

# IN WHOSE BEST INTERESTS: SEXUAL ORIENTATION AND ADOPTION LAW

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## I. INTRODUCTION

Like marriage, in terms of general definitional principles, adoption law in the United States has remained relatively static during the twentieth century, until relatively recently. As part of a larger shift in cultural attitudes and jurisprudential values, common assumptions governing the adoption law of the States have been called into question. It is possible that the most dramatic manifestation of this reality is the current debate surrounding adoption by same-sex couples and the questioning of legal preferences that disfavor homosexual individuals as adoptive parents.<sup>1</sup>

This article seeks to put the developments surrounding this debate into perspective, and to offer a few observations about the significance of the legal changes now taking place. It will first briefly address the historical assumptions of adoption law in the United States, particularly the role of the "best interest of the child standard" in adoption determinations. Then, the article will survey the law on adoption in the states as it relates to adoption by homosexual persons and same-sex couples. It will conclude by suggesting some of the possible ramifications of the trends outlined in the survey. This piece will use broad strokes to try and describe general principles which might seem almost ethereal to some readers, although general principles are the appropriate starting point for discussing practical change.

A state's adoption scheme reflects the efforts of that state legislature to provide for children who cannot be raised by their own mother and father. In such cases, the state has the somber duty to place the child in an adoptive

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<sup>1</sup> This debate is, of course, not confined to the United States, but is now gaining widespread attention in the United Kingdom where the House of Lords rejected a parliamentary attempt to allow for adoption by unmarried couples. See George Jones, *Adoption for Gay Couples Rejected by Peers*, DAILY TELEGRAPH, Oct. 17, 2002, available at <http://www.telegraph.co.uk/news/main> (last visited Feb. 24, 2003).

family as an alternative, to in effect create a family where none was before. As such, laws on adoption historically have sought “to shape the adoptive family according to the nuclear family model.”<sup>2</sup> Thus, states have crafted policies that attempt to promote adoption of children into situations that are as much like the nuclear family as possible and, as a result, “fashion adoption in imitation of procreation.”<sup>3</sup>

Historically, adoption was motivated primarily by a desire to benefit adoptive parents.<sup>4</sup> One commentator has noted that “[t]here were two broad purposes that Roman adoption law served: (1) to avoid extinction of the family, and (2) to perpetuate rites of family religious worship.”<sup>5</sup> Another commentator stated that “the purpose of ancient adoption laws was to provide an heir for the adopting parents.”<sup>6</sup> While adoption laws in the United States, beginning with Massachusetts’ statute in 1851, relied on Roman law concepts, Massachusetts’ statute included “one very important innovation: it emphasized the needs of the adopted child.”<sup>7</sup> This is now the stated policy for adoption in every U.S. jurisdiction.<sup>8</sup>

These two aspects of adoption policy (the imitation of the natural family situation and the emphasis on a child’s best interests) are inextricably linked. Stated another way, adoption is a way to provide a child the family the child lacks, not a way to provide adults the child they lack. Adoption makes sense only in the context of natural family life. If a child is born to a father and mother who are married to one another and who do not fail the child through abandonment or abuse, there would be no need for an adoption. The availability of a child for adoption is a signal that there is a family breakdown that must be fixed through the creation of a new family. Otherwise, orphanages would be a reasonable solution to the problem of children lacking the necessities of life because of parental absence or neglect.

The next two sections will describe legal trends that may impact these traditional adoption policies.

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<sup>2</sup> Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias In Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 606 (2001).

<sup>3</sup> *Id.*

<sup>4</sup> See Lucy S. McGough & Annette Peltier-Falahawazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 23 (1999); Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L. Q. 677, 680 n.9 (1999).

<sup>5</sup> Stephen B. Presser, *The Historical Background of the American Law of Adoptions*, 11 J. FAM. L. 443, 446 (1971).

<sup>6</sup> Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 172 (1997).

<sup>7</sup> *Id.* at 174.

<sup>8</sup> *Id.*

## II. STATUTORY SURVEY OF AMERICAN ADOPTION LAW

The general adoption statutes are remarkably similar in every state. Generally, they provide that any adult may adopt, and that a married couple may adopt jointly. For instance, the Alabama statute provides, "[a]ny adult person or husband and wife jointly who are adults may petition the court to adopt a minor."<sup>9</sup> Similarly, Michigan law states, "[i]f a person desires to adopt a child . . . , that person, together with his wife or her husband, if married, shall file a petition."<sup>10</sup> This approach is almost unanimously followed.<sup>11</sup> With only two significant exceptions, no state statute specifically addresses the effect of a parent's declared sexual orientation on his or her ability to adopt.<sup>12</sup>

The first exception is Florida, where the adoption statute states bluntly, "[n]o person is eligible to adopt under this statute if that person is a homosexual."<sup>13</sup> This statute has been the subject of a number of legal challenges.<sup>14</sup> In the first challenge, the Florida Supreme Court reviewed a lower court decision upholding the constitutionality of the statute against vagueness, privacy, and equal protection claims under the Florida

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<sup>9</sup> ALA. CODE § 26-10A-5 (2002).

