



ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW

I. INTRODUCTION: LESBIAN, GAY AND BISEXUAL PARENT FAMILIES.

A. A Growing Number of Children Live In Families With Two Same-Sex Parents.

Until recent decades, most children of lesbian, gay and bisexual parents were the offspring of heterosexual relationships where one of the parents later discovered his or her sexual orientation. In recent years, however, the increasing availability of donor insemination¹ and progress in combating anti-gay discrimination among private and public adoption agencies has resulted in a dramatic increase in the number of lesbian, gay and bisexual couples who are planning families and parenting children.² Some studies have estimated that six million or more children in the United States today are being raised in families headed by same-sex parents.³

One of the most visible signs of this development is the growing number of support groups for lesbian, gay and bisexual parents throughout the United States. The Family Pride Coalition (www.familypride.org, formerly the Gay and Lesbian Parents Coalition International) is a national, non-profit organization formed in 1979 to advance the well-being of lesbian, gay, bisexual and transgender parents and their families through mutual parenting support, collaboration and public advocacy. The Family Pride Coalition corresponds with 320 other groups of lesbian, gay, bisexual and transgender parents and

¹ See generally Meyer, *Legal, Psychological, and Medical Considerations in Lesbian Parenting*, 2 *Law & Sexuality* 248 (1992).

² See, e.g., Jess Well, ed., *Lesbians Raising Sons* (1997); April Martin, *The Lesbian and Gay Parenting Handbook* (1993); Cheri Pies, *Considering Parenthood* (1985); Joy Schulenberg, *Gay Parenting: A Complete Guide for Gay Men and Lesbians with Children* (1985).

³ See, e.g., *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 *Fam. L. Rep.* (BNA) 1512, 1513 (Aug. 25, 1987). See also American Academy of Pediatrics, *Technical Report: Co-Parent or Second-parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (Feb. 2002).

their children and has sponsored an annual week-long convention for these families called Family Week for the past 10 years. The convention features a children's conference, for children 6 to 12 years old, and a youth conference facilitated by Children of Lesbians and Gays Everywhere (COLAGE, www.colage.org), a national support and advocacy group of teenagers and adults raised by lesbian, gay, bisexual or transgender parents. Families Like Ours, Inc. (www.familieslikeours.org), a non-profit organization providing information and support to lesbian, gay, bisexual and transgender adoptive and pre-adoptive families, responds to approximately 16 internet inquiries a month from individuals and couples interested in adoption in their home state. And Baby Magazine (www.andbabymag.com), a national publication devoted to lesbian, gay, bisexual and transgender parenting issues, has been steadily embraced by parenting experts and professionals since its founding in 2001. The National Center for Lesbian Rights (www.nclrights.org), a non-profit legal organization founded in 1977, receives approximately 1400 inquiries annually from lesbian, gay, bisexual and transgender people seeking information or assistance about parenting issues.

B. Sexual Orientation Is Not Relevant to Parental Ability.

Sexual orientation is fundamentally irrelevant to a person's capacity to be a good parent. Social science research has confirmed what experience and common sense already suggest, namely, that love, stability, patience, and time to spend with a child are far more critical factors in being a good parent than a person's gender or sexual orientation. In fact, studies have found “a remarkable absence of distinguishing features between the lifestyles, child-rearing practices, and general demographic data” of lesbian and gay parents and those who are not gay.⁴ The American Academy of Pediatrics has confirmed that “[a] growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, sexual functioning as do children whose parents are heterosexual.” American Academy of Pediatrics, *Technical Report: Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (Feb. 2002). “Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.” American Psychological Association, *Lesbian and Gay Parenting: A Resource for Psychologists* 8 (1995).

⁴ Beverly Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 *Am. J. of Orthopsychiatry* 536 (1981).

See also Golombok & Fisher, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32(1) *Developmental Psychology* 3, 9 (1996) ("there is no evidence . . . to suggest that parents have a determining influence on the sexual orientation of their children"); and Gold et al., *Children of Gay or Lesbian Parents*, *supra*, at 357 ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual households."). In all respects, lesbians and gay men have proved to be just as committed to the parental role and just as capable of being good parents as their heterosexual counterparts. Charlotte Patterson, *Lesbian and Gay Parenthood*, in M.H. Bornstein, ed., *Handbook of Parenting* 255 (1996).

