

# COMMENT

## Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother

*Often lesbians have partners with whom they raise children. Conventional adoption laws deny these lesbian couples the option of providing two legal parents for their children. Second parent adoption would allow the biological mother's partner to adopt without requiring the natural parent to relinquish her rights and responsibilities. Thus, second parent adoption is similar to stepparent adoption but without marriage. This Comment urges judges to grant second parent adoption when it is in the child's best interests.*

### INTRODUCTION

A and B have lived together<sup>1</sup> for nine years. Five years ago they decided to have a child. A conceived through artificial insemination by donor.<sup>2</sup> What is B's relationship to the child?<sup>3</sup>

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<sup>1</sup> A and B are "nonmarital cohabitants." The term "nonmarital cohabitant" may refer to heterosexual couples who choose not to marry, heterosexual couples who cannot marry (because one or both are incapable of contracting a marriage), or homosexual couples who cannot marry (because the state does not recognize same-sex marriages). Hill-Kay & Amyx, Marvin v. Marvin: *Preserving the Options*, 65 CALIF. L. REV. 937, 963 (1977); see also *infra* note 13 (discussing the unavailability of marriage for homosexuals).

<sup>2</sup> Artificial insemination accounts for over 20,000 births a year. *New Frontiers in Conception: Medical Breakthroughs and Moral Dilemmas*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 14 [hereafter *New Frontiers*]. Artificial insemination was first used in the 1700's. H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIANS & GAY COUPLES 171 (2d ed. 1980). One reason women want artificial insemination by donor, a reason "that has emerged more recently and [is] particular to lesbians, is the desire to achieve pregnancy without the complications of marriage or the unpleasant-

Under present law, if *A* and *B* are unmarried, *B* and the child have no legal relationship.<sup>4</sup> Although the adults planned to coparent, *A* is legally a single parent.<sup>5</sup> *B*, the mother's partner, has no enforceable rights or responsibilities to the child.<sup>6</sup> Conversely, the child is denied

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ness of casual heterosexual encounters." G. HANSCOMBE & J. FORSTER, *ROCKING THE CRADLE, LESBIAN MOTHERS: A CHALLENGE IN FAMILY LIVING* 94 (1981); see also *SEXUAL ORIENTATION AND THE LAW* § 1.04(1) (R. Achtenberg ed. 1985); Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981).

<sup>3</sup> This fact pattern represents a real case. See *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985). In that case the child had been parented by two women since birth. The biological mother conceived by artificial insemination. The women entered into a joint agreement to have and raise the child. They share parenting responsibilities completely, including financial support. Both parents are professionals. The biological mother is a psychiatrist who specializes in child psychiatry. The nonbiological mother is a teacher and preschool administrator. Petitioner's Memorandum in Support of Decree of Adoption at 102, *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985).

<sup>4</sup> See *SEXUAL ORIENTATION AND THE LAW*, *supra* note 2, at § 1.04. If *A* and *B* are a gay or lesbian couple this problem is particularly acute because gay and lesbian couples cannot marry. See *infra* note 13 and accompanying text.

If you're one-half of a gay or lesbian couple and you both agree that you want to raise a child, you face the practical problem that, in almost all cases, only one of you will be able to have legal custody. . . . [U]nder present law, only 'a single person' or a married couple can adopt a child, or become a foster parent. Since a lesbian/gay couple cannot legally marry, only one member can qualify. And, of course, only one member of a lesbian couple can be the biological mother of a particular child. In all these situations, the other member of the couple will have no legal rights to the custody of the child.

H. CURRY & D. CLIFFORD, *supra* note 2, at 142.

<sup>5</sup> *A* is the child's only legal parent. "Legal parent" includes either a natural parent or an adoptive parent. CAL. CIV. CODE § 241(e) (West 1982). *A* is solely responsible for the child's financial and emotional well-being.

<sup>6</sup> See *SEXUAL ORIENTATION AND THE LAW*, *supra* note 2, at § 1.04(3). Although *B* may share the financial support of the child, the child is not legally *B*'s dependent. *B* has no authority to make decisions for the child in a medical emergency. *B* cannot claim the child as a dependent for tax deduction purposes. See 26 U.S.C. § 151(e) (1982). If *A* dies before the child reaches the age of majority, the courts may deny *B* custody rights. If *B* and *A*'s relationship dissolves, *B* may be denied an ongoing relationship with the child. See *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985). In that case, when *M* turned four years old, *S*, the nonbiological parent, petitioned the court to legalize her de facto parental relationship with *M* through second parent adoption. *S* gave several reasons for wanting to establish a legal relationship with *M*. *M*'s biological parent, *A*, has business and personal interests in England. *S*, *A*, and *M* have travelled to England several times. *S* and the child anticipate travelling to or from England without *A*. They fear difficulties unless *M*'s legal relationship to *S* is

the legal and financial benefits of a second parent.<sup>7</sup>

Second parent adoption<sup>8</sup> would provide the child with two legal parents. It would allow *B* to adopt *A*'s child without requiring *A* to give up any rights or obligations. Second parent adoption resembles stepparent adoption, which adds rather than substitutes one parent for another.<sup>9</sup> They differ because with second parent adoption the parents are

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established. Additionally, *S* sought the adoption so that *M* could be her heir. *S* wanted *M*'s position protected in the likelihood that *S* inherits from her family. The adoption would also permit *M* to obtain support from *S*'s estate, should it become necessary. Further, the adoption would protect *M* should *A* die before *M* reaches the age of majority. Finally, both *A* and *S* wanted *S* to have the authority to deal with schools, doctors, and other agencies on *M*'s behalf. Petitioner's Memorandum in Support of Decree of Adoption at 2-3, *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985).

<sup>7</sup> The child could suffer economic disadvantage. For example, if *A* and *B* are employed they may receive benefits that extend to their dependents, such as health and dental insurance, pension benefits, sick leave, and employer-provided child care. Even if *B*'s benefit package is more complete, only *A*'s benefits extend to the child. In addition, the child may suffer legal liabilities. For example, the child will not inherit from *B* if *B* dies intestate. See, e.g., CAL. PROB. CODE §§ 6408, 6408.5 (West Supp. 1985). If the child's biological parent becomes unwilling or unable to provide financial support for the child, the state has no other parent upon whom to impose that responsibility. For an illustration of the child's potential legal disabilities, see *supra* note 6.

<sup>8</sup> This Comment uses the term "second parent adoption" to designate the adoption of a child by her parent's nonmarital partner, without requiring the first parent to give up any rights or responsibilities to the child. The court ordered a second parent adoption in *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985). In its Decree of Adoption, the court stated that the adoption was in the best interests of the child. The decree did not require paternal consent since the child was conceived by artificial insemination. The biological mother's consent to the adoption, along with the determination that the adoption was in the child's best interests, was sufficient to allow the adoption. Amended Decree of Adoption at 1-2, *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985).

In July 1985, an Alaska superior court judge ordered a similar adoption in *In re Adoption of A.*, No. 1JU-85-25 (Alaska Super. Ct. July 23, 1985). That case involved two biological parents and a third psychological parent. See *infra* note 63 (discussing psychological parenting.) The three adults agreed to share parenting responsibilities. All three consented to the adoption of *A* by the nonbiological parent. The judge, finding the adoption in the child's best interests, granted the adoption without terminating the parental rights of the natural mother and father. Findings of Fact and Conclusions of Law, *In re Adoption of A.*, No. 1JU-85-25 (Alaska Super. Ct. July 23, 1985).

<sup>9</sup> "The only exception to the rule that adoption severs the rights of natural parent(s) is when a stepparent adopts the child of his or her spouse. In such cases, the rights of the natural parent remain intact." *In re Jessica W.*, 122 N.H. 1080, 1083, 453 A.2d 1297, 1300 (1982); see also Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-By-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 214 n.135 (1982-83). See generally *infra* notes 35-61 and accompanying text.

not married.<sup>10</sup> Both stepparent and second parent adoption differ from conventional adoption, which replaces the natural parents with adoptive parents.<sup>11</sup>

This Comment focuses on second parent adoption for lesbian-parented families.<sup>12</sup> Since lesbian couples are prohibited from marrying,<sup>13</sup> they cannot legally coparent.<sup>14</sup> Nevertheless, many lesbian

<sup>10</sup> An analogy can be made to the law of nonmarital property rights. In *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court extended certain property rights that traditionally accompanied marriage to nonmarital partners. The court recognized that nonmarital cohabitants may choose to share property rights in the same way married couples do. Similarly, second parent adoption recognizes that the same parent/child relationship may exist in a nonmarital family as exists in a stepfamily.

<sup>11</sup> "In adoption the original parent must surrender his rights." B. MADDOX, *THE HALF PARENT* 168 (1975); see, e.g., *In re Bryant's Adoption*, 134 Ind. App. 480, 189 N.E.2d 593 (1963); CAL. CIV. CODE § 229 (West 1982); 2 AM. JUR. 2D *Adoption* §§ 83, 84 (1962 & Supp. 1985). See generally *infra* notes 19-34 and accompanying text.

<sup>12</sup> A lesbian-parented family is a single lesbian or a lesbian couple with one or more children. According to one study, 10% of women in the United States are lesbians and 15-20% of those are parents. Rand, Graham & Rawlings, *Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials*, J. HOMOSEXUALITY, Winter 1982, at 27. As of 1981, 1.5 million lesbian mothers in the United States were living with their children. Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHO. 536, 536 (1981). There appear to be many more lesbian mothers than gay fathers. A. MOSES & R. HAWKINS, JR., *COUNSELING LESBIAN WOMEN AND GAY MEN* 198 (1982).

Second parent adoption is not limited to lesbian-parented families. Nonmarital families seeking second parent adoption could also include gay couples with children, heterosexual couples with children who cannot or choose not to marry, see *infra* text accompanying notes 84-89, and even friends or relatives who wish to raise children together. See generally *supra* note 1.

<sup>13</sup> The right to marry is fundamental. *Zablocki v. Redhail*, 434 U.S. 374 (1978). It carries with it innumerable benefits. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 874 (1979), describes these benefits:

Once validated, the marriage relationship confers upon its participants preferential tax treatment, a right of action with regard to a fatal accident of the spouse, social security benefits, and the protection . . . from innumerable nongovernmental benefits such as employee family health care, group insurance, lower automobile insurance, family memberships in various organizations, and the ability to hold real estate by the entirety.

Yet, gay and lesbian couples are not permitted to marry. SEXUAL ORIENTATION AND THE LAW, *supra* note 2, at § 3.046[1]. Many scholars have written persuasively on the right of homosexuals to marry. See, e.g., LeFrancois, *The Constitution and the "Right" to Marry: A Jurisprudential Analysis*, 5 OKLA. CITY U.L. REV. 507, 552-55 (1980) (arguing single-gender marriages would promote social goals of marital intimacy and stability as well as heterosexual marriages); Rivera, *supra*, at 874-78 (dis-

couples raise children.<sup>15</sup> To provide these children with two legal, custodial parents,<sup>16</sup> this Comment proposes an expansion of conventional adoption law. Specifically, the Comment argues that second parent adoption is a natural extension of stepparent adoption. Both increase legal and psychological protection for the adopted child.<sup>17</sup> Thus, courts should permit second parent adoption upon satisfaction of the prerequisite for conventional adoption: a finding that the adoption is in the child's best interests.<sup>18</sup>

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Discussing the constitutional and social grounds for denying homosexual marriage); Veitch, *The Essence of Marriage — A Comment on the Homosexual Challenge*, 5 *ANGLO-AM. L. REV.* 41 (1976) (discussing the states' interest in regulating marriage and how admission of same-sex couples into the marriage institution would serve those interests); see also *Developments in the Law — The Constitution and the Family*, 93 *HARV. L. REV.* 1159, 1280-89 (1980) (analyzing five attributes essential to constitutional protection of the traditional family and arguing they exist in homosexual relationships); *Marriage as a Restricted Club*, Ms., Feb. 1984, at 59.