<sup>10</sup> MICH. COMP. LAWS ANN. § 710.24.

<sup>11</sup> See ALASKA STAT. § 25.23.020 (Michie 2002); ARIZ. REV. STAT. ANN. § 8-103 (West 2002); ARK. CODE ANN. § 9-9-204 (Michie 2002); CAL. FAM. CODE § 8601 (West 2002); COLO. REV. STAT. § 19-5-202 (2002); DEL. CODE ANN. 13 § 903 (2002); D.C. CODE § 16-302 (2002); GA. CODE ANN. § 19-8-3 (2002); HAW. REV. STAT. ANN. § 578-1 (Michie 2002); IDAHO CODE ANN. § 16-1501 (Michie 2002); 750 ILL. COMP. STAT. ANN. 50/2 (West 2002); IND. STAT. ANN. § 31-19-2-2 (West 2002); IOWA CODE ANN. § 600.4 (West 2002); KAN. STAT. ANN. § 59-2113 (2002); KY. REV. STAT. ANN. § 199.470 (Michie 2002); LA. CHILD CODE 1198, 1221 (2002); ME. REV. STAT. ANN. 18-A § 9-301 (West 2002); MD. CODE ANN. § 5-309 (2002); MINN. STAT. ANN. § 259.22 (West 2002); MO. ANN. STAT. § 453.070 (West 2002); MONT. CODE ANN. § 42-1-106 (2002); NEB. REV. STAT. ANN. § 43-101 (Michie 2002); NEV. REV. STAT. ANN. § 127.030 (Michie 2002); N.C. GEN. STAT. § 48-1-103 (2002); N.J. STAT. ANN. 9:3-43 (West 2002); N.M. STAT. ANN. 32A-5-11 (Michie 2002); N.Y. DOM. REL. LAW § 110 (McKinney 2002); N.D. CENT. CODE § 14-15-03 (2002); OHIO REV. CODE ANN. § 3107.03 (West 2002); OKLA. STAT. ANN. 10 § 7503-1.1 (West 2002); OR. REV. STAT. 109.309 (2002); 23 PA. CONS. STAT. ANN. § 2312 (West 2002); R.I. GEN. LAWS § 15-7-4 (2002); S.C. CODE ANN. § 20-7-1670 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 25-6-2 (Michie 2002); TENN. CODE ANN. § 36-1-107 (2002); TEX. FAM. CODE ANN. § 162.001 (Vernon 2002); VA. CODE ANN. § 63.1-1201 (Michie 2002); WASH. REV. CODE ANN. § 26.33.140 (West 2002); W. VA. CODE ANN. § 48-22-201 (Michie 2002); WIS. STAT. ANN. § 48.82 (2002); WYO. STAT. ANN. § 1-22-103 (Michie 2002).

<sup>12</sup> MICH COMP. LAWS § 710.24 (2002); N.H. REV. STAT. ANN. § 170-8:4 (West 2002).

<sup>13</sup> FLA. STAT. ANN. § 63.042 (West 2002).

<sup>14</sup> See *infra* text accompanying notes 15, 18, 19, 21.

Constitution.<sup>15</sup> The court affirmed the district court's decision except in regard to the equal protection claims, as to which it held that the trial court did not have a sufficiently developed record to support summary judgment in favor of the petitioner, a homosexual.<sup>16</sup> The court remanded the case for trial, but the petitioner voluntarily dismissed the suit after remand.<sup>17</sup> In the second case, the American Civil Liberties Union (ACLU) challenged the statute again in state court and, again, the court upheld the constitutionality of the statute.<sup>18</sup> The most recent challenge took place in federal district court, again by the ACLU.<sup>19</sup> The district court upheld the constitutionality of the statute by holding that adopting a child and being adopted are privileges rather than fundamental rights; therefore, the plaintiffs could not assert a due process claim.<sup>20</sup> Further, applying rational basis review as mandated by *Romer v. Evans*, the court dismissed all equal protection claims.<sup>21</sup> An appeal to this decision is now pending before the Eleventh Circuit Court of Appeals.<sup>22</sup>

Until 1999, New Hampshire had a similar prohibition. Its law stated, "[s]pecifically as follows, any individual not a minor and not a homosexual may adopt."<sup>23</sup> In 1999, the New Hampshire legislature removed the words "and not a homosexual."

The other exception is Connecticut.<sup>24</sup> The Connecticut statute provides that child placement agencies may consider a prospective parent's sexual orientation in making placement decisions.<sup>25</sup> Specifically, the statute states, "[n]othing in this section shall be deemed to require the Commissioner of Children and Families or a child-placing agency to place a child for adoption or in foster care with prospective adoptive or foster parents who are homosexual or bisexual."<sup>26</sup>

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<sup>15</sup> See *Cox v. Florida Dept. of Health and Rehab. Services*, 656 So. 2d 902, 903 (Fla. 1995).

<sup>16</sup> *Id.*

<sup>17</sup> *Gay Men Give Up on Adoption*, ST. PETERSBURG TIMES, Dec. 15, 1995, at 6B.