Based on this research, numerous mainstream health and child welfare organizations have condemned discrimination against lesbian, gay and bisexual parents and have issued statements supporting second-parent and joint adoptions by lesbian, gay and bisexual couples. Since 1976, for example, the American Psychological Association has affirmed that: "The sex, gender identity, or sexual orientation of natural, or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases." American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 32 *Am. Psychologist* 408, 432 (1977). See also, e.g., American Academy of Pediatrics, *Policy Statement on Co-parent and Second-parent Adoptions*, 109 *Pediatrics* 339-340 (Feb. 2002) (supporting "legislative and legal efforts to provide the possibility of adoption of the child by the second parent or co-parent in [same-sex parent] families"); American Academy of Family Physicians (2002) (resolution calling upon the Academy to establish policy and support legislation that would protect children in same-sex parent families); American Psychiatric Association (Dec. 2002) (statement endorsing the right of gay and lesbian couples to adopt); American Psychoanalytic Association, *Position Statement on Gay and Lesbian Parenting* (May 2002); Child Welfare League of America, *CWLA Standards of Excellence for Adoption Services* (2000) (standard regarding sexual orientation of applicants provides that "[a]pplicants should be fairly assessed on their abilities to successfully parent a child needing family membership and not on their appearance, differing lifestyle, or sexual preference."); the National Association of Social Workers, *Lesbian and Gay Issues*, in *Social Work Speaks: NASW Policy Statements* 93, 162 (1988) (providing that NASW shall work for the adoption of policies and legislation to end all forms of discrimination on the basis of sexual orientation).

II. LESBIAN, GAY AND BISEXUAL PEOPLE AS ADOPTIVE PARENTS: AN OVERVIEW OF CURRENT LAW.

The growing need for adoptive homes and the growing visibility of lesbian, gay and bisexual parent families has contributed to a dramatic decrease in anti-gay discrimination on the part of adoption agencies and courts. Despite this progress, however, significant obstacles to equal treatment still remain. In some states, gay, lesbian and bisexual individuals or couples can adopt, and in some states they cannot. Moreover, whether or not an individual or couple can adopt within any particular state may depend upon what county they live in. The following is a brief description of the different types of adoption available to lesbian, gay and bisexual parents and a brief overview of the current law.

A. Individual Adoptions.

Every state permits unmarried individuals to adopt. Individual adoptions (also sometimes called “stranger” adoptions) are adoptions in which an individual, unmarried person adopts a child who has been placed for adoption by his or her biological parent or parents, who have agreed to give up all of their parental rights. Individual adoptions may take place through: (1) a state child welfare or public adoption agency; (2) a private, state-authorized adoption agency; or (3) consensual arrangements between private parties, including everything from the adoption of the child of a relative, acquaintance or friend to the adoption of an orphan situated abroad and brought into the United States. Like all adoptions, individual adoptions must be reviewed and approved by a court and almost always include a home investigation by the state’s child welfare agency.

Currently, Florida is the only state that categorically prohibit lesbians and gay individuals from becoming adoptive parents by statute.⁵ FLA. STAT. CH. 63.042(3) (West 1985 & Supp. 1995) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”)⁶ New Hampshire, which

⁵ Massachusetts sought to prohibit lesbians and gay men from becoming foster parents by regulation, but the policy was dropped in 1990 in settlement of a lawsuit. For a detailed description of this controversy, see Wendell Ricketts, *Lesbians and Gay Men as Foster Parents* 67-87 (National Child Welfare Resource Center 1991). On January 6, 1997, the Child Welfare Agency Review Board for the state of Arkansas voted to ban lesbians and gay men from being foster parents. Arkansas is the only state with such a ban. “Arkansas Board Votes to Refuse Homosexual Foster Parents,” *The Commercial Appeal*, January 7, 1999, at B4.