Gays want legal recognition of same-sex couples for several reasons. Aside from the financial benefits described above, marriage has psychological benefits.

Perhaps more important than monetary benefits is the social approval conferred by society on married couples. Gay people attempting to obtain a valid state marriage license often do so for the psychological boost that comes with marriage and to make a political statement about commitment that would contradict negative stereotypes of lesbians and homosexuals as flighty, unstable, and immature.

Gould, *Lesbians and the Law: Where Sexism and Heterosexism Meet*, in *WOMEN IDENTIFIED WOMEN* 159 (T. Darty & S. Potter ed. 1984).

<sup>14</sup> When only one member of a married couple is a biological parent, the other member is considered a stepparent. See *infra* note 45 and accompanying text (discussing the formation of stepfamilies). Stepparents may adopt their stepchildren without causing the custodial natural parent to relinquish her parental rights or responsibilities. See *infra* note 38. Stepparent adoption is not available to unmarried couples. See *infra* note 80. Thus, since only one member of a lesbian couple can be a biological parent, children of lesbian couples have only one legal custodial parent. If the lesbian couple conceived the child by artificial insemination, see *supra* text accompanying notes 1-3; *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985), the child is denied a legal second parent.

<sup>15</sup> See *supra* note 12; *infra* notes 62 & 78 and accompanying text.

<sup>16</sup> Sometimes children have a legal custodial parent and a legal noncustodial parent. This is often true in stepfamilies. It also occurs when a divorced woman with children subsequently enters into a lesbian relationship. See *infra* text accompanying note 102. In these situations adoption presents difficulties. See *infra* notes 37 & 51 and accompanying text. This Comment focuses on second parent adoption when the child has no existing second legal parent. See *supra* text accompanying notes 1-3.

<sup>17</sup> See *supra* notes 6-7; *infra* text accompanying notes 47-57 (discussing benefits of stepparent adoption); *infra* text accompanying notes 66-71 (discussing benefits of second parent adoption).

<sup>18</sup> See *infra* notes 21-34 & 106 (describing the best interests prerequisite).

This Comment begins by laying the legal framework for second parent adoption. Part I traces the history of adoption law and the development of the child's best interests doctrine. This part also identifies the similarities between stepparent and second parent adoption. Part II explores the need for second parent adoption. It discusses the benefits of second parent adoption and identifies those it most affects. Finally, part III focuses on second parent adoption for lesbian-parented families. It examines common concerns and misconceptions about lesbians — individually, in couples, and as parents. The Comment concludes that when second parent adoption is in the child's best interests, judges should use their discretion to grant the adoption, even under existing adoption statutes.

## I. CONVENTIONAL AND STEPPARENT ADOPTION

### A. *Conventional Adoption and the Child's Best Interests*

Conventional adoption creates a new family unit by terminating the legal rights and obligations of a child's biological parents and vesting those rights in the child's adoptive parents.<sup>19</sup> Typically, the adoption process requires the natural parents' consent<sup>20</sup> and a finding by the

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<sup>19</sup> See, e.g., H. CLARK, *LAW OF DOMESTIC RELATIONS* 602 (1968); *Legal Issues for Children of the 80's: Adoption*, 2 CHILDREN'S LEGAL RTS. J. 32 (1980-81) [hereafter *Legal Issues*]; Comment, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent*, 15 AKRON L. REV. 567, 568 (1981-82) [hereafter Comment, *Survey*]; Comment, *Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States*, 7 B.C. INT'L & COMP. L. REV. 469, 474 (1984) [hereafter Comment, *Stepparent Adoption*].

<sup>20</sup> See, e.g., *In re Adoption of K.*, 417 S.W.2d 702 (Mo. Ct. App. 1967); 2 AM. JUR. 2D *Adoption* § 24 (1962 & Supp. 1985); Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 177 (1983-84); Presser, *The Historical Background of American Law of Adoption*, 11 J. FAM. L. 443, 465 (1971-72); Comment, *Stepparent Adoption*, *supra* note 19, at 472-76. However, the biological parent's relationship with her child may be involuntarily terminated. Courts do not require consent to adoption if the parent forfeits her parental rights. 2 AM. JUR. 2D *Adoption*, *supra*, at § 29. Or courts may deem the parent to have consented impliedly. See, e.g., the Model State Adoption Act, § 7:

A consent or relinquishment required by Section 5 of this Act may be implied by any of the following acts of a parent:

- (a) Leaving the adoptee without provision for his or her identification for a period of thirty (30) days;
- (b) Knowingly leaving the adoptee with others without provisions for support and without communication, or not otherwise maintaining a significant parental relationship with the adoptee for a period of:

judge that adoption is in the child's best interests.<sup>21</sup>

The "best interests of the child" standard is the "hallmark of American adoption."<sup>22</sup> It distinguished early American adoption statutes from

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- (1) Six (6) months if the adoptee was under the age of one (1) year at the commencement of the six (6) month period; or
  - (2) Twelve (12) months if the adoptee was over the age of one (1) year at the commencement of the twelve (12) month period; or
  - (3) Twelve (12) months if an adoptee of any age is left with the other parent; provided that the parent has been served with notice setting forth the time and place of the hearing at which the consent or relinquishment may be implied; or
  - (c) Receiving notification of the pendency of the adoption proceedings under Section 15 and failing to answer or otherwise respond to the petition within thirty (30) days.

*Draft ABA Model State Adoption Act*, 19 FAM. L.Q. 103, 109-10 (1985) [hereafter *Adoption Act*].

Many states have liberalized their adoption statutes for stepparent adoption and no longer require the noncustodial parent's consent. *See* Comment, *Survey*, *supra* note 19, at 569. A parent's rights may be involuntarily terminated on any of the following grounds: abandonment, inability to provide care for a given period of time (usually one year), mental illness or deficiency, incarceration for certain felonies, continuous drug or alcohol abuse, or extreme child abuse or neglect. *Id.* Courts have interpreted "abandonment" liberally. *See, e.g.,* Anonymous v. Anonymous, 25 Ariz. App. 10, 540 P.2d 741 (1975) (mother's abandonment shown by failure to see or inquire about the child for over one year); Gill v. Catreet, 153 Ga. App. 726, 266 S.E.2d 362 (1980) (holding father's failure to provide child support constituted abandonment); *In re* Adoption of Webb, 14 Wash. App. 651, 544 P.2d 130 (1975) (failure to visit child for one year and pay support for six months held to be abandonment).

<sup>21</sup> Carroll, *Abrogation of Adoption by Adoptive Parents*, 11 FAM. L.Q. 155, 158 (1985). This standard often includes a determination that the parent(s) are fit. Presser, *supra* note 20, at 465; Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1043 (1979); *see, e.g.,* *In re* Adoption of Minor Child, 279 So. 2d 55 (Fla. Dist. Ct. App. 1973) (holding welfare of child to be of paramount consideration in all adoption proceedings); *In re* Harshey, 45 Ohio App. 2d 97, 341 N.E.2d 616 (1975) (probate court decides two basic issues in an adoption hearing: whether petitioner is suitably qualified, and whether adoption is in child's best interests); *see also infra* text accompanying notes 22-34 (discussing the evolution of the best interests standard); Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 853 n.5 (1985) (same) [hereafter Comment, *Rational Custody*]. Factors considered relevant in determining a child's best interests vary from court to court. Comment, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984) [hereafter Comment, *Visitation After Adoption*]; *see infra* text accompanying notes 106-11 (suggesting the factors considered relevant vary according to whether the parents are homosexual or heterosexual).

<sup>22</sup> Howe, *supra* note 20, at 177.

their Roman predecessors<sup>23</sup> by shifting the focus from the rights and needs of the adoptive parents to the welfare of the child.<sup>24</sup>

American courts first applied the best interests standard in child custody disputes.<sup>25</sup> The standard evolved into the paramount consideration in custody decisions.<sup>26</sup> This concern for child welfare evinced an enhanced awareness of childhood as a significant phase of development.<sup>27</sup>

<sup>23</sup> American adoption law is modeled after Roman law and is therefore an exception to most American laws which derive from English common law. *Id.* at 175. Adoption did not become a part of English law until 1926. H. CLARK, *supra* note 19, at 602-03. Historians have traced adoption practice to 2285 B.C. Howe, *supra* note 20, at 173. Ancient Babylonians, Egyptians, Hebrews, and Greeks all practiced some form of adoption. *Id.*; M. LEAVY, *LAW OF ADOPTION* 1 (1968); Presser, *supra* note 20, at 446. The Romans, however, had the most advanced adoption laws. H. CLARK, *supra*, at 602; Presser, *supra*, at 446. Romans practiced adoption for two principal reasons. Adoption avoided extinction of a family and perpetuated rites of family worship. M. LEAVY, *supra*, at 1; Howe, *supra*, at 174; Presser, *supra*, at 446; Zainaldin, *supra* note 21, at 1041. Often the adopted individual was an adult male. Howe, *supra*, at 174; Zainaldin, *supra*, at 1041.

<sup>24</sup> M. LEAVY, *supra* note 23, at 2; Presser, *supra* note 20, at 446; Zainaldin, *supra* note 21, at 1042-43. The first departure from the Roman model came in 1851 when Massachusetts passed the "Act to Provide for the Adoption of Children." M. LEAVY, *supra*, at 1; Zainaldin, *supra*, at 1042. Prior to passage of the Massachusetts statute, children were "placed-out" to uninvestigated families and used as cheap labor. Howe, *supra* note 20, at 176. The English custom of "putting out," or apprenticeship, served the dual purpose of training and caring for dependent children. The custom was brought over to America and served as a model for early American adoptions. Presser, *supra*, at 455-57. The Massachusetts law marked the beginning of judicially monitored transfer of parental rights and responsibilities. Howe, *supra*, at 175-76; Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9 (1982-83); Zainaldin, *supra*, at 1043.

<sup>25</sup> Zainaldin, *supra* note 21, at 1052. The first American case to introduce judicial discretion in child custody law was *Nickols v. Giles*, 2 Root 461 (Conn. 1796). Zainaldin, *supra*, at 1053. Several years later the Pennsylvania Supreme Court explicitly applied judicial discretion to determine the child's best interests. *Id.* at 1054; see *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). Components of the best interests of the child determination included the individual's ability to respond to the child's needs, gender roles, parental conduct, the image of childhood, and the age of the child. Zainaldin, *supra*, at 1055.

<sup>26</sup> Zainaldin, *supra* note 21, at 1069-72. By the 1840's courts were applying the following four presumptions about the child's welfare: children of "tender age" should be placed with their mother; older boys belonged with their father; respect should be given to a child's attachments and ties of affection; and wishes of children old enough to exercise "reasonable discretion" should guide decisions. *Id.* at 1072-74.