<sup>18</sup> *Amer v. Johnson*, No. 92-14370 (11) (Fla. Cir. Ct. Sept. 5, 1997) (final order upholding the constitutionality of the statute). William E. Adams, Jr., *A Look at Lesbian and Gay Rights in Florida Today*, 24 NOVA L. REV. 751, 766 (2002).

<sup>19</sup> *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1380 (S.D. Fla. 2000).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1381-82 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

<sup>22</sup> See Terri Somers, *State Court Asked To Toss Brief*, SUN-SENTINEL, Apr. 20, 2002, at 3B.

<sup>23</sup> N.H. REV. STAT. ANN. § 170-B:4 (amended 1999).

<sup>24</sup> CONN. GEN. STAT. § 45a-726a (2002).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Six statutes, while not mentioning homosexuality per se, address the related issue of adoption by same-sex couples.<sup>27</sup> In 2000, the Mississippi Legislature amended its adoption statute to read, “[a]doption by couples of the same gender is prohibited.”<sup>28</sup> Prior to Mississippi’s amendment, the Utah Legislature amended its statute which now states:

A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of [this section], “cohabiting” means residing with another person and being involved in a sexual relationship with that person.<sup>29</sup>

The Alabama adoption statute’s annotation notes a legislative resolution “that we hereby express our intent to prohibit child adoption by homosexual couples.”<sup>30</sup>

In distinction, Massachusetts’s statute provides:

If the child has been previously adopted, all the legal consequences of the former decree shall, upon a subsequent adoption, determine, except so far as any interest in property that may have vested in the adopted child and a decree to that effect shall be entered on the record of the court.<sup>31</sup>

Vermont’s law provides, “[i]f a family unit consists of a parent and the parent’s partner, and the adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary under this subsection.”<sup>32</sup> Connecticut’s law states:

Subject to the approval of the Court of Probate . . . , any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, other

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<sup>27</sup> ALA. CODE § 26-10A-6 (2002); CONN. GEN. STAT. § 45a-724 (2002); MASS. GEN. LAWS ch. 210, § 10 (1998); MISS. CODE ANN. § 93-17-3 (2002); UTAH CODE ANN. § 78-30-1 (2002); VT. STAT. ANN. tit. 15 § 1-102 (2002).

<sup>28</sup> MISS. CODE ANN. § 93-17-3 (2002).

<sup>29</sup> UTAH CODE ANN. § 78-30-1 (2002).

<sup>30</sup> ALA. CODE § 26-10A-6 (2002) (referencing Act 98-439, HJR 35).

<sup>31</sup> MASS. GEN. LAWS ANN. ch. 210, § 10 (1998).

<sup>32</sup> VT. STAT. ANN. tit. 15 § 1-102 (2002).

person other than the parties to such an agreement have been terminated.<sup>33</sup>

Other states have language which, though not likely to be directed towards joint adoption by same-sex couples, would prevent that possibility.<sup>34</sup> These statutes provide that in the event of an adoption the rights of the adoptee's parents shall be terminated.<sup>35</sup> Thus, if a child was conceived as a result of artificial insemination or adopted by a single homosexual, the laws would seem to clearly mandate that before any other person could adopt that child, the natural or adoptive parent's rights would first have to be terminated. However, as the next section will show, some courts have found creative ways of getting around this type of provision.

### III. CASE LAW DOCTRINES

Obviously, mere statutory provisions do not tell us everything we need to know about adoption practice in the states. Ascertaining what actually occurs in the states may be difficult or impossible because of the nature of the adoption process. A sympathetic social worker or judge may facilitate adoptions by homosexuals and same-sex couples and because these determinations are never appealed, these decisions never result in reported cases which would bring the adoptions to the attention of any but the judge, the participants and their attorneys, and the person performing a home study.<sup>36</sup> In fact, a recent study indicates that 63% of the U.S. adoption agencies surveyed would approve adoption by homosexual persons.<sup>37</sup>

Notwithstanding this, there are a number of state cases which help to further elucidate the picture of state laws regarding adoption by homosexuals and same-sex couples.

The relevant cases can be separated into two general categories: (1) the effect of a prospective adoptive parent's declared sexual orientation on adoption<sup>38</sup> and (2) joint adoption by same sex couples.<sup>39</sup>

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<sup>33</sup> CONN. GEN. STAT. ANN. §45a-724 (2002).

<sup>34</sup> See, e.g., N.C. GEN. STAT. § 48-1-103 (1995); R.I. GEN. LAWS § 15-7-17 (2002); S.C. CODE ANN. § 20-7-1770 (Law Co-op. 1999); S.D. CODIFIED LAWS § 25-6-17 (Michie 1999); VA. CODE ANN. § 63.1-233 (Michie 2002); WASH. REV. CODE § 26.33.260 (2003); W. VA. CODE § 48-22-703 (2001); WIS. STAT. ANN. § 48.92 (2002); WYO. STAT. ANN. § 1-22-114 (Michie 2001).

<sup>35</sup> *Id.*

<sup>36</sup> See Sharon S. v. Superior Court of San Diego County, 113 Cal. Rptr. 2d 107 (Cal. Ct. App. 2001).