⁶ The Florida statute applies to adoption only and does not prohibit lesbians and gay men from being foster parents. See *Matthews v. Weinberg*, 645 So.2d 487 (Fla. Ct. App. 1994) (holding that lesbians and gay men may not be excluded from being foster parents).

adopted a similar ban in 1987, repealed its statute in 1999. The Florida Supreme Court previously upheld the constitutionality of Florida's ban on gay adoption in 1995.⁷ The statute is now being challenged again in federal court. The lower court upheld the statute and the case is now pending on appeal before the 11th Circuit Court of Appeals.⁸

In addition, although not specifically directed at lesbian, gay and bisexual people, Utah prohibits adoptions by “a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state,”⁹ and Mississippi prohibits “adoption by couples of the same gender.”¹⁰

In all other states, lesbian, gay and bisexual individuals are, at least theoretically, eligible to adopt. The “best interest of the child” is the primary criterion for approving an adoption, although there is considerable flexibility in the factors that may be taken into account in evaluating an adoptive parent’s suitability. In practice, judicial reaction to openly lesbian, gay and bisexual adoptive parents ranges from supportive acceptance to overt hostility. In *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992), for example, the judge held that “an open lesbian relationship is not a reason to deny adoption” because “a child's best interest is not predicated on or controlled by parental sexual orientation.”¹¹ In *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990), the Ohio Supreme Court approved the adoption of a disabled child by a gay man, holding that “nonmarital sexual conduct” (including “homosexual activity”) must be shown to have a direct adverse impact on the child before it can be a basis for denying an adoption petition. At the opposite end of the spectrum, the Arizona Court of Appeals upheld the denial of an adoption petition brought by a bisexual man, on the ground that “he testified that it was possible that he at some future time would have some type of homosexual relationship with another man.” *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830 (Ariz. Ct. App. 1986).

B. Second-parent and Joint Adoptions.

⁷ *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So.2d 902, 903 (Fla. 1995) (subsequently the petition was withdrawn).

⁸ *Lofton v. Kearney*, 157 F. Supp. 2d. 1372 (S.D. Fla. 2001) (pending appeal).

⁹ UTAH CODE ANN. §78-30-1(3)(b).

¹⁰ MISS. CODE ANN. §93-17-3(2).

¹¹ New York administrative regulations prohibit the denial of an adoption solely on the basis of the applicant's marital status or sexual orientation. N.Y. Comp. Codes R. & Regs. tit. 18, 421.16[h][2] (1996).

Second-parent adoption (also called co-parent adoption) is a legal procedure that allows a same-sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights. Joint adoption is a legal procedure in which both partners in a couple simultaneously adopt a child who, at least in the usual case, has no biological or pre-existing adopting relationship to either party. Second-parent and joint adoptions protect children in same-sex parent families by giving the child the legal security of having two legal parents, entitling them to crucial financial benefits, including inheritance rights, wrongful death and other tort damages, Social Security benefits, and child support. In many situations, second-parent adoptions are important to ensure health insurance coverage for the child and to allow both parents to make medical decisions for the child. Moreover, second-parent and joint adoptions foster children's emotional and developmental health by recognizing the children's actual relationship to both adults in such families. Second-parent adoptions also protect the rights of the same-sex, second parent, by ensuring that he or she will continue to have a legally recognized parental relationship to the child if the couple separates or if the biological (or original adoptive parent) dies or becomes incapacitated.

Most state adoption statutes provide that a parent who consents to the adoption of a child must give up his or her own parental rights, **unless** the adopting party is the parent's legal spouse and thus a stepparent to the child. Given that no state currently permits same-sex couples to marry, the key legal question for courts ruling on second-parent adoptions has been whether to forego an overly literal and rigid interpretation of state adoption statutes in order to advance the statute's underlying purpose of promoting the child's best interests. *See, e.g., In re Adoption of B.L.V.B.*, 628 A.2d at 1276 ("[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. . . . [the non-biological mother] has acted as a parent of [the children] from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore with the public policy of this state."); *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) ("Where the mother's same-sex partner has, with the mother's consent, participation and cooperation, assumed a full parental role in the life of the mother's child, and where the child is consequently bonded to the partner in a loving, functional parental relationship, the stepparent provision...should not be narrowly interpreted so as to defeat an adoption that is clearly in the child's best interests.").