<sup>27</sup> As Zainaldin concluded:

In short, the law of child custody in the new republic rested upon a developing conception of childhood and parenthood. The judiciary clearly appreciated the vulnerability of childhood. Judges also spied a subtler, more profound truth: character was formed through association. Habits and

Responding to children's vulnerability, judges began to sanction de facto and equitable adoptions.<sup>28</sup> Massachusetts, followed by twenty-four other states,<sup>29</sup> codified this concern for the child's best interests in modern adoption statutes.<sup>30</sup>

Modernly, "best interests of the child" refers to the material, moral, and emotional qualities of the parent, and her ability and willingness to give care, affection, and discipline.<sup>31</sup> Best interests does not refer to the most acceptable among several acceptable alternatives.<sup>32</sup> Rather, it means the opposite of detriment or harm.<sup>33</sup> Factors a court may consider under the best interests of the child standard include: the moral fitness of the parties; the home environment; the child's emotional ties to the adults; the adults' emotional ties to the child; the desirability of continuing an existing relationship; and the preference of the child.<sup>34</sup>

### B. Stepparent Adoption

Stepparent adoption is unlike conventional adoption. While conventional adoption's purpose is to improve a child's environment,<sup>35</sup> stepparent adoption "merely formalize[s] an existing relationship."<sup>36</sup> The

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personality were molded by family environment. Thus, through the discretionary determination of custody, judges acted not only to preserve idyllic childhood, but also to promote an environment that would blend innocence with morality. The child was infinitely malleable, and if environment was important, nurture was critical.

*Id.* at 1085.

<sup>28</sup> *Id.* An equitable or de facto adoption is one that does not comply with statutory requirements. *See In re Cozza*, 163 Cal. 514, 126 P. 161 (1912); *see also* *Reynolds v. City of Los Angeles*, 176 Cal. App. 3d 1044, \_\_\_\_ Cal. Rptr. \_\_\_\_ (1986) (equitable adoption is an informal adoption usually involving an oral contract). *See generally* *Proffitt v. Evans*, 433 S.W.2d 876 (Ky. Ct. App. 1968); H. CLARK, *supra* note 19, at 654.

<sup>29</sup> *Presser*, *supra* note 20, at 443.

<sup>30</sup> *Zainaldin*, *supra* note 21, at 1086.

<sup>31</sup> *In re Nichols' Guardianship*, 70 Ill. App. 2d 376, 216 N.E.2d 690 (1966); *see also* *Cleeton v. Cleeton*, 369 So. 2d 1072 (La. Ct. App. 1979) (holding "best interests of the child" involves more than fulfillment of physical needs); *Commonwealth ex rel. Husack v. Husack*, 273 Pa. Super. 192, 417 A.2d 233 (1979) (holding "best interests" includes intellectual, spiritual, and moral well-being in addition to physical well-being).

<sup>32</sup> *Mandelstam v. Mandelstam*, 458 S.W.2d 786, 788 (Ky. Ct. App. 1970).

<sup>33</sup> *Id.*

<sup>34</sup> *Turner v. Pannick*, 540 P.2d 1051, 1053 (Alaska 1975).

<sup>35</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 472-76; Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604, 611 (1979) [hereafter Comment, *Stepparent Custody*].

<sup>36</sup> Comment, *Stepparent Custody*, *supra* note 35, at 611.

most significant difference between the two is their effect on the relationship between the child and her natural parents. Conventional adoption terminates the natural parent/child relationship, but stepparent adoption maintains the relationship between the child and her natural custodial parent.<sup>37</sup>

A stepparent only becomes obliged to support a stepchild in one of two ways.<sup>38</sup> The stepparent may voluntarily assume responsibility for the stepchild.<sup>39</sup> However, this *in loco parentis* relationship creates only limited rights and obligations.<sup>40</sup> The second way to create a legal bond between stepparent and child is stepparent adoption.<sup>41</sup> Stepparent adoption establishes a parent/child relationship between the stepparent and child that is legally indistinguishable from a natural parent/child relationship.<sup>42</sup>

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<sup>37</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 472-76. However, stepparent adoption severs the child's relationship with the noncustodial natural parent. Comment, *Survey*, *supra* note 19, at 568; Comment, *Stepparent Adoption*, *supra*, at 470; Comment, *Stepparent Custody*, *supra* note 35, at 604-06. Consequently, many commentators argue that stepparent adoption may be detrimental to the child's best interests. See, e.g., Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 44-46 (1975); Visser & Visser, *Legal Action is No Substitute for Genuine Relationships*, 5 FAM. ADVOC. 35 (1981-82); Comment, *Stepparent Custody*, *supra*, at 604-06. Others argue that the child benefits from stepparent adoption and the feeling it brings of permanence and security. See Comment, *Survey*, *supra*, at 593:

The emotional development of a child is often dependent upon his knowledge that his home environment is and will remain a stable, secure, and continuous arrangement coupled with the love and sense of belonging a permanent family unit can provide. It may hamper a stepparent's and child's attempt to establish a normal and meaningful relationship if a third party — the natural parent — has retained parental rights without accepting parental obligation.

<sup>38</sup> Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 210 (1970).

<sup>39</sup> Comment, *Survey*, *supra* note 19, at 568. A legal obligation arises only if the stepparent intentionally assumes support for the stepchild.

<sup>40</sup> Berkowitz, *supra* note 38, at 210; Comment, *Survey*, *supra* note 19, at 568. For instance, voluntary assumption does not include the stepparent's right to collect worker's compensation or insurance policy proceeds, wrongful death suits, or descent and distribution. Nor does it provide stability upon termination of the marriage by death or divorce. Courts will award custody to the noncustodial natural parent, rather than the stepparent, regardless of the stepchild's ties of affection or needs for stability. *Id.*

<sup>41</sup> Berkowitz, *supra* note 38, at 210; Comment, *Survey*, *supra* note 19, at 568; Comment, *Stepparent Adoption*, *supra* note 19, at 470.

<sup>42</sup> B. MADDOX, *THE HALF-PARENT* 169-70 (1975). "Adoption recasts the stepparent in the part of a parent and gives him the same legal relationship with the child as

Stepparent adoption has become the most popular form of adoption.<sup>43</sup> The increase in stepparent adoption correlates with the rise in divorces and remarriages.<sup>44</sup> Every year in the United States approximately one million children become stepchildren.<sup>45</sup> Yet, without stepparent adoption, stepparents lack legal rights and responsibilities to their stepchildren.<sup>46</sup>

Stepparents adopt for both legal and psychological reasons.<sup>47</sup> Psychologically, stepparent adoption may be an attempt to strengthen the stepparent/child bond or to weaken the noncustodial natural parent/child bond.<sup>48</sup> Some stepparents pursue adoption as a vindictive act against the natural parent's former spouse, or to eliminate contact with the other natural parent.<sup>49</sup> Remarried parents may want all their children to bear the same surname.<sup>50</sup> Commentators have argued that many of these reasons are contrary to the child's best interests.<sup>51</sup> Often they reflect the needs of the adults rather than those of the children.<sup>52</sup>

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legitimate birth. Thus the child gains a new parent, rights of inheritance, and adopted status." Masson, *Step-Parent Adoption*, in *ADOPTION ESSAYS IN SOCIAL POLICY, LAW AND SOCIOLOGY* 146 (P. Bean ed. 1984).

<sup>43</sup> *Adoption Act*, *supra* note 20, at 110.

<sup>44</sup> Bodenheimer, *supra* note 37, at 13; Comment, *Stepparent Adoption*, *supra* note 19, at 469-70. At least 48% of current marriages will end in divorce. Weitzman, *Changing Families, Changing Laws*, 5 *FAM. ADVOC.* 2, 4-5 (1982-83); *see also infra* note 122. Over 80% of divorced people remarry. Weitzman, *supra*, at 5-6.

<sup>45</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 469. Approximately one-half million stepfamilies are formed each year. Visser & Visser, *supra* note 37, at 35. Between 10 and 15% of all households in the United States are stepfamilies. Comment, *Stepparent Adoption*, *supra*, at 469.

<sup>46</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 470 (citing Bodenheimer, *supra* note 37, at 45). The existence of a steprelation does not, in and of itself, create rights and obligations between a stepparent and child. B. MADDOX, *supra* note 42, at 163; Comment, *Stepparent Custody*, *supra* note 35, at 605.

<sup>47</sup> Visser & Visser, *supra* note 37, at 35; Comment, *Stepparent Adoption*, *supra* note 19, at 476-78.

<sup>48</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 476-78.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See supra* note 37; *see, e.g.*, Visser & Visser, *supra* note 37, at 35 (arguing that research indicates the breaking off of relations with the biological parent can have serious emotional consequences for the child); Comment, *Stepparent Adoption*, *supra* note 19, at 476-78 (suggesting some motivations for stepparent adoption are less loving than others); Comment, *Stepparent Custody*, *supra* note 35, at 604-06 (suggesting stepparent adoption may be detrimental to the child's best interests when it severs an existing relationship between the child and her noncustodial parent).

<sup>52</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 476-78.

Other stepparents adopt to establish certain legal rights.<sup>53</sup> For instance, members of stepfamilies cannot inherit from one another.<sup>54</sup> Courts may deny stepparents custody and visitation rights after the death or divorce of the natural custodial parent.<sup>55</sup> Stepparents may not consent to emergency medical treatment for the stepchild<sup>56</sup> and are not responsible for support of the stepchild during and after the marriage.<sup>57</sup>

Unmarried couples seeking second parent adoption have the same motivations as stepparents who adopt.<sup>58</sup> In both cases the step or second parent has inadequate legal rights.<sup>59</sup> Conventional adoption is inappropriate because the custodial natural parent wishes to retain her parental rights and responsibilities.<sup>60</sup> In the stepparent context, courts often allow adoption.<sup>61</sup> They should do the same in the context of second

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<sup>53</sup> *Id.* at 470 n.7, 477-78.

<sup>54</sup> *Id.* at 476-91. See *In re O'Connor's Will*, 140 Misc. 757, 251 N.Y.S. 686 (Bronx County Sur. Ct. 1931) (holding deceased's stepdaughter not entitled to share in deceased's estate); *Brown v. Brown*, 226 Va. 320, 309 S.E.2d 586 (1983) (the term "child" in distribution statute does not include unadopted stepchildren); *In re Smith's Estate*, 49 Wash. 2d 229, 229 P.2d 550 (1956) (same). However, after the stepparent adoption the child would lose all intestate rights as to her noncustodial biological parent. Comment, *Stepparent Adoption*, *supra* note 19, at 476-91.

<sup>55</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 476-78. Once a marriage ends (by death or divorce) the noncustodial natural parent, rather than the stepparent, receives legal custody of the child. See, e.g., *In re B.G.*, 11 Cal. 3d 679, 697, 523 P.2d 244, 256, 114 Cal. Rptr. 444, 456 (1974); *In re Arkle*, 93 Cal. App. 404, 410, 269 P. 698, 691 (1928).

<sup>56</sup> Comment, *Stepparent Adoption*, *supra* note 19, at 476-78.

