

Second Parent Adoption: *When Crossing the Marital Barrier Is in a Child's Best Interests*

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INTRODUCTION

Lately I have noticed that many of my heterosexual friends who are in long-term relationships are seriously considering marriage. When I ask them why, the most common answer is that they are thinking of having children. These people share the belief that through marriage they would be able to offer their children the highest degree of legal and societal protection. Under the current state of the law, this is true. When two people decide to have a child together and want to provide that child with the maximum amount of legal security that two parents can offer, then marriage is the answer. This is also true when a person who already has a child wants to share ongoing childcare and child rearing with another adult. In such cases, the child is best protected if the adults marry and the new spouse adopts the child through stepparent adoption. When the adults are lesbian or gay, or otherwise legally unable or unwilling to marry, however, the question becomes one of how to ensure this protection. Another alternative is needed. Second parent adoption provides such an alternative.

The phrase "second parent adoption" was first coined in legal literature in a Comment written by Elizabeth Zuckerman in the *University of California, Davis Law Review* in 1986.¹ In her article, Zuckerman defines second parent adoption as the desirable legal outcome to the situation which arises when "nonmarital cohabitants share parenting duties"² yet

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¹ Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986) (Comment).

² *Id.* at 741.

only one of the partners is the legal parent³ of the child. As with a step-parent adoption,⁴ the legal parent in a second parent adoption consents to the child's adoption by a coparent without having to relinquish any rights toward the child him or herself. But since only the legal spouse of a parent may become a stepparent,⁵ the need for second parent adoption arises when coparents are legally unable or unwilling to marry.

Second parent adoption is particularly important for individuals who are the sole legal parent of their child, yet are involved in a non-marital relationship with a person who is coparenting the child as well. If the parties are either unwilling or legally unable to marry and want to share the legal responsibility of parenting, the legal parent is left with one of two choices: having his or her child adopted by the coparent, which requires termination of the legal parent's own parental rights,⁶ or raising the child without the legal protections of a second parent. Where there is a person who has assumed the role of coparent to the child and that person and the legal parent cannot marry, second parent adoption extends the protections and benefits of stepparent adoption outside of marriage. In such cases, the legal parent seeks recognition of an ongoing familial situation by asking that the child receive the benefits of having two legal parents. Because it is clearly desirable to provide a child with two legal parents when all the parties involved so desire and the option exists, this Article is primarily concerned with second parent adoptions which seek to legitimate existing family relationships.

Since legally competent heterosexual couples have the option of marrying and petitioning for stepparent adoption, second parent adoption is of special significance for those who are legally denied the right to marry, a large subgroup of which are lesbian and gay couples.⁷ As of 1976, in California alone there were an estimated 300-400,000 lesbian and gay parents,⁸ many of whom were the sole legal parent of their child.

³ In this Article, the terms legal parent, natural parent and parent will be used interchangeably, as will the terms "psychological parent" and "coparent." Also, for purposes of clarity, "child" will be used with the understanding that all examples may apply equally to situations involving more than one child.

⁴ Black's Law Dictionary defines "stepparent" without regard to marital relationship: "The mother or father of a child born during a previous marriage of the other parent and hence, not the natural parent of such child." BLACK'S LAW DICTIONARY 1268 (5th ed. 1979). However, "stepfather" and "stepmother" are defined as the "husband[/wife] of one's mother[/father] by virtue of a marriage subsequent to that of which the person spoken is the offspring." *Id.*

⁵ *E.g.*, Marckwardt v. Superior Ct. for County of L.A., 150 Cal. App. 3d 471, 478; 198 Cal. Rptr. 41, 46 (1984).

For support of its propositions, this Article focuses on the law of those states which have granted second parent adoptions (Alaska, California and Oregon), giving primary emphasis to California law. However, the method of analysis posited by this Article may be applied to any state.

⁶ See *infra* text accompanying notes 106-149 for a discussion of statutes requiring termination of legal parent's rights upon the adoption of his or her child by another.

⁷ Lesbian and gay couples are legally denied the right to marry. SEXUAL ORIENTATION AND THE LAW § 3.04[1] (R. Achtenberg ed. 1987).