The concept of second-parent adoption was originated by the National Center for Lesbian Rights (formerly the Lesbian Rights Project) in the mid 1980s, when the first such adoptions were granted in San Francisco.¹² Over the past two decades, second-parent adoptions have been granted in a steadily growing number of state and county jurisdictions. Currently, second-parent adoption is available by statute or appellate court decision in the following states: California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont. *See* CAL. FAMILY CODE § 9000(f); CONN. GEN. STAT. § 45a-724(3); *In re M.M.D. v. B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re Petition of K.M. & D.M.*, 274 Ill. App. 3d 189, 653 N.E.2d 888, 210 Ill. Dec. 693 (Ill. App. Ct. 1995); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (Mass. 1993); *In re Jacob, In re Dana*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (N.Y. 1995); *In re the Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1, 666 A.2d 535 (N.J. Super 1995); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002); *In re Adoption of B.L.V.B. & E.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (Vt. 1993); 15A VT. STAT. ANN. 1-102(b). Second-parent adoptions have also been granted by trial court judges in certain counties of at least 15 other states, including: Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington. *See* Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-parent Adoptions*, 75 Chi.-Kent L. Rev. 933, 934 (2000).

Only four states have expressly resisted the trend of judicial decisions elsewhere. Appellate courts in Colorado, Nebraska, Ohio and Wisconsin have held that second-parent adoptions are not permissible under their respective adoption statute. *See, In re Adoption of T.K.J. and K.A.K.*, 931 P.2d 448, *reh'g denied*, and *cert. denied* (Colo.Ct. App. 1996); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb.

¹² *See, e.g., In re Adoption Petition of N.* Case No. 18086, (Cal. Super. Ct., San Francisco County, filed March 11, 1986).

2002); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); *Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

III. ADOPTION PROVIDES CRUCIAL LEGAL PROTECTION TO CHILDREN OF LESBIAN, GAY AND BISEXUAL FAMILIES.

In the absence of a legally protected parental relationship, a child cannot claim financial support or inheritance rights from the second parent; is not entitled to Social Security benefits retirement benefits or state worker's compensation benefits if the second parent dies or becomes incapacitated; and is ineligible for health insurance or other insurance benefits from the second parent's employer. Moreover, a child may be denied essential care if the second parent is ineligible for parental leave to care for a seriously ill child under the Family and Medical leave Act or is, in the event of an emergency in which the legal parent is unavailable, unable to consent to medical treatment for the child, or even to visit his or her own child in a hospital emergency room.

Second-parent or joint adoption is also critical to protect the child's right to financial support and to a continuing relationship with the second parent if the parents separate. Courts in family law situations generally attempt to ensure ongoing contact between a child and both of his or her parents, even when the family unit is no longer intact, based on the recognition that ongoing contact with the parents is almost invariably in the best interest of the children, because "children generally will sustain serious emotional harm when deprived of emotional benefits flowing from a true parent-child relationship." *Guardianship of Phillip B.* (1983) 139 Cal. App. 3d 407, 422. In the absence of a legally defined parent-child relationship, children of lesbian, gay and bisexual parents are sometimes deprived of this right. *See Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995) (court has "no inherent authority to award visitation" to a non-biological lesbian parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (lesbian partner has no standing to seek visitation with child she raised with lesbian mother); *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (Cal App. 1991) (same); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991) (non-biological lesbian parent was not entitled to visitation, even if visitation would be in the child's best interest). *But See E.N.O. v. L.M.M.*, 429 Mass. 824 (Mass. 1999) (non-biological, same-sex partner was granted visitation as a "de facto" parent); *V.C. v. M.J.B.*, 163 N.J. 200 (N.J. 2000) (non-biological lesbian parent was entitled to visitation as a "psychological parent" of child); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I.

2000) (court enforced the parties' written agreement to allow the former same-sex partner to have visitation with the child).

Similarly, in the absence of a second-parent or joint adoption, a child whose legal parent dies or is incapacitated may be taken away from the second parent and become a ward of the state, or be placed in foster care or with relatives of the legal parent with whom the child has no bond.¹³ Even if the legal parent has nominated the second parent as the child's guardian in his or her will, there is no requirement that courts approve this nomination, and relatives of the legal parent can challenge the nomination. Such challenges have led to expensive and time-consuming litigation and have caused emotional trauma to the children involved in such disputes.¹⁴