<sup>57</sup> *Id.* See, e.g., *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (holding husband had no duty to support wife's children from previous marriage); *In re Iacino's Estate*, 34 Colo. App. 379, 529 P.2d 346, *rev'd*, 189 Colo. 513, 542 P.2d 840 (1974) (holding stepchild relationship ended when marriage ended by divorce); *Thompson v. Thompson*, 205 Kan. 630, 470 P.2d 787 (1970) (holding stepfather has no legal duty to support stepchild); *Zeller v. Zeller*, 195 Kan. 452, 407 P.2d 478 (1965) (holding in absence of statute stepfather has no obligation to provide for stepchild's support); *Harper v. New Mexico Dep't of Human Serv.*, 94 N.M. 288, 609 P.2d 1244 (N.M. Ct. App. 1979) (holding stepfather has no legal obligation to support nonadopted stepchildren); *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171, (Suffolk County Fam. Ct. 1978) (holding that the relationship between stepparent and stepchild arises as a result of remarriage of the child's natural parent and terminates upon dissolution of the marriage).

<sup>58</sup> See *supra* notes 3, 6 & 8 (describing reasons the couple in *In re Adoption of M. by S. & A.* sought second parent adoption).

<sup>59</sup> See *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985) (described *supra* notes 3, 6 & 8); Comment, *Stepparent Adoption*, *supra* note 19, at 476-78, 480-83.

<sup>60</sup> See *supra* notes 9 & 19 and accompanying text.

<sup>61</sup> See *supra* note 43 and accompanying text. More than half of the adoptions in

parent adoption.

## II. SECOND PARENT ADOPTION

The need for second parent adoption arises when nonmarital cohabitants share parenting duties. Unmarried parents may raise their children alone or with the help of friends and relatives, but many raise their children with nonmarital partners.<sup>62</sup> These partners become psychological parents.<sup>63</sup> Children depend on them for love and support.<sup>64</sup> Yet, without marriage, these psychological parents have no legal relationship to the children they help raise.<sup>65</sup> Second parent adoption would create a legal relationship.

Establishing a legal bond between the psychological parent and child provides emotional and financial security for the child.<sup>66</sup> For example,

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California in 1974 involved a stepparent. Comment, *Stepparent Adoption*, *supra* note 19, at 470 n.7. At least one-third of the adoptions nationally are stepparent adoptions. *Id.*

<sup>62</sup> This may be particularly true of gay and lesbian parents. "Unless prohibited by a court decision, most gay parents will probably become involved with a lover. . . . In many instances, at least where lesbian mothers are concerned, the mother's lover becomes a second parent." A. MOSES & R. HAWKINS, JR., *supra* note 12, at 208; *Artificial Insemination of Single Women Poses Difficult Questions*, N.Y. Times, Mar. 9, 1979, at A18, col. 1. Over 40% of lesbian mothers are raising their children with a lesbian partner. Bryant, *Lesbian Mothers* 58 (1975) (unpublished thesis, available in California State University, Sacramento Library). One survey discovered 76% of lesbian mothers shared the parenting duties with their live-in partners. Miller, Jacobsen & Bigner, *The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research*, J. HOMOSEXUALITY, Winter 1981, at 49, 55-56. See generally *infra* note 78 and accompanying text.

<sup>63</sup> The concept of psychological parenting was first described in J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 12-13 (1973). "Unlike adults, children have no psychological conception of relationship by blood tie until quite late in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." *Id.*

<sup>64</sup> *Id.* at 18.

<sup>65</sup> See *supra* notes 4-8 and accompanying text. Some rights and responsibilities may attach to the psychological parent by way of the *in loco parentis* doctrine. However, applicability is unclear in a nonmarital context. Even in the stepparent context, *in loco parentis* provides inadequate legal rights. See *supra* note 40.

<sup>66</sup> See, e.g., *In re Adoption of A.*, No. 1JU-85-25 (Alaska Super. Ct. July 23, 1985); *In re Adoption of a Child by A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (1977); *In re A.J.J., Infant*, 108 Misc. 2d 657, 438 N.Y.S.2d 444 (1981); *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985). In all the above cases psychological parents petitioned for and were granted adoption of the child they were helping to raise.

second parent adoption would provide the child with inheritance rights as to her second parent.<sup>67</sup> It would allow a minor child to obtain support from her second parent's estate.<sup>68</sup> If the child's biological parent died, or if the parents' relationship dissolved, second parent adoption would ensure that the nonbiological parent supported the child until the age of majority.<sup>69</sup> In addition, adoption would protect the second parent's rights toward the child in the event of dissolution of the parents' relationship or death of the natural parent.<sup>70</sup> Finally, second parent adoption would give the nonbiological parent the authority to deal with the child's schools, doctors, and other agencies.<sup>71</sup> These reasons are the same as the ones justifying stepparent adoption.<sup>72</sup> But when the adults are not married, and only one is a biological parent, adoption is an even greater needed protection.<sup>73</sup>

Homosexuals,<sup>74</sup> and lesbians in particular, need second parent adoption for several reasons.<sup>75</sup> First, approximately ten percent of adult women are lesbians.<sup>76</sup> Second, many lesbians — either through prior heterosexual relationships, adoption, or artificial insemination — are custodial parents.<sup>77</sup> Third, often these lesbian mothers have live-in

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<sup>67</sup> *In re* Adoption of M. by S. & A., No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985); see *supra* note 6.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *infra* text accompanying notes 82-83 (discussing *In re* K., in which the psychological parent did not adopt and, upon the death of the natural parent, was denied custody of the child).

<sup>71</sup> See *In re* Adoption of M. by S. & A., No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985); *supra* note 6.

<sup>72</sup> See *supra* notes 53-57 and accompanying text.

<sup>73</sup> If the parents are married, the nonadopting stepparent may assume certain parental rights and responsibilities. See *supra* notes 39-40 and accompanying text (describing *in loco parentis*). If the adults are not married, but both are biological parents, they have legal parental status for most purposes. See *In re* Adoption of a Child by A.R., 152 N.J. Super. 541, 378 A.2d 87 (1977); *In re* A.J.J., Infant, 108 Misc. 2d 657, 438 N.Y.S.2d 444 (1981).

<sup>74</sup> This Comment uses the term "homosexual" to refer to both gay men and lesbian women.

<sup>75</sup> See *supra* note 12; *infra* text accompanying notes 76-81.

<sup>76</sup> Rand, Graham & Rawlings, *supra* note 12, at 27; Rivera, *supra* note 13, at 883-84; see also sources cited *infra* note 165.

<sup>77</sup> See *supra* note 12; *infra* note 101 and accompanying text. The following statistics include at least some lesbians and their children: "Children born to unmarried women constituted approximately 17% of all births in 1979." Donovan, *supra* note 9, at 195 n.13. "The single parent household makes up 13% of the population. . . . [T]he number of children living in one-parent families increased 60% in ten years." Clatworthy, *The Non-Traditional Family and the Child*, 12 CAP. U.L. REV. 345, 347 (1983).

partners with whom they share parenting responsibilities.<sup>78</sup> Finally, because marriage is not available to lesbian couples,<sup>79</sup> the lesbian parent's partner cannot adopt as a stepparent.<sup>80</sup> Yet children in lesbian-parented families form attachments to their mother's partner without regard to legal status.<sup>81</sup> Second parent adoption is the only alternative for these lesbian-parented families who wish to provide their children with two legal parents.

A recent Florida case, *In re K.*, is a tragic example of the need for second parent adoption in lesbian-parented families.<sup>82</sup> In that case a lesbian couple lived together for fourteen years and conceived a daughter through artificial insemination. The natural parent died when the child was six years old. The child's nonbiological parent expected to continue raising the child. Instead, the court awarded custody to the

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Eleven million children live in female-headed households. P. ADAMS, J. MILNER & N. SCHREPF, *FATHERLESS CHILDREN* 2 (1984) [hereafter *FATHERLESS CHILDREN*]. Unmarried women are voluntarily choosing motherhood without marriage. Donovan, *supra*, at 195. Unmarried women, both heterosexual and lesbian, seek artificial insemination to become parents. Kritchevsky, *supra* note 2, at 3 n.10. Never-married one-parent families increased 314% between 1970 and 1980. *Single Mothers By Choice: Perils and Joys*, N.Y. Times, May 2, 1983, at 85, col. 2. "Households headed by women increased from 17.2 percent of the total in 1960 to 23.6 percent in 1975. This proportion is projected to increase to 29 percent by 1990, with the addition of almost 10 million female-headed households." G. MASNICK & M. BANE, *THE NATION'S FAMILIES: 1960-1990*, at 105 (1980).

<sup>78</sup> See *supra* note 62. Lesbians are more likely than gay men to be living with their primary partner in a steady, sexually exclusive relationship. Peplau, *Research on Homosexual Couples: An Overview*, J. HOMOSEXUALITY, Winter 1982, at 3, 6. In one study of 34 lesbian mothers with custody of their children, 76% had live-in partners with whom they shared parenting responsibilities. Miller, Jacobsen & Bigner, *supra* note 62, at 49. Another study, comparing 20 lesbian mothers and their children with 20 single heterosexual mothers and their children, found that the lesbian mothers were more likely to share living arrangements and child care with a lover than were the heterosexual mothers. Kirkpatrick, Smith & Roy, *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHO. 545 (1981). It is particularly common for lesbian couples to choose children. The majority of lesbians who seek artificial insemination plan to raise the child with a partner. Kritchevsky, *supra* note 2, at 17 n.82. "A.I. gives the lesbian woman the opportunity to have a child without involvement with a man and, if she wishes, to raise the child with a partner in a two-parent unit." *Id.* at 33; see also *New Frontiers*, *supra* note 2.

<sup>79</sup> See *supra* note 13.

<sup>80</sup> See CAL. CIV. CODE § 226.9 (West 1982 & Supp. 1986). Marriage is the "springboard" for stepparent adoption. See *infra* note 89.

<sup>81</sup> See *supra* notes 63-64 and accompanying text.

<sup>82</sup> A description of this 1986 case, written by The Defense Fund of Colorado, is on file with U.C. Davis L. Rev.

child's biological grandparents, who previously had almost no emotional or financial relationship with the child.<sup>83</sup> If the child's parents had been able to marry, the nonbiological parent could have adopted as a stepparent. Without marriage, second parent adoption was the only way to ensure stability in the child's life.

Children of heterosexuals may also benefit from second parent adoption. For example, in *In re Adoption by A.R.*,<sup>84</sup> the plaintiff was the biological father of a six-year-old boy for whom he had cared since birth. The father was engaged to the child's mother when they conceived the child, but a New Jersey court subsequently found the mother incompetent and incapable of contracting a marriage. Plaintiff wanted to adopt the child to preserve the child's inheritance rights.<sup>85</sup> Although the parents could not marry, the court permitted the adoption without terminating the mother's parental rights and obligations.<sup>86</sup> Without identifying it by name, the court essentially granted a second parent adoption.

Sometimes a couple that can marry chooses not to. If the couple has a child, however, the adults may wish to provide her with two legal parents. This occurred in *In re A.J.J., Infant*,<sup>87</sup> in which a New York court allowed a natural mother to retain her parental rights and responsibilities while her nonmarital partner<sup>88</sup> adopted her child.<sup>89</sup>

In these two cases the nonmarital partners were both biological parents. But sometimes only one partner is a biological parent.<sup>90</sup> Without

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<sup>83</sup> The judge removed the child from her psychological second parent despite testimony by many experts indicating she could suffer "severe and irreparable harm if removed from her surviving parent." *Id.*

<sup>84</sup> 152 N.J. Super. 541, 378 A.2d 87 (1977).