<sup>37</sup> See Lou Chibbaro, Jr., *Most Agencies OK Gay Adoptions*, WASHINGTON BLADE, Dec. 6, 2002.

<sup>38</sup> See, e.g., Adoption of Anonymous, 622 N.Y.S. 2d 160, 161 (App. Div. 1994).

<sup>39</sup> See, e.g., *In re Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993).

*A. Homosexuality As a Per Se Bar to Adoption*

Although only two states have statutory policies that treat sexual orientation as a per se disqualifying factor for prospective adoptive parents,<sup>40</sup> in past decades, there have been a few states in which courts have addressed the issue of the effect of homosexuality on fitness to adopt.<sup>41</sup> The majority of these decisions have adopted the rule that a potential adoptive parent's homosexuality is not a bar to adopting a child.<sup>42</sup> These cases include decisions from New York, Ohio, Tennessee and Virginia.<sup>43</sup> In the New York case, an appellate division court reversed the denial of an adoption by a homosexual individual, holding that homosexuality does not preclude an unmarried adult from adopting a child where there is no evidence that the adoption would not be in the child's best interest.<sup>44</sup> The Ohio case involved a compelling fact situation in which a homosexual psychological counselor sought to adopt a child with serious physical and psychological disabilities.<sup>45</sup> The Ohio Supreme Court held that the evidence presented did not prove that the homosexual conduct of the plaintiff would have adverse effects on the child's development.<sup>46</sup> In a recent Tennessee case, a child's grandparents challenged an adoption by a lesbian woman who had been given physical custody of the adopted child by the child's biological mother.<sup>47</sup> The court held that absent evidence that it will harm the child; a potential adoptive parent's sexual orientation will not be dispositive in deciding whether to approve the adoption.<sup>48</sup> In the Virginia case, the Virginia Supreme Court reversed the grant of an adoption to a child's stepmother because the fact that the child's mother was a lesbian was insufficient to prove that she was an unfit parent.<sup>49</sup>

Other cases have given varying degrees of weight to the sexual orientation of the prospective parent in determining whether to grant an adoption.<sup>50</sup> In an Arizona case, a court of appeals affirmed a juvenile court

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<sup>40</sup> Carolyn S. Grigsby, *Lofton v. Kearney: Discrimination Declared Unconstitutional in Florida*, 21 ST. LOUIS U. PUB. L. REV. 199, 213 (2002).

<sup>41</sup> *Adoption of Anonymous*, 622 N.Y.S.2d at 161; *In re Adoption of Charles B.*, 552 N.E.2d 884, 888 (Ohio 1990); *In re Adoption of M.J.S.*, 44 S.W.3d 41, 77 (Tenn. Ct. App. 2001); *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981).

<sup>42</sup> See cases cited *supra* note 41.

<sup>43</sup> *Id.*

<sup>44</sup> *Adoption of Anonymous*, 622 N.Y.S.2d at 161.

<sup>45</sup> *In re Adoption of Charles B.*, 552 N.E.2d at 884.

<sup>46</sup> *Id.* at 888.

<sup>47</sup> *In re Adoption of M.J.S.*, 44 S.W.3d 41 (Tenn. Ct. App. 2001).

<sup>48</sup> *Id.* at 49-50.

<sup>49</sup> *Doe v. Doe*, 284 S.E.2d 799, 804-06 (Va. 1981).

<sup>50</sup> See, e.g. *Appeal in Pima County Juvenile Action*, 727 P.2d 830, 834 (Ariz. Ct. App. 1986); *In re Adoption of J.M.G. and C.C.G.*, 736 P.2d 967, 970 (Mont. 1987).

decision that a bisexual applicant was not acceptable as an adoptive parent, holding that "sexual orientation" was an appropriate factor for the court to consider in assessing the man's petition to adopt.<sup>51</sup> The next year, the Montana Supreme Court affirmed a lower court decision allowing a child to be adopted without the consent of the natural father. The court held, among other things, that the lower court did not err in allowing evidence regarding the father's homosexual relationships because that evidence might indicate the state of his emotional and mental health.<sup>52</sup>

### B. *Second Parent Adoptions*

A quickly developing trend involves attempts by same-sex couples to jointly adopt children.<sup>53</sup> This situation could arise in a number of circumstances. First, a same-sex couple might jointly petition to adopt a child.<sup>54</sup> Second, a partner of a child's biological parent (such as where a woman has had a child as a result of assisted reproduction or from a previous heterosexual relationship) might petition to adopt the partner's child without terminating the biological parent's parental rights.<sup>55</sup> Finally, one partner in a same-sex couple might adopt a child as an individual and the other partner would then also seek to adopt that child without a termination of the ties created by the first adoption.<sup>56</sup>

The obvious complication raised by these scenarios comes because of the general statutory rule which foresees only adoptions by individuals or married couples (either jointly or by a step-parent).<sup>57</sup> Except in the states described above which specifically allow for a joint adoption by same-sex couples, a same-sex couple would thus not be able to adopt jointly. Of course, some courts have found a way around this statutory difficulty.<sup>58</sup>

The two general rationales courts have used to circumvent the statutory language which would prevent joint adoption by same sex couples can be illustrated by two anecdotes from Lewis Carroll. The categories are not exclusive. In fact, the first anecdote really introduces all of the cases, and the second describes a subset of them.