A recent case in District of Columbia provides a vivid illustration of the critical difference that second-parent or joint adoption can make in protecting children in lesbian, gay or bisexual parent families. Victoria Lane and Laura Solomon were each granted a second-parent adoption of Victoria's biological child, Maya, and Laura's biological child, Tessa, by a District of Columbia trial court. *Matter of Petition of L.S.*, 119 Daily Wash. L. Rep. 2249 (D.C. Super Ct., Aug. 30, 1991). Two years later, Victoria Lane was killed in an automobile accident. Due to the second-parent adoption, there was no need for Laura, the surviving parent, to undergo any court action to protect her relationship with her deceased partner's child. Both children were eligible for social security survivor benefits, and both were permitted to file an action for wrongful-death. If a second-parent adoption had not been in place, both children's financial stability would have been seriously impaired, and Maya might well have undergone the additional trauma of being legally separated from her second mom. *See* Deb Price, *Girl Would Be Orphan If They'd Lost the Battle*, Minneapolis Star-Tribune, Jan. 5, 1994 at 4E.

¹³ *See, e.g., McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (denying custody to lesbian coparent following death of biological mother, despite power of attorney and will designating the coparent as the child's legal guardian).

¹⁴ *See, e.g., In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 Fla. Cir. Ct. May 30, 1989) (following the death of the biological mother, the non-biological mother had to petition to invalidate the child's adoption by the biological mother's parents, who had first denied the non-biological mother visitation and then adopted the child without her knowledge or consent); and *In re Hatzopoulous*, Fam. Law Rep. (BNA) 2075 (Colo. Juv. Ct. 1977) (following the biological mother's death, the non-biological mother had to go through a protracted court battle to regain custody of her child after custody was initially placed with the biological mother's aunt and uncle).

By contrast, the fate of the children in *Nancy S. v. Michelle G.*, 228 Cal. App. 3d 831 (Cal. App. 1991) illustrates the harms that result to children if second-parent adoptions are not available. Because the parties did not complete a second-parent adoption, the court in *Nancy S.* concluded that Michelle G., the non-biological parent who had shared equally in parenting of the children since their birth, had no standing to request visitation or custody of the children after she and Nancy dissolved their relationship. As a result, both children's relationship with Michelle was terminated.¹⁵

Several years later, Nancy and her son, Micah, moved to Oklahoma. Nancy subsequently died in a car accident, and Micah sustained severe injuries. When Micah was asked how to contact his father, Micah said that he did not have a father, but that he had another mother and sister in California. Oklahoma authorities refused to contact Michelle and instead Micah was declared a ward of the state with plans to place him in foster care. Fortunately, but entirely coincidentally, a hospital chaplain intervened and helped to locate Michelle. After repeated pleas by Michelle and Nancy's relatives, Oklahoma authorities finally allowed Micah to return to live with Michelle and his sister.

IV. WHAT SAME-SEX PARENTS CAN DO IF SECOND-PARENT OR JOINT ADOPTION IS NOT AVAILABLE.

In jurisdictions where second-parent or joint adoption is not available, lesbian, gay and bisexual parents can attempt to protect their relationship with their children through a variety of privately executed documents: wills, guardianship agreements, authorization to consent to emergency medical treatments, and the like. Sample partnership and family protection forms can be found at:

<http://www.nclrights.org/publications/lifelines.htm>

While same-sex parents willingly assume these obligations, these documents do not create a legally recognized parental relationship, and they are vastly inferior to the security and protection of legal recognition through adoption.

V. CONCLUSION

Lesbian, gay and bisexual people have fought hard for legal rights in the area of family law (including custody and visitation rights, domestic partnership benefits, sick-leave benefits, marriage, and adoption) because they want to strengthen and preserve their family ties, particularly with their children. As same-sex parent families become more numerous and more visible, courts and other institutions are

¹⁵ Hersche, *Family Circle*, S.F. Chron. 1Z1 (Aug. 29, 1999), available at 1999 WL 2694404.

integrating lesbian, gay and bisexual parent families into the framework of existing family law protections. Each child deserves a home and all the love and care that parents can provide. Each child is entitled to the emotional security that follows from legal recognition of his or her family relationships. For all of these reasons, courts should evaluate prospective adoptive parents on the basis of their individual character and ability to parent, not on their sexual orientation, and courts should grant second-parent or joint adoptions when they are in a child's best interests.

For more information, contact

National Center for Lesbian Rights
870 Market St., Ste. 370
San Francisco, CA 94102
(415) 392-6257
www.nclrights.org