<sup>85</sup> "Collateral inheritance through the father would be changed by the adoption proceeding." *Id.* at 543, 378 A.2d at 89.

<sup>86</sup> *Id.*

<sup>87</sup> 108 Misc. 2d 657, 438 N.Y.S.2d 444 (1981).

<sup>88</sup> In this case the nonmarital partner was also the biological father of the adopted child. *Id.* at 658, 438 N.Y.S.2d at 445.

<sup>89</sup> Comparing this couple's refusal to marry with the inability of the couple to marry in *In re Adoption by A.R.*, the court granted the adoption. "While 'marriage' is the springboard for the stepfather-stepmother exception, this legal status has been broadly construed by at least one court in a sister state 'to preserve the rights and relationship between the child and his mother.'" *In re A.J.J.*, 108 Misc. 2d at 659, 438 N.Y.S.2d at 446 (citing *In re Adoption by A.R.*, 152 N.J. Super. at 545, 378 A.2d at 89-90).

<sup>90</sup> This is most often the case for lesbians who have children through artificial insemination or gay men who have children through surrogate mothering. If a member of a gay or lesbian couple adopts a child as a single parent, neither member of the couple is a biological parent. In some cases only one member of a nonmarital heterosexual couple is a biological parent. For example, a widow with a child from her previous

the advantage of blood or marriage, the other partner lacks legal standing in the child's life.<sup>91</sup> If the couple is unable to marry,<sup>92</sup> the need for second parent adoption is even more acute because stepparent adoption is unavailable.<sup>93</sup> Conventional adoption also does not meet their needs because it requires the natural parent to terminate her legal rights and responsibilities.<sup>94</sup> However, the theory behind both accepted kinds of adoption applies to second parent adoption. The best interests of the child policy underlying conventional adoption, and the legal and psychological motivations underlying stepparent adoption, are precisely the same for second parent adoption.<sup>95</sup>

### III. ADOPTION THEORY APPLIED TO SECOND PARENT ADOPTION

The best interests of the child is a subjective determination left to the discretion of judges.<sup>96</sup> This portion of the Comment establishes a foundation for that determination within the context of second parent adoption for lesbian-parented families. It combats myths and misconceptions about lesbians with documentation that lesbians and heterosexuals are equally capable parents. Further, because American adoption laws originated to promote the welfare of children,<sup>97</sup> this Comment argues that judges should allow second parent adoptions that are in the child's best interests. Second parent adoption for lesbian couples that choose children<sup>98</sup> often will be in the best interests of the child because these lesbian parents plan for their children and provide them with loving,

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marriage may subsequently live with a man. They may choose not to or may be unable to marry but still wish to provide the child with two legal parents. *See supra* note 1 (discussing nonmarital cohabitants).

<sup>91</sup> *See supra* note 73 and accompanying text.

<sup>92</sup> Gays and lesbians are prohibited from marrying. *See supra* note 13 and accompanying text. Sometimes a heterosexual couple can be prohibited from marrying. *See, e.g., In re Adoption by A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (1977).

<sup>93</sup> *See supra* note 80 and accompanying text.

<sup>94</sup> *See supra* note 19 and accompanying text.

<sup>95</sup> Compare *supra* notes 21-34 (discussing best interests standard) and *supra* notes 48-57 (discussing reasons stepparents pursue adoption) with *supra* notes 66-71 (discussing reasons nonmarital partners seek second parent adoption) and *infra* notes 106-47 (arguing second parent adoption for lesbian-parented families is in the child's best interests).

<sup>96</sup> *See infra* notes 150-51 and accompanying text; *see also supra* text accompanying notes 31-34.

<sup>97</sup> *See supra* notes 22-30 and accompanying text.

<sup>98</sup> The introductory hypothetical provides an example of a lesbian couple that chooses children. *See also In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985).

supportive families.

### A. *The Best Interests of the Child with Lesbian Parents*

Although the need for second parent adoption may arise in a variety of contexts, it occurs most often in lesbian-parented families.<sup>99</sup> To some, the phrase "lesbian mother" is a contradiction in terms.<sup>100</sup> Yet many lesbians are mothers.<sup>101</sup> Lesbians can become custodial parents in one of two ways. They may retain custody of their children after the breakup of a heterosexual relationship or marriage.<sup>102</sup> Alternatively, lesbians may choose to have children after acknowledging their sexual orientation,<sup>103</sup> either within a homosexual relationship<sup>104</sup> or as a single

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<sup>99</sup> See *supra* notes 62 & 74-81 and accompanying text.

<sup>100</sup> Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976) (analyzing child custody and neglect standards as applied to lesbian mothers and suggesting legal tactics for future cases); Comment, *Parent and Child: M.J.P. v. J.G.P.: An Analysis of the Relevance of Parental Homosexuality in Child Custody Determinations*, 35 OKLA. L. REV. 633 (1982) (surveying custody decisions and the changing view of homosexuals as parents) [hereafter Comment, *Parental Homosexuality*]; Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975) (discussing constitutional issues raised by custody determinations involving lesbian mothers in a homophobic society) [hereafter Note, *Avowed Lesbian Mother*]. See *infra* note 109 (discussing homophobia).

<sup>101</sup> There are between 8 and 16 million lesbians in the United States. Of these, between 1.5 and 5 million are mothers. If each lesbian mother has an average of two children, 3 to 10 million children have at least one lesbian parent. Rivera, *supra* note 13, at 833-84; see also A. MOSES & R. HAWKINS, JR., *supra* note 12, at 198; SEXUAL ORIENTATION AND THE LAW, *supra* note 2, at § 1.04; Hunter & Polikoff, *supra* note 100, at 691 n.1; Bryant, *supra* note 62, at 58. "Lesbian mothers have always raised children in our society, but this fact has only recently come to the attention of the courts." Basile, *Lesbian Mothers I*, WOMEN'S RTS. L. REP., Dec. 1974, at 3.

<sup>102</sup> Some women marry and have children before realizing they are lesbians. Comment, *Parental Homosexuality*, *supra* note 100, at 633. In 1975, 185 lesbian mothers responded to an inquiry regarding how they became mothers. None mentioned artificial insemination. Over 63% became parents through a heterosexual marriage. Bryant, *supra* note 62.

<sup>103</sup> Lesbians may become parents through artificial insemination, adoption, or other alternatives. See SEXUAL ORIENTATION AND THE LAW, *supra* note 2, at § 1.04 (discussing methods of becoming a parent and the legal ramifications).

<sup>104</sup> This is the ideal situation for second parent adoption for several reasons. Both adults actively choose to become parents and to share the rights and responsibilities of parenting. In addition, this scenario avoids the difficult situation, often present in step-parent adoptions, in which the noncustodial natural parent must relinquish her rights so the stepparent can adopt. See E. VISHNER & J. VISHNER, STEP-FAMILIES 104 (1979); Masson, *supra* note 42, at 146; see also *supra* notes 37 & 51 and accompany-

parent.<sup>105</sup>

Lesbian couples may want to provide for their children by seeking second parent adoption. Courts should apply the same criteria to second parent adoption they apply to stepparent adoption. In all cases, courts must allow adoptions that promote the welfare of the child.<sup>106</sup> For example, judges consider the following factors to determine the best interests of the child in a stepparent adoption: the stability of the family; the present and future effects of adoption or nonadoption on the child; the interaction between the child and the adults; the child's adjustment to her living situation, school, and community; and the mental and physical health of all interested parties.<sup>107</sup> However, the determination of best interests for children with lesbian parents may come under more biased scrutiny than for children with heterosexual parents.

Although many studies attest to the health and happiness of gay and lesbian-parented families,<sup>108</sup> judges and others cling to homophobic<sup>109</sup>

ing text.

<sup>105</sup> Donovan, *supra* note 9, at 193. Women increasingly choose to form families without an adult male. FATHERLESS CHILDREN, *supra* note 77, at 106; *see also* Comment, *Mother Knows Best: A Constitutional Perspective on Single Motherhood by Choice*, 2 S. ILL. U.L.J. 329 (1984) [hereafter Comment, *Single Motherhood*]. There is an "increased likelihood that women — both older and younger — who do become pregnant unintentionally and opt against abortion will decide to raise their children themselves." S. MERRITT & L. STEINER, *AND BABY MAKES TWO* 55 (1984). *See generally supra* note 77.

<sup>106</sup> *See* Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959); Foster, *Adoption and Child Custody: Best Interest of the Child?*, 22 BUFFALO L. REV. 1 (1972); *see, e.g., In re Adoption of Anthony*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (Bronx County Fam. Ct. 1982) (allowing adopted child to maintain contact with his biological siblings because court considered it to be in the child's best interests). In Arizona, the child's best interests is the sole, rather than primary, consideration in stepparent adoption proceedings. *See, e.g., In re Holman*, 80 Ariz. 201, 295 P.2d 372 (1956) (holding court could ignore the natural parent's rights if in the child's best interests); *Anderson v. Pima*, 77 Ariz. 339, 271 P.2d 834 (1954) (same).

<sup>107</sup> Comment, *Survey*, *supra* note 19, at 570; *see also supra* notes 31-34 and accompanying text.

<sup>108</sup> *See infra* note 114 and accompanying text.

<sup>109</sup> "Homophobia" is a new word that means the obsessive or irrational dread or treatment of homosexuals. *See* Brownstone, *The Homosexual Parent in Custody Disputes*, 5 QUEEN'S L.J. 199, 213-16 (1979) (discussing judicial attitudes towards homosexuality); Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, CIV. LIB. REV., Jan.-Feb. 1979, at 19, 20 (accusing the judiciary of "displaying the subjective, emotional, and often irrational sort of judgments endemic to homophobia"); Note, *Avowed Lesbian Mother*, *supra* note 100, at 800-15 (discussing homophobia, the evolution of the sin-crime-sickness syndrome).

misconceptions.<sup>110</sup> One judge expressed his concerns through the following inquiries: (1) Are children more likely to develop a homosexual preference if they are raised by a homosexual parent? (2) What will be the effect upon the moral development of these children? (3) Won't children raised by homosexual parents be psychologically damaged by societal disapproval?<sup>111</sup> This section explores the erroneous beliefs that homosexuals are ill or unstable and should not be allowed to raise their children, that children raised by homosexuals will grow up to be homosexual, and that children of homosexuals will be harmed by societal disapproval. Before second parent adoption becomes a viable option for lesbians, judges must become familiar with the facts.

### 1. The Psychological Health of Single Lesbians and Lesbian Couples

Homosexuality is no longer regarded as a mental or emotional illness.<sup>112</sup> That it once was is perhaps a reflection on medical and social scientists who, until recently, used mental hospital patients or convicted prisoners to study same-sex orientation.<sup>113</sup> New research indicates that homosexual men and women are as emotionally healthy and socially well-adjusted as their heterosexual counterparts.<sup>114</sup> Based on research

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<sup>110</sup> For example, Judge Campbell had this to say about lesbians: "As fellow human beings afflicted with behavior which exposes them to ridicule and humiliation, they are, if they confine their activities to other consenting adults, more to be pitied than condemned." Campbell, *Child Custody When One Parent is a Homosexual*, JUDGES' J., Spring 1978, at 38, 52.

<sup>111</sup> *Id.* at 40.