#### 1. *Creative statutory interpretation*

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<sup>51</sup> *Appeal in Pima County Juvenile Action*, 727 P.2d at 834.

<sup>52</sup> *In re Adoption of J.M.G.*, 736 P.2d at 970.

<sup>53</sup> See Felicia E. Lucious, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 S.U. L. REV. 171, 194 (1994).

<sup>54</sup> See, e.g., *Adoption of Galen*, 680 N.E.2d 70 (Mass. 1997).

<sup>55</sup> See, e.g., *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

<sup>56</sup> See Stella Lellos, *Litigation Strategies: The Rights of Homosexuals to Adopt Children*, 16 TOURO L. REV. 161, 167, 168 (1999).

<sup>57</sup> See *In re Adoption of Tammy*, 619 N.E.2d at 318.

<sup>58</sup> See, e.g., *id.*

In the first anecdote, Alice is conversing with Humpty Dumpty but is stymied by his unusual use of the word “glory”, which he insists means, “a nice knock-down argument.”<sup>59</sup> When challenged, he says, “[w]hen I use a word . . . it means just what I choose it to mean—neither more nor less.”<sup>60</sup> Alice responds, “[t]he question is . . . whether you *can* make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’”<sup>61</sup> In these joint adoption cases, the courts are the masters as they construe statutory language in creative ways.

A typical strategy is exemplified in an important Massachusetts case in which the Supreme Judicial Court allowed an adoption by a partner of the adopted child’s biological mother.<sup>62</sup> The court reasoned away the requirement that a biological parent’s rights must be terminated before his or her child can be adopted by someone to whom he or she are not married by construing the statutory provision for adoption by any “person” to mean by any “persons.” The court stated, “[i]n the context of adoption, where the legislative intent to promote the best interests of the child is evidenced throughout the governing statute, and the adoption of a child by two unmarried individuals accomplishes that goal, construing the term ‘person’ as ‘persons’ clearly enhances, rather than defeats, the purpose of the statute.”<sup>63</sup> A Delaware court applied the same construction, holding, “the term ‘unmarried person’ though stated in the singular can be read to include the plural ‘unmarried persons.’”<sup>64</sup> Similar decisions have been handed down in a number of Illinois cases,<sup>65</sup> where these types of adoptions have become common enough that, in one case, a judge who seemed to hesitate in granting an adoption was removed from the case.<sup>66</sup>

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<sup>59</sup> LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 94 (Random House 1946). Parenthetically, this raises important questions about the role of the courts in making adoption policy. Because all family policy goes to the root of how society is organized, it seems particularly inappropriate to have that policy shaped by judicial innovation, rather than a legislative codification of widely shared values.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

<sup>63</sup> *Id.* at 321. The principle enunciated in *In re Adoption of Tammy* seems to be so settled, that a later decision ignored the requirement that the Supreme Judicial Court only reverse a lower court’s decision to order a home study in a prospective joint adoption by a same sex couple if there was clear abuse of discretion in the lower court decision, in order to make such an adoption easier for the parties. See *In re Adoption of Galen*, 680 N.E.2d 70-72 (Mass. 1997).

<sup>64</sup> *In re Hart*, 806 A.2d 1179, 1185 (Del. 2001).

<sup>65</sup> See *In re K.M. & D.M.*, 653 N.E.2d 888, 893 (Ill. Ct. App. 1996); *In re M.L.S.*, No. 90 Coa 1202, 1994 WL 157949, at \*3 (Cook Cty. Cir. Ct. Mar. 14, 1994).

<sup>66</sup> See *In re C.M.A.*, 715 N.E.2d 674, 677 (Ill. Ct. App. 1999).

A variation on this theme is exemplified in a pair of New Jersey cases. In one of these cases, a trial court judge relied on precedent to construe the stepparent provision to include “a person who lives with, but is not married to, the natural or adoptive parent of a child.”<sup>67</sup> A later decision similarly held that the stepparent exception could not be read literally.<sup>68</sup>

Another Pennsylvania case employed a similar approach.<sup>69</sup> In that case, the Pennsylvania Supreme Court held that a statutory exception to the general rule (that a parent’s rights must be terminated unless the potential adoptive parent is the spouse of the parent) existed where a trial court employed its discretion to hold that such an exception was warranted under the circumstance of the individual case.<sup>70</sup> The court employed a peculiar twist of logic in holding that any other reading of the statutory language allowing for exceptions where some adoption formalities are not met (and where there is “cause shown” that would justify the failure to meet the requirement) “would command an absurd result as the Adoption Act does not expressly preclude same-sex partners from adopting.”<sup>71</sup> The principle governing the court’s decision was presumably that anything not forbidden can be shoe-horned into the statutory scheme.<sup>72</sup>

## 2. *Functional Equivalent of Marriage*

The second descriptive anecdote is from an earlier book. Here, Alice is startled when, after eating a portion of a mushroom, her neck is elongated until her head is far above the trees.<sup>73</sup> There, she is attacked by a pigeon who takes her for a serpent. Of course she denies this but to no avail.

