in most states around the country have remained almost the same without regard to changing families.[194] Traditional families account for approximately one quarter of households in the United States.[195] The number of non-traditional families is on the rise. Many of these non-traditional families are willing and able to provide healthy, stable homes for children.[196] These homes should be recognized and considered as valid options for children wishing to be adopted.

In order for the state courts and prospective adoptive parents (who are non-traditional families) to consider the option of joint adoption, statutory reform with regard to who may adopt is required.[197] Statutory recognition of joint adoption by gay and lesbian couples would be in the best interest of children. Furthermore, adoption legislation should prohibit administrative and judicial decisions based on

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189. *See id.* at 23.

190. Stuart v. State, 597 A.2d 1076 (N.H. 1991).

191. *Id.*

192. CONN. GEN. STAT. ANN. § 45a-726a (West 1993) (considering sexual orientation of prospective adoptive or foster parent).

193. *See* Note, *supra* note 18, at 225.

194. *See* Note, *supra* note 18, at 225. *See also* Linda F. Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 496.

195. *See* Note, *supra*, note 18, at 225.

196. *See id. See also Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1645 (1989).

197. *See* Note, *supra*, note 18, at 225.

prejudice against lesbians and gays.[198] The institutionalization of irrational prejudices is not in the best interests of any child.[199]

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198. *See id.*
199. *See id.*