<sup>112</sup> See Hunter & Polikoff, *supra* note 100, at 726; Comment, *Rational Custody*, *supra* note 21, at 870. "Homosexuality is not now considered a mental illness, and gay people as a whole do not seem to be peculiarly susceptible to mental disease." Dressler, *supra* note 109, at 23. "[A] clear and consistent pattern emerges from studies on homosexuals using psychological testing: Homosexuality in and of itself is unrelated to psychological disturbances or maladjustment." Gonsiorek, *Results of Psychological Testing on Homosexual Populations*, in *HOMOSEXUALITY* 74 (W. Paul ed. 1982).

<sup>113</sup> Comment, *Rational Custody*, *supra* note 21, at 871.

<sup>114</sup> As early as the 1950's, psychologist Evelyn Hooker concluded "homosexuality as a clinical entity does not exist." Hooker, *The Adjustment of the Male Overt Homosexual*, 18 J. PROJECTIVE TECHNIQUES 30 (1957). In 1953 Kinsey investigated psychologically healthy women regarding their sexual behavior. This research uncovered evidence of homosexuality as natural sexual behavior rather than as psychiatric illness. A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

Today many studies attest to the psychological health of lesbians and gay men. See, e.g., M. SAGHIR & E. ROBINS, *MALE AND FEMALE HOMOSEXUALITY* (1973); Armon, *Some Personality Factors in Overt Female Homosexuality*, 24 J. PROJECTIVE TECHNIQUES 292 (1960); Berkman, *Spouseless Motherhood, Psychological Stress, and Physical Morbidity*, 10 J. HEALTH & SOC. BEHAV. 323 (1969); Chang & Block, *A Study of*

showing no significant psychological differences between heterosexuals and homosexuals, the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973.<sup>115</sup> The American Psychological Association, the National Association of Social Workers, and the American Public Health Association have all taken similar positions.<sup>116</sup> It is now clear that homosexuality is not an indicator of sickness or poor functioning.<sup>117</sup> In fact, some commentators believe that lesbianism has a number of psychological advantages.<sup>118</sup>

Not only are single lesbian women as healthy as single heterosexual women,<sup>119</sup> but studies show that lesbian couples and heterosexual couples are equally satisfied in their love relationships.<sup>120</sup> Gays and

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*Identification in Male Homosexuals*, J. CONSULTING PSYCHOLOGY, Aug. 1960, at 307; Freedman, *Far From Illness, Homosexuals May be Healthier Than Straights*, PSYCHOLOGY TODAY, Mar. 1975, at 28, 30; Grundlach & Riess, *Self and Sexual Identity in the Female: A Study of Female Homosexuals*, in NEW DIRECTIONS IN MENTAL HEALTH 205 (B. Riess ed. 1968); Hogan, Fox & Kirchner, *Attitudes, Opinions and Sexual Development of 205 Homosexual Women*, J. HOMOSEXUALITY, Fall 1977, at 123; Oberstone & Sukoneck, *Psychological Adjustment and Life Style of Single Lesbians and Single Heterosexual Women*, 1 PSYCHOLOGY WOMEN Q. 172 (1976); Thompson, Jr., McCandless & Strickland, *Personal Adjustment of the Male and Female Homosexuals and Heterosexuals*, 78 J. ABNORMAL PSYCHOLOGY 237 (1971); see also D. ROSEN, LESBIANISM 10-13, 65-67 (1974); Hunter & Polikoff, *supra* note 100, at 726.

<sup>115</sup> Browning, *Changing Theories of Lesbianism: Challenging the Stereotypes*, in WOMEN IDENTIFIED WOMEN, *supra* note 13, at 20; Hitchens, Martin & Morgan, *Child Custody and the Homosexual Parent*, JUDGES' J., Fall 1979, at 33, 34 n.1; Hunter & Polikoff, *supra* note 100, at 726; Levitt & Klassen, *Public Attitudes Toward Homosexuality*, in J. HOMOSEXUALITY, Fall 1974, at 29, 30; Comment, *Rational Custody*, *supra* note 21, at 872.

<sup>116</sup> Hitchens, Martin & Morgan, *supra* note 115, at 34; Comment, *Rational Custody*, *supra* note 21, at 872.

<sup>117</sup> Kirkpatrick & Morgan, *Psychodynamic Psychotherapy of Female Homosexuality*, in HOMOSEXUAL BEHAVIOR 357 (J. Marmor ed. 1980). "It would appear that homosexual adults who have come to terms with their homosexuality, who do not regret their sexual orientation, and who can function effectively sexually and socially, are no more distressed psychologically than are heterosexual men and women." *Id.*

<sup>118</sup> Lesbians tend to have stronger self-directedness and greater independence. A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 218 (1978); Hunter & Polikoff, *supra* note 100, at 728; Pagelow, *Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions*, J. HOMOSEXUALITY, Spring 1980, at 189.

<sup>119</sup> See *supra* note 114; see also Rand, Graham & Rawlings, *supra* note 12, at 28.

<sup>120</sup> Cardell, Finn & Marecek, *Sex-role Identity, Sex-role Behavior, and Satisfaction in Heterosexual, Lesbian, and Gay Male Couples*, 5 PSYCHOLOGY WOMEN Q. 488 (1981) (comparing 10 lesbian couples, 5 gay male couples, and 10 heterosexual couples, and finding that the lesbian couples did not differ in satisfaction from the other

lesbians seek the same qualities in their partners as heterosexuals.<sup>121</sup> Not surprisingly, homosexual and heterosexual relationships succeed or fail for similar reasons and in similar proportions.<sup>122</sup>

Because one element of the best interests of the child determination is family stability,<sup>123</sup> the likelihood that the lesbian relationship will last is a significant issue underlying second parent adoption for lesbian-parented families. Many lesbians have primary partners with whom they live.<sup>124</sup> Sixty-seven percent of the respondents in a nationwide survey of gay and lesbian couples indicated they were involved in long-

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groups); Peplau, Padesky & Hamilton, *Satisfaction in Lesbian Relationships*, J. HOMOSEXUALITY, Winter 1982, at 23 (studying 127 lesbians to identify factors associated with satisfaction in lesbian relationships); Ramsey, Latham & Lindquist, Long Term Same-Sex Relationships: Correlates of Adjustment (Aug. 1978) (paper presented at the annual meeting of the Am. Psychological Ass'n, Toronto) (studying 26 lesbian couples, 27 gay male couples, and 25 heterosexual couples, and finding that lesbians did not differ significantly from the other couples), *cited in* Peplau, Padesky & Hamilton, *supra*.

<sup>121</sup> Laner, *Permanent Partner Priorities: Gay and Straight*, J. HOMOSEXUALITY, Fall 1977, at 21 (comparing 48 heterosexual men, 44 heterosexual women, 69 gay or bisexual men, and 19 gay or bisexual women and finding that the top three priorities in all four groups were that partners be honest, affectionate, and intelligent).

<sup>122</sup> Most homosexuals want a steady love relationship and look to their partners for affection and companionship, just as heterosexuals do. Peplau, *supra* note 78, at 5. One study found that equality in involvement and power contributed to the success of lesbian relationships. Peplau, Padesky & Hamilton, *supra* note 120. Another study of 156 gay male couples, with close to a third of the sample living together longer than 10 years and some male couples together for 40 or 50 years, dispels the myth that gay male relationships do not last. D. McWHIRTER & A. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 285 (1984).

As for heterosexual couples, emerging statistics make increasingly clear that marriage does not guarantee longevity in a relationship. The divorce rate in the United States has risen steadily since the late 1950's. By 1976 there was one divorce for every two marriages. The divorce rate per thousand population increased 127% from 1962 to 1976. M. HUNT & B. HUNT, *THE DIVORCE EXPERIENCE* 6 (1977). In 1980 alone, approximately 1,182,000 divorces took place in the United States. S. ALBRECHT, H. BAHR & K. GOODMAN, *DIVORCE AND REMARRIAGE* xi (1983); *see also* Glick & Norton, *Marrying, Divorce and Living Together in the United States Today*, in *FAMILY FACTBOOK* 189 (Dr. H. Znaniecki Lopata ed. 1978). Even a marriage with children is not assured success. Almost two-thirds of divorced couples have children. *See* M. HUNT & B. HUNT, *supra*, at 17.

<sup>123</sup> *See supra* text accompanying note 107.

<sup>124</sup> Peplau & Amara, *Understanding Lesbian Relationships*, in *HOMOSEXUALITY*, *supra* note 112, at 233-47. The same is true of gay male couples. *See* D. McWHIRTER & A. MATTISON, *supra* note 122, at 113-26; *see also supra* note 78 and accompanying text.

term relationships.<sup>125</sup> One researcher reported that the average length of cohabitation for lesbian couples was over six years.<sup>126</sup> Another study showed that among older lesbians twenty year relationships are not uncommon.<sup>127</sup>

Affirming the psychological health of lesbians as individuals and in couples is only the first step toward second parent adoption for lesbian-parented families. Of further importance is the capacity of lesbians to parent.

## 2. The Effect of a Mother's Lesbianism On Her Children

Many lesbians are mothers, but are they good mothers? Studies show that homosexuals and heterosexuals are equally able to raise children.<sup>128</sup> One study, comparing forty lesbian and heterosexual single mothers and their children, concluded that "more striking than any differences between the two groups . . . were the similarities."<sup>129</sup> Another comparative study found no differences between children of lesbian

<sup>125</sup> M. MENDOLA, *THE MENDOLA REPORT* 254-65 (1980).

<sup>126</sup> Peplau & Amara, *supra* note 124, at 238. Research on the length of lesbian relationships is somewhat misleading, however, because many respondents are young.

<sup>127</sup> *Id.* at 235; see also Peplau, Padesky & Hamilton, *supra* note 120.

<sup>128</sup> A. MOSES & R. HAWKINS, JR., *supra* note 12, at 200, 203; Miller, Jacobsen & Bigner, *supra* note 62, at 55.