‘A likely story indeed!’ said the Pigeon, in a tone of deepest contempt. I’ve seen a good many little girls in my time, but never *one* with such a neck as that! No, no! You’re a serpent; and there’s no use denying it. I suppose you’ll be telling me next that you never tasted an egg!’ ‘I have tasted eggs, certainly,’ said Alice, who was a very truthful child; ‘but little girls eat eggs quite as much as serpents do, you know.’

<sup>67</sup> *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 553 (N.J. Super. Ct. 1993).

<sup>68</sup> *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1996).

<sup>69</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002).

<sup>70</sup> *Id.* at 1199-1202.

<sup>71</sup> *Id.* at 1202.

<sup>72</sup> *See In re Adoption of E.O.G.*, 28 Pa. D. & C.4th 262 (Pa. Ct. Comm. Pleas 1993).

<sup>73</sup> LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND*, 72-73 (Franklin Watts, Inc. 1967).

'I don't believe it,' said the Pigeon; 'but if they do, why, then they're a kind of serpent; that's all I can say.'<sup>74</sup>

In this subset of cases, the court's creative statutory interpretation seems motivated by a functional definition of the family. This definition is characterized by a court identifying functions associated with traditional family life and then labeling other relationships that fulfill similar purposes a "family."

A line of cases from New York helps to typify this approach. In a very early case involving a joint adoption by a same-sex couple, a surrogate court held that a strict statutory construction which would disallow the proposed adoption "would nullify the advantage sought by the proposed adoption: the creation of a legal family unit *identical* to the actual family setup."<sup>75</sup> A later case argued that "to suggest that adoption petitions may not be filed by unmarried partners of the same or opposite sex because the legislature has only expressed a desire for these adoptions to occur in the traditional nuclear family constellation of the 1930's ignores the reality of what is happening in the population."<sup>76</sup> Subsequent cases establish a strong preference in favor of these kinds of adoptions in New York.<sup>77</sup>

The first state supreme court to rule on the issue followed a similar logic. In a 1993 case, the Vermont Supreme Court found that a biological mother's partner was a "de facto parent" and thus should be allowed to adopt the mother's child without terminating the mother's parental rights.<sup>78</sup> Similarly, one of the Pennsylvania courts noted above uses the term "psychological parent" to fit a same-sex partner into its preferred definition of family.<sup>79</sup>

A District of Columbia case involving a male same-sex couple held that "the focus is on how the child shall best thrive, not on what the particular family format shall look like."<sup>80</sup>

Of course, some state court decisions reject these approaches and have not provided for joint adoption by same-sex couples. Each has deferred to the clear legislative language in the adoption laws. For instance, a case decided by a California court of appeals earlier this year disapproved of an executive branch practice of ignoring the statutory language requiring a biological parent to relinquish parental rights before a child is adopted by any person

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<sup>74</sup> *Id.*

<sup>75</sup> *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1000 (Surr. Ct. 1992).

<sup>76</sup> *In re Adoption of Camilla*, 620 N.Y.S.2d 897, 901-02 (Fam. Ct. 1994).

<sup>77</sup> *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Christine G.*, 644 N.Y.S.2d 1016 (N.Y. App. Div. 1996). *See also In re Adoption of Caitlin*, 622 N.Y.S.2d 835 (Fam. Ct. 1994).

<sup>78</sup> *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993).

<sup>79</sup> *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 550 (N.J. Super. Ct. 1993).

<sup>80</sup> *In re M.M.D.*, 662 A.2d 837, 859 (D.C. Ct. App. 1995).

other than a stepparent.<sup>81</sup> Also this year, the Nebraska Supreme Court held that, “with the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child before” a biological child of a partner in a same-sex couple could be adopted by the mother’s partner.<sup>82</sup> Similar decisions have been made in Ohio<sup>83</sup> and Wisconsin.<sup>84</sup>

Similarly, the Connecticut Supreme Court, addressing an earlier version of the state statute, ruled that a same-sex partner of a child’s biological mother did not meet any of the statutory categories of adoptive parents, and that the legislature would have to modify the statute to make such an adoption possible.<sup>85</sup> A Colorado court, including a concurring opinion openly questioning the validity of the statutory scheme, still deferred to the statutory scheme in rejecting a petition to adopt by a couple in a domestic partnership arrangement.<sup>86</sup>

#### IV. IMPLICATIONS OF THE RETREAT FROM ADOPTION AS A SUBSTITUTE FOR THE NATURAL FAMILY

I believe that these trends reflect a reversion from adoption policy focused on the best interests of the children, to one aimed at providing for adults. This is manifest in two general ways. First, in the effect on children, and second, in the effect on the concept of adoption as a way of forming a family.