<sup>129</sup> Hoefter, *supra* note 12, at 543. Other studies that demonstrate the absence of any distinguishing features between the life-styles, child-rearing practices, and general demographic data of single lesbian mothers and single heterosexual mothers include: Hotvedt, Green & Mandel, *The Lesbian Parent: Comparison of Heterosexual and Homosexual Mothers and Children* (1979) (presented to the Am. Psychological Ass'n, N.Y.), *cited in* Kirkpatrick, Smith & Roy, *supra* note 78, at 548; Kirkpatrick, Roy & Smith, *Adjustment of Sexual Identity of Children of Lesbian and Divorced Heterosexual Mothers* (1979) (presented to the Am. Psychological Ass'n, N.Y.), *cited in* Kirkpatrick, Smith & Roy, *supra*, at 545; Lewin & Lyons, *Lesbian and Heterosexual Mothers: Continuity and Differences in Family Organization* (1979) (presented to the Am. Psychological Ass'n, N.Y.), *cited in* Kirkpatrick, Smith & Roy, *supra*, at 545; see also Pagelow, *supra* note 118 (concluding single lesbian mothers exhibit greater independence and self-reliance than their heterosexual counterparts); Bryant, *supra* note 62 (185 lesbian respondents, tending to be less religious, better educated, more often professionally employed, and more involved in the women's movement than was the general population); Ostrow, *Gay and Straight Parents: What About the Children?* (1977) (thesis for Bachelor of Arts, Hampshire College) (concluding that the sexual preference of the parent had no direct effect on their children's play choices), *cited in* Nungesser, *Theoretical Bases for Research on the Acquisition of Social Sex-Roles by Children of Lesbian Mothers*, J. HOMOSEXUALITY, Spring 1980, at 177, 182; St. Marie, *A Descriptive Study of Lesbian Mothers* (1976) (unpublished paper on file at Lyman Assoc., 330 Ellis St., Rm. 401, San Francisco), *cited in* Nungesser, *supra*, at 182, 187.

mothers and those living with heterosexual mothers in either the type or frequency of emotional or psychological problems.<sup>130</sup> The same researchers also found no difference in gender identity between the two groups of children.<sup>131</sup> Nevertheless, a popular misconception is that gay parents will raise gay children.<sup>132</sup> This fear mistakenly assumes that children develop their sexual orientation by mimicking their parents.<sup>133</sup> Most homosexuals, however, are the children of heterosexual parents. In addition, no study on the subject reveals any greater incidence of same-sex orientation among children of gay or lesbian parents than among children in the general population.<sup>134</sup>

### 3. The Burden of Social Stigma on Children of Lesbians

Perhaps the strongest argument against second parent adoption for lesbians is the threat of social stigma against their children. In custody cases, using peer pressure as ammunition, judges often condition custody on the lesbian mother keeping her sexual orientation discreet.<sup>135</sup>

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<sup>130</sup> Kirkpatrick, Smith & Roy, *supra* note 78. The relevance of a parent's sexual preference to the adjustment of her child was discounted in *Bezio v. Patenaude*, 381 Mass. 563, 571, 410 N.E.2d 1207, 1215 (1980). Dr. Alexandra Kaplan, a clinical psychologist and professor at the University of Massachusetts testified in *Bezio* that "[sexual orientation of the parent] is irrelevant to [the child's] mental health." *Id.* at 572, 410 N.E.2d at 1216.

<sup>131</sup> Kirkpatrick, Smith & Roy, *supra* note 78; *see also* Bryant, *supra* note 62 (reporting the incidence of lesbian, gay, or bisexual children raised by lesbian mothers is no greater than in the general population).

<sup>132</sup> *See, e.g.*, Campbell, *supra* note 110, at 40; Comment, *Rational Custody*, *supra* note 21, at 881 n.188; Note, *Avowed Lesbian Mother*, *supra* note 100, at 860-61.

<sup>133</sup> Comment, *Rational Custody*, *supra* note 21, at 881-82.

<sup>134</sup> *See* Pagelow, *supra* note 118, at 189-204; *see also* Cohen, *Children of Homosexuals Seem Headed Straight*, *PSYCHOLOGY TODAY*, Nov. 1978, at 44-45; Green, *The Best Interest of the Child With a Lesbian Mother*, 10 *BULL. AM. ACAD. PSYCHIATRY & L.* 7, 14 (1982) (finding no significant gender identity differences among children of heterosexual and lesbian-parented families); Green, *Sexual Identity of 37 Children Raised by Homosexual or Transexual Parents*, 135 *AM. J. PSYCHIATRY* 692, 696 (1978) (reporting normal sexual behavior among the subject children); Hoeffler, *supra* note 12, at 542 (suggesting a lack of any significant differences between children of lesbian and heterosexual mothers on measures of sex-role behavior); Note, *Avowed Lesbian Mother*, *supra* note 100, at 860-61 (citing several experts who have denounced the theory that gay parents are more likely to raise gay children).

Another issue sometimes raised, particularly with gay men, is that homosexual parents will molest their children. Comment, *Rational Custody*, *supra* note 21, at 880. In fact, 97% of child molesters are heterosexual males. A. MOSES & R. HAWKINS, JR., *supra* note 12, at 200. Thus, this fear, like the fear that gay parents will raise gay children, is a product of homophobic stereotyping rather than fact.

<sup>135</sup> *See, e.g.*, *Irish v. Irish*, 102 Mich. App. 75, 300 N.W.2d 739 (1981) (upholding

This limitation usually prohibits the mother from living with her lesbian lover.<sup>136</sup> Faced with the denial of custody,<sup>137</sup> lesbians may be forced to accept these conditions. Studies show, however, that these restrictions may be contrary to the best interests of the children.<sup>138</sup>

Whether or not lesbian parents are open about their sexual orientation, community prejudice is not an acceptable reason to deny lesbians

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a lesbian mother's visitation rights with the restriction that the mother's lover not stay overnight when the children are present), *cited in* LESBIAN MOTHERS AND THEIR CHILDREN 13 (D. Hitchens & A. Thomas eds. 1983) [hereafter CHILDREN]; London v. London, No. D28246 (Wash. Super. Ct., King County July 1, 1971) (modifying a lesbian mother's visitation rights to include the restriction that she not take the children "anywhere where there are other homosexuals"), *cited in* CHILDREN, *supra*, at 15; *see also* Campbell, *supra* note 110, at 40.

<sup>136</sup> Gould, *supra* note 13, at 155.

Until the mid-1970's, the courts would award a lesbian mother custody of the children with the understanding that she and her lover (and her lover's children) would maintain separate households. In essence the court would simultaneously recognize the lesbian family unit as being in the "best interests of the child," then dismantle the family.

Wolf, *Lesbian Childbirth and Woman-Controlled Conception*, in WOMEN IDENTIFIED WOMEN *supra* note 13, at 186; *see, e.g.*, Mitchell v. Mitchell, No. 240665 (Cal. Super. Ct., Santa Clara County 1972) (conditioning custody by the lesbian mother on her living separately from her partner and never associating with her in the presence of the children); A. v. A., 15 Or. App. 353, 514 P.2d 358 (1973) (homosexual father retained custody of sons as long as no other male lived in the household), *cited in* CHILDREN, *supra* note 135, at 1. *But cf. In re Marriage of Ashling*, 42 Or. App. 47, 599 P.2d 475 (1979) (holding that as long as the mother's sexual practices remained discreet, a restriction prohibiting other lesbians around the children was inappropriate), *cited in* CHILDREN, *supra*, at 3.

<sup>137</sup> *See, e.g.*, Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975). In *Chaffin*, the appellate court placed the children of a lesbian woman with their maternal grandmother. The placement was somewhat ironic because the grandmother had already raised one gay child. The judge affirmed the trial court by saying, "[I]n exercising a choice between homosexual and heterosexual households for the purpose of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interest." *Id.* at 46-47, 119 Cal. Rptr. at 26; *see also* Townend v. Townend, 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. Mar. 14, 1975) (awarding custody to the paternal grandmother, stating the children might be teased by their peers because they lived with a lesbian parent), *cited in* CHILDREN, *supra* note 135, at 23.

<sup>138</sup> Rand, Graham & Rawlings, *supra* note 12, at 28. This study found a positive correlation between psychological health in lesbian mothers and disclosure by the mothers of their sexual orientation to employers, ex-husbands, and children. The study concluded that to the extent parents' psychological health influences their children's adjustment, disclosure is beneficial. *See also* Berkman, *supra* note 114 (suggesting that lesbian mothers who expressed their lesbianism were psychologically healthier than those who did not and that, therefore, expression was in the child's best interests).

the right to parent.<sup>139</sup> Societal reaction, including stigma and peer pressure, is an unfortunate possibility for all minorities. But denying a parent the right to raise her child because of social stigma was an argument considered, and ultimately rejected, by the Supreme Court in *Palmore v. Sidoti*.<sup>140</sup> In *Palmore*, a white mother lost custody of her daughter after she began living with a black man whom she later married. The trial court granted custody to the father to minimize the damaging effect of social stigma on a white child living in a racially mixed household.<sup>141</sup> The Supreme Court unanimously overturned the trial court.<sup>142</sup> Writing for the Court, Chief Justice Burger said, "the law cannot, directly or indirectly, give . . . effect" to other people's "biases" and "prejudices."<sup>143</sup>

Similarly, although children of lesbians may have to cope with prejudice, society's biases should not be a basis for denying second parent adoption. Allowing prejudice to interfere in judicial decisions would perpetuate, rather than combat, the myths and stereotypes surrounding gays and lesbians.<sup>144</sup> On a more practical level, whether or not courts grant second parent adoptions, children would still have to cope with having lesbian parents.<sup>145</sup> The child would benefit more from a court that accepts the lesbian-parented family and provides legal protection than from one that denies a relationship which exists for the child regardless of any legal decision. Finally, as in the case of *In re K.*,<sup>146</sup> separating a child from her parent may be more traumatic than any stigma the child would face because of her mother's lesbianism.<sup>147</sup>

### *B. Lesbian Custody: An Indicator for Second Parent Adoption*

Adoption and child custody have been historically linked through a common judicial standard, the best interests of the child.<sup>148</sup> Therefore, it is useful to examine lesbian custody cases for insight into how judges may apply the best interests standard in second parent adoption cases.

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<sup>139</sup> Comment, *Rational Custody*, *supra* note 21, at 878.

<sup>140</sup> 104 S. Ct. 1879 (1984).

<sup>141</sup> *Palmore v. Sidoti*, 426 So. 2d 34 (Fla. Dist. Ct. App. 1983).

<sup>142</sup> *Palmore*, 104 S. Ct. at 1879.

<sup>143</sup> *Id.* at 1882; *see also infra* note 162.

<sup>144</sup> Note, *In the "Best Interests of the Child" and the Lesbian Mother: A Proposal for Legislative Change in New York*, 48 ALB. L. REV. 1021, 1037-39 (1984) [hereafter Note, *Best Interests*].

<sup>145</sup> *Id.*

<sup>146</sup> *See supra* notes 82-83 and accompanying text.

<sup>147</sup> Note, *Best Interests*, *supra* note 144, at 1037-39.

<sup>148</sup> *See supra* notes 25-30 and accompanying text.

As experts make available more information about lesbian-parented families, women should win or lose custody and adoption battles on the facts of each case, rather than on myths and misconceptions. However, the best interests of the child standard allows judges tremendous discretion.<sup>149</sup> While the standard is purposefully vague to protect parents and children from inflexible rules,<sup>150</sup> it may also encourage biased decisions.<sup>151</sup> Fortunately, more informed judges have recognized that no connection exists between sexual orientation and parenting.<sup>152</sup> In *Nadler v. Superior Court*,<sup>153</sup> a California Court of Appeals first expressed the view that homosexuality per se should not bar a parent's right to custody.<sup>154</sup> Several jurisdictions now agree that lesbianism does not render a parent unfit.<sup>155</sup>

The Massachusetts Supreme Judicial Court, in *Bezio v. Patenaude*,<sup>156</sup> held there must be a nexus between a parent's sexual orientation and some present detriment to the child before the court will deny the parent custody. The court relied on expert testimony stating "there is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, or maladjusted than children raised with a loving couple of mixed sex."<sup>157</sup>

In *Belmont v. Belmont*,<sup>158</sup> petitioner tried to have his children removed from their mother's custody because she was a lesbian living with her female lover. A New Jersey Superior Court denied the petition, stating the father failed to produce any evidence that the children were adversely affected by their mother's sexual orientation. The court

<sup>149</sup> See *supra* note 21 and accompanying text.

<sup>150</sup> Hunter & Polikoff, *supra* note 100, at 693.

<sup>151</sup> *Id.* at 694. "When the issue in question is lesbianism, in a society in which homosexuality is viewed as immoral or unhealthy, the possibilities for abuse are clear." See *infra* note 163.

<sup>152</sup> See *infra* notes 153-62 and accompanying text.

<sup>153</sup> 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

<sup>154</sup> *Id.* at 525, 63 Cal. Rptr. at 354.

<sup>155</sup> See, e.g., *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981) (finding lesbianism does not render a parent unfit absent a showing of harm to the children); *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973) (finding no evidence to show that the parent's homosexual relationship rendered the home unfit); *Doe v. Doe*, 8 FAM. L. REP. (BNA) 2101 (Va. Sup. Ct. Dec. 4, 1981) (declining to hold that a lesbian mother or gay father is per se an unfit parent); see also *infra* notes 156-62 and accompanying text. See generally Gould, *supra* note 13, at 155.

<sup>156</sup> 381 Mass. 563, 410 N.E.2d 1207 (1980), cited in CHILDREN, *supra* note 135, at 4.

<sup>157</sup> *Id.* at 572, 410 N.E.2d at 1215-16.

<sup>158</sup> No. M-1637-74 (N.J. Super. Ct. July 22, 1980), cited in CHILDREN, *supra* note 135, at 3.

also cited expert testimony indicating the children had "proper" sex role identification.<sup>159</sup>

A lesbian mother living with her female partner also won custody of her four children in *Armanini v. Armanini*.<sup>160</sup> The New York judge held that the mother's sexual preference did not in itself make her an unfit parent. Other courts have gone further, saying a mother's sexual orientation is "irrelevant" to her parental capabilities.<sup>161</sup> As one judge recognized, it is "the kind of care, the quality of care, the love, security, affection, and discipline [that] are important" and "if two female homosexuals can give that kind of care, it matters not that they are lesbians."<sup>162</sup>

While decisions granting custody to lesbians are encouraging, they are not the general rule. Many judges have denied lesbians the right to raise their children, holding that a mother's lesbianism is contrary to the best interests of her children.<sup>163</sup> These cases indicate judges are

<sup>159</sup> See *id.*

<sup>160</sup> 5 FAM. L. REP. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979), *cited in* CHILDREN, *supra* note 135, at 2. Five years earlier both partners of a lesbian relationship won the right to establish a joint household for their six children. *Isaacson v. Isaacson*, No. D-36867 (Wash. Super. Ct. Sept. 3, 1974), *cited in* CHILDREN, *supra*, at 20-21; *Schuster v. Schuster*, No. D-36868 (Wash. Super. Ct. Sept. 3, 1974), *cited in* CHILDREN, *supra*, at 20-21.

<sup>161</sup> See, e.g., *Driber v. Driber*, No. 220748 (Wash. Super. Ct. Sept. 17, 1973) (granting custody to one mother after a hearing in which the judge noted the stability of the lesbian relationship), *cited in* CHILDREN, *supra* note 135, at 7-8; see also *Hunter & Polikoff*, *supra* note 100, at 698. *But cf.* *Koop v. Koop*, No. 221097 (Wash. Super. Ct. Sept. 17, 1973) (denying custody to the other mother of the lesbian relationship), *cited in* CHILDREN, *supra*, at 8.

One court even awarded permanent custody to the lesbian partner of a deceased mother. *In re Hatzopoulos*, 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977, *rel.* Nov. 15, 1977), *cited in* CHILDREN, *supra*, at 11.

<sup>162</sup> *Smith v. Smith*, 5 FAM. L. REP. (BNA) 2450, 2451 (Mich. Cir. Ct. Mar. 12, 1979). One judge disagreed with the charge that children living with their lesbian mother would be psychologically injured by community intolerance.

It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

*M.P. v. S.P.*, 169 N.J. Super. 425, 438, 404 A.2d 1256, 1263 (Super Ct. App. Div. 1979).

<sup>163</sup> See, e.g., *Chaffin v. Frye*, 45 Cal. App. 3d 39, 46-47, 119 Cal. Rptr. 22, 26 (1975) (discussed *supra* note 137); *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980) (affirming a trial court's order to remove custody from a lesbian mother, saying

misinformed about the ability of gays and lesbians to parent. Despite increased information concerning the psychological health of lesbians — individually, in couples, and as parents — misconceptions and prejudice persist. Evidence shows that lesbians and heterosexual women are more alike than they are different.<sup>164</sup> Nevertheless, lesbian-parented families face discrimination from the general public and the courts. Advocates for lesbian-parented families must counter judicial homophobia with thorough, well-documented facts. A significant minority of the adult population is homosexual.<sup>165</sup> Gays and lesbians come from all racial, religious, class, and educational backgrounds.<sup>166</sup> Many have children.<sup>167</sup> Often lesbians raise their children with the help of partners.<sup>168</sup> These couples can be stable, capable parents.<sup>169</sup>

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that a court need not wait until actual damage is done to remove a child from an unwholesome environment), *cited in* CHILDREN, *supra* note 135, at 18; *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976) (awarding custody to the father, stating a home in which there is a lesbian relationship is not in the children's best interests), *cited in* CHILDREN, *supra*, at 11; *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (1979) (upholding a change of custody because, although the lesbian mother was loving and capable, the court did not feel the mother and her partner could raise a child well), *cited in* CHILDREN, *supra*, at 18; *Jacobson v. Jacobson*, 8 FAM. L. REP. (BNA) 2155 (N.D. Sup. Ct. Dec. 30, 1981) (setting aside the trial court's award of custody because the mother's lesbian relationship was not in the children's best interests), *cited in* CHILDREN, *supra*, at 14; *Townend v. Townend*, 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. March 14, 1975) (finding the mother unfit because she was living with another woman in a lesbian relationship), *cited in* CHILDREN, *supra*, at 23; *O'Harra v. O'Harra*, No. 73-384 E (Or. Cir. Ct. June 18, 1984), *aff'd*, 20 Or. App. 201, 530 P.2d 877 (1975) (denying a lesbian mother custody of her three sons).

<sup>164</sup> "[M]any lesbians are mothers, and they are raising their children well, or raising them poorly or raising them indifferently, just as their heterosexual counterparts do." D. MARTIN & P. LYON, *LESBIAN/WOMAN* 131 (1972). Many researchers believe heterosexual and homosexual couples are very similar. "Human beings enter into intimate relationships to fulfill certain needs like compatibility, rapport, love, intimacy, security, commitment, self-respect, self-esteem and self-actualization . . . . The model or reference for long-term gay relationships seem[s] to be a monogamous dyadic one." D. TANNER, *THE LESBIAN COUPLE* 77-78 (1978); *see also supra* notes 119-22 and accompanying text.

<sup>165</sup> Hunter & Polikoff, *supra* note 100, at 725; *see supra* note 76 and accompanying text; *see also* A. KINSEY, *supra* note 114; A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); J. MARMOR, *HOMOSEXUAL BEHAVIOR* 7 (1980).

<sup>166</sup> Hunter & Polikoff, *supra* note 100, at 725.

<sup>167</sup> *See supra* notes 12, 77 & 101 and accompanying text.

<sup>168</sup> *See supra* notes 78 & 104 and accompanying text.

<sup>169</sup> *See supra* notes 120-34 and accompanying text.

### C. *Second Parent Adoption: The Next Step in Adoption Law*

Most adoption statutes provide that upon adoption the natural parents are "relieved of" all parental duties and responsibilities.<sup>170</sup> But, although this language appears to require mandatory termination of the natural parents' rights, the statute's underlying purpose is determinative.<sup>171</sup> From its inception, the purpose of American adoption law has been to promote the welfare of children.<sup>172</sup> Thus, judges should allow second parent adoptions that are in the child's best interests.<sup>173</sup>

The best interests of the child standard is purposely flexible to meet the variety of custody and adoption cases.<sup>174</sup> Second parent adoption is but another variation in the adoption law scheme. It is a vehicle for judges to protect children in nonmarital families.

Judges should not allow their own biases or misconceptions about

<sup>170</sup> See, e.g., CAL. CIV. CODE § 229 (West 1982).

<sup>171</sup> See, e.g., *In re Jessica W.*, 122 N.H. 1080, 1083, 453 A.2d 1297, 1300 (1982) ("We conclude that interpreting [the adoption statute] liberally, in order to permit adoptions of this nature to take place, is in accordance with the legislative intent to protect, not injure, adopted children such as Jessica.").

<sup>172</sup> See *supra* notes 22-30 and accompanying text.

<sup>173</sup> Although judges should construe adoption statutes to promote the welfare of children, the best interests of the child determination often comes under biased scrutiny. This is particularly a problem when the parents are gay or lesbian. Regardless of the many studies that attest to the health and happiness of lesbian-parented families, some judges cling to homophobic misconceptions. Thus, to protect the integrity of adoption determinations and the welfare of the children, this Comment alternatively proposes a legislative amendment to the Model State Adoption Act.

No amendment can or should deprive judges of their discretion in adoption proceedings. The best interests determination must remain open-ended to protect parents and children from inflexible rules. However, this proposed amendment would ensure that judges do not beg the second parent adoption question for lack of legislative authority. Therefore, in addition to the stepparent adoption exception to the requirement that the natural parent relinquish her rights and responsibilities upon adoption of her child, the Model Act should read:

#### Section 26(1) Second Parent Adoptions

Any person may, according to the provisions of this Act, adopt his or her nonmarital partner's child, without requiring the existing legal parent to relinquish his or her rights and responsibilities, except that:

- (a) Before the filing of the petition for adoption, the adoptee must have resided for a period of one (1) year with petitioner, unless this filing provision is waived by the court for good cause shown;
- (b) No investigation under Section 17 shall occur unless otherwise directed by the court; and
- (c) No report of fees and charges under Section 21 shall be made unless ordered by the court.

<sup>174</sup> See *supra* note 21 and accompanying text.

lesbian relationships or other nonmarital arrangements to interfere with what is best for the child. Lesbian couples with children want to protect them by providing two legal parents. Psychological studies and lesbian custody cases strongly suggest that lesbian parents raise healthy, well-adjusted children. Since children raised by lesbian couples relate to both adults as parents, they should be protected by each.

### CONCLUSION

The adoption context has expanded dramatically since 1851. But although the notion of second parent adoption may not have occurred to legislators in the mid-nineteenth century, the underlying purpose of adoption statutes has not changed. Courts must still act with the best interests of the child in mind.

Judges have an opportunity to use their discretion to provide a legal second parent for the millions of children that live in lesbian-parented families.<sup>175</sup> In a second parent adoption case, the court is not considering whether to place a child in a lesbian home environment. The child already lives with lesbian parents. Rather, the court must evaluate whether the child will benefit by having two legal parents. If so, the court can and should grant the second parent adoption.

When a lesbian couple chooses to have a child, both women act as the child's parents. The child is thus advantaged, not disadvantaged.<sup>176</sup> In these cases judges should formalize the relationship between the child and her second parent. Lesbians have and will continue to have children. Second parent adoption would not encourage homosexuality, nor would it encourage parenting by homosexuals. Its purpose is to provide for the best interests of the children by legally recognizing their second parent.

*Elizabeth Zuckerman*

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<sup>175</sup> See *supra* note 101.

<sup>176</sup> See OUR RIGHT TO LOVE 75 (G. Vida ed. 1978):

People always approach this subject [lesbian parenting] in terms of what are the problems, but there are some wonderful advantages — especially when two lesbians are living together and doing the parenting. There's another warm, loving adult in the household who emotionally is much more available to [the child] than most men would be, given the way they've been socialized and given the way they've been taught to relate to children.