##### A. *Implications for Children*

To repeat and elaborate on an earlier point, a child is eligible to be adopted only because of some breakdown in the natural pattern of procreation which requires a father and mother, preferably with a strong commitment to one another. If a child is born to married parents, it will usually require a very dramatic failure on the part of the parents, such as abusive behavior, for that child to need to be placed in an adoptive home. Children who are abandoned or whose parents die are similarly available for adoption only because of a breakdown in the normative ideal of marital child-rearing. This preference for providing for a child an intact family is the motivation for allowing stepparents to adopt a child where one parent has relinquished his or her ties to the child. It is not the lack of biological parents being addressed, it is the lack of an intact family.

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<sup>81</sup> See *Sharon S. v. San Diego County Superior Court*, 11 Cal. Rptr. 2d 107 (Cal. App. 4 Dist. 2002).

<sup>82</sup> *In re Adoption of Luke*, 640 N.W.2d 374, 379 (Neb. 2002).

<sup>83</sup> See generally *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>84</sup> See generally *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

<sup>85</sup> See *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

<sup>86</sup> See *Adoption of T.J.K.*, 931 P.2d 488 (Colo. Ct. App. 1996).

Further, adoption policy is not aimed at merely providing for basic temporal or economic needs of a child. That could be provided by an orphanage or group home, or by a less permanent arrangement such as a guardianship. Put succinctly, the “interest” of the child served by adoption laws is an “interest” in having an ideal family. That this is not always the result of an adoptive placement does not change the fact that it is the subjective intent of adoption regimes. If a child’s best interest were truly, as the majority of commentators seem to imply, merely a question of ensuring the “best” emotional, physical and economic context for a child’s upbringing, there would be no reason for the state to refrain from breaking up intact families if it were to determine that a better context for a child existed elsewhere. The utter impossibility of such a regime points to the fact that, while important, quantifiable indications of child well-being cannot totally displace family structure in the determination of what is in a child’s best interest.

This policy has traditionally been reflected in the preference for adoptive placements which place a child in a situation as close to what he or she would have had absent some intervening effect which has made an adoption necessary.<sup>87</sup> Allowing for adoption by individuals does not detract from this policy because the single adoptive parent may eventually marry and allow the child to be raised in the best possible situation. This is the reason for the provision for step-parent adoptions—to make it easier for a child to be secure in an intact, marriage-based family. Obviously, though, adoption by unmarried couples, the partners in which each have some legal tie to the child, would defeat that purpose. In these cases, if the partners were to separate and marry other persons, the child could not be made a permanent part of either of those new family units.

As a prudential concern, there is little or no evidence that would help us to know what the effect of parenting by same-sex couples would have on children in more practical ways. In fact, respected criticism of the studies purporting to examine the effect of parenting by same-sex couples on children has prompted even some advocates of such parenting to abandon the “no difference” argument which had, in the past, been so prevalent.<sup>88</sup> This criticism has come from a number of reviewers evincing a variety of perspectives on the issue of homosexual adoption. One such critique was made in 1995 by prominent Berkeley sociologist Diana Baumrind, who reviewed a number of studies evaluating the claim that, among other things, children of homosexual parents suffered no adverse outcomes, and were not any more likely to develop a homosexual sexual orientation than children not

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<sup>87</sup> As Bill Pierce noted, this preference is supported by credible data.

<sup>88</sup> See David Crary (AP), *Kids of Gay Parents Arguably Different, 2 Say: More Likely To Explore Homosexuality*, THE COM. APPEAL (Memphis, Tenn.), June 17, 2001, at A17.

raised in such homes.<sup>89</sup> Problems Dr. Baumrind found with the research that she reviewed included the use of small, self-selected convenience samples, reliance on self-report instruments, and biased study populations consisting of disproportionately privileged, educated, and well-off parents.<sup>90</sup> Due to these flaws, Baumrind questioned these conclusions on both “theoretical and empirical grounds.”<sup>91</sup>

In another such review, University of Southern California sociology professors Judith Stacey and Timothy Biblarz reviewed twenty-one studies from the body of research purporting to examine homosexual parenting.<sup>92</sup> Stacey and Biblarz found serious problems with both the methodology and the conclusions of the studies, notwithstanding their personal support for parenting by homosexual couples.<sup>93</sup> Notably, the authors acknowledged that “there are no studies of child development based on random, representative samples of [same-sex couple headed] families.”<sup>94</sup>

The Marriage Law Project at the Columbus School of Law in Washington, D.C. recently commissioned yet another review of the gay parenting literature. The study, performed by statistics consultants Robert Lerner and Althea Nagai, examined forty-nine of the studies comprising the body of gay parenting research. Because of the deeply flawed methodologies prevalent in every study, Lerner and Nagai were forced to conclude that the studies proved nothing.<sup>95</sup> Their exhaustive survey revealed that every one of the studies reviewed failed in at least one of ten critical areas tested for scientific rigor.<sup>96</sup> Common problems with the studies included: (1) failure to use a testable hypothesis or attempt to prove a negative hypothesis;<sup>97</sup> (2) lack of control methods, such as failure to control for group variables like income and education, or even the complete failure to use any comparison group;<sup>98</sup> (3) no references to the measures used to establish the validity of the studies;<sup>99</sup> (4) absence of representative samples including self-selected sample

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<sup>89</sup> Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEV. PSYCHOL. 130, 133-34 (1995).

<sup>90</sup> *Id.* at 134.

<sup>91</sup> *Id.*

<sup>92</sup> See Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001).

<sup>93</sup> *Id.* at 174.

<sup>94</sup> *Id.* at 166.

<sup>95</sup> ROBERT K. LERNER & ALTHEA NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING 6 (2001), available at <http://www.marriagewatch.org/publications/wrr.pdf>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 13-16.

<sup>98</sup> *Id.* at 71.

<sup>99</sup> *Id.* at 66.

groups;<sup>100</sup> and (5) failure to show that the results are not a function of chance factors.<sup>101</sup>

Finally, none of these studies even attempted to observe children who are adopted by homosexuals as opposed to the natural children of homosexuals.

#### *B. Implications for the Concepts of Adoption and Family*

One commentator has said that “[t]he traditional child welfare agency focus of providing a permanent home for a child in need, to which I subscribe, is eclipsed today, often by efforts to satisfy the desires of adults who wish to parent.”<sup>102</sup> If adoption is understood as a way of providing for the needs of the adoptive parents, then the family context is not as crucial because, unlike the child’s interest in adoption, which is to have a family breakdown remedied, a prospective parent’s interest may vary dramatically from wanting to approximate a natural family, to trying to secure affection or companionship, or even more base motives.

For some, of course, the parents’ interest in creating a family will coincide with the child’s interest in having an intact family. Since the blunt instrument of the law is not necessarily capable of discerning a parent’s subjective intent, adoption policy must establish default rules that maximize the likelihood that the child’s interest will be met regardless of parental intent. As noted above, this is the motivation for the historical preference for an adoption which approximates as closely as possible the natural context of procreation. The corollary of this preference is a disfavor for allowing adoptions by same-sex couples and by individuals who have decided that they will express their sexuality in nonmarital contexts.

By its very nature, a claim that a particular group of adults has a fundamental right to adopt is a complete shift to an ethic of adoption in the interest of (a set of) parents. Whereas the use of marriage as the context in which adoption ideally takes place requires prospective parents to adjust to the needs of children, a rights-based approach to adoption claims asks children to adjust to parental lifestyles.

Adoption by same-sex couples and other unmarried cohabitants threatens to obscure the social understanding of the meaning of adoption just as same-sex marriage would obscure the social meaning of marriage. In fact, there is a linkage. Michael Scott-Joynt noted, in the recent debate in the United Kingdom, that allowing for such adoptions “would be like destroying a precious eco-system on which the security, maturity, well-being and

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<sup>100</sup> *Id.* at 75-77.

<sup>101</sup> *Id.* at 83-92.

<sup>102</sup> Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 680 (1999).

wholesomeness not only of countless individuals but of our society, now and in the future, depends.”<sup>103</sup>

The meaning of family is certainly clouded when courts assert that there is no difference between “person” and “persons” being eligible to adopt. Do these courts really believe that the adoption statutes were meant to allow for adoption by any two persons? Why, then, the need for a step-parent adoption provision, since a step-parent is certainly as much a person as a same-sex partner? If so, why limit the number to two? A recent article is willing to take this logical leap:

When more than two people function as parents to a child, the child should not be limited to only two legally recognized parents. Existing law recognizes a maximum of two parents for each child, and even those courts that recognize two same-sex individuals as legal parents are adhering to the traditional two-parent family model. In order to reflect the reality of non-traditional families, the courts must waive the numeric and gender restrictions and allow for third-parent adoption. By doing so, the court system would legally recognize the reality of children's lives. By permitting a child to have more than two legal parents, lesbians and gays could enter into cooperative arrangements in which each attains full parental status.<sup>104</sup>

The problems with the “functional” definition of the family are also significant, as I have argued elsewhere.<sup>105</sup> The use of a functional definition of the family allows a court to gloss over the inherent differences between the relationship being identified as a “functional family” and the natural family which provides the reference point for the “functional” definition. In comparing the natural family and the “equivalent” relationship, which are alike in some ways but not in others, the court conveniently does not mention that, if the relationship were a “family”, it would not have to be identified as its own “functional” equivalent.

## V. CONCLUSION

A shift from a child-centered adoption regime to one primarily motivated by the interests of adults seeking to adopt would signal a major retreat from

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<sup>103</sup> George Jones, *Adoption for Gay Couples Rejected by Peers*, DAILY TELEGRAPH (London), Oct. 17, 2002, at 1 (statement of the Bishop of Winchester, the Rt. Rev. Michael Scott-Joynt).

<sup>104</sup> Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 211-12 (2001).

<sup>105</sup> William C. Duncan, “Don’t Ever Take a Fence Down”: The “Functional” Definition of Family—Displacing Marriage in Family Law, 3 J. L. & FAM. STUDIES 57 (2001).

the policy reflected in American adoption law for over a century. In a time when the law seems in danger of losing the plot, regarding marriage and the family, such a retreat cannot but further complicate the fragile social understanding of the family and the fundamental unit of society, and it cannot serve the best interests of children.