⁸ R. ACHTENBERG, LESBIAN AND GAY PARENTING: A PSYCHOLOGICAL AND LEGAL PER-

Many of these parents choose to raise their children with a same-sex partner who is a coparent to the child both psychologically and financially. Since a gay man or lesbian who is a coparent to his or her partner's child is unable to become a stepparent through marriage, he or she cannot take the additional step of becoming a legal parent to that child through stepparent adoption. This is true no matter how significant a parental role the coparent plays in the child's life. The benefits and protection of the legal relationship, which are recognized during the marriage of a parent and stepparent and which continue after a marriage's dissolution, are thereby denied lesbian and gay coparents and the children they have reared as their own.

The fact that a child may already have two legal parents does not necessarily obviate the need for a second parent adoption. As with a stepparent adoption, a noncustodial parent may agree to his or her child's adoption by the custodial parent's partner.⁹ Furthermore, certain situations may even call for the status of parent to be granted to a person who has been a coparent along with both of a child's natural parents.¹⁰ Without the consent of both natural parents and a finding that the adoption would be in the child's best interests, however, a second parent adoption would not be granted in either situation.

To date, several second parent adoptions have been granted in the United States. They have occurred in situations where the adopting coparent was the child's natural parent,¹¹ a heterosexual partner of the parent,¹² and a same-sex partner of the parent.¹³ One of these cases involved an adoption of a child by the mother's female partner wherein both the legal mother and father of the child were allowed to retain their parental rights.¹⁴

This Article will present a general outline of those factors which may be important to bringing a successful claim for second parent adoption. By reviewing the development of the statutory and case law gov-

SPECTIVE 1 (1987) (available from the Lesbian Rights Project, 1370 Mission Street, Fourth Floor, San Francisco, California 94102).

⁹ Acknowledging that the severance of the legal ties between a child and noncustodial parent may raise legitimate concerns as to what is best for a child, this Article does not unconditionally advocate the severance of one legal relationship merely to replace it with another. The controlling factor in all cases should be what is best for the child.

¹⁰ See *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985). See *infra* discussion accompanying notes 236-243.

¹¹ *E.g.*, *In re Jessica W.*, 122 N.H. 1052, 453 A.2d 1297 (1982); *In re A.J.J.*, Infant, 108 Misc. 2d 657, 438 N.Y.S.2d 444 (1981); *In re Adoption by A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (1977).

¹² *E.g.*, *In re Adopting Parent*, No. A-10169 (Cal. Super. Ct., Riverside County Apr. 25, 1985); *In re D.J.L.*, No. A-28345 (Cal. Super. Ct., San Diego County Apr. 17, 1984).

¹³ *E.g.*, *In re Adoption Petition of N.*, No. 18086 (Cal. Super. Ct., San Francisco County filed Mar. 11, 1986); *In re Adoption of a Minor Child*, No. 1-JU-86-73 (Alaska Super. Ct. Feb. 6, 1987); *In re Adoption of M.M.S.A.*, No. D-8503-61930 (Or. Cir. Ct., Multnomah County Sept. 4, 1985).

¹⁴ *In re Adoption of A.O.L.*, (No. 1-JU-85-25).

erning adoption in states which have granted second parent adoptions, as well as the legal arguments successfully presented by the petitioners in several of these cases, this Article will identify some of the crucial issues which may arise in a court hearing on a petition for second parent adoption.

The first Part examines the policy behind any adoption: protecting the best interests of the child. Through a review of the literature which establishes judicial guidelines for determining what is best for a child, this Part demonstrates that in some situations second parent adoption may be the sole alternative for protecting a child's interests. It also looks at determining a child's best interests when a parent is lesbian or gay.

The second Part of the Article examines the type of adoption statutes under which successful claims for second parent adoption have been brought. It reviews statutory policy as well as statutory and case law, suggesting the types of provisions and supporting law which are most favorable or most troublesome to a claim for second parent adoption.

The third Part addresses the jurisdictional concerns surrounding the resolution of issues of custody, visitation and support which may arise once a second parent adoption has been granted.

Finally, the Article analyzes some successful second parent adoption claims, including legal strategies used by the petitioning parties and factors considered by the courts in rendering their decisions.

I. THE PURPOSE OF THE ADOPTION STATUTES

From its inception, the purpose of American adoption law has been to promote children's welfare.¹⁵ To effectuate this purpose, adoption statutes have two basic requirements which must be satisfied before a child may be adopted: 1) the legal parent or guardian of the child must formally consent to the child's adoption,¹⁶ and 2) a finding must be made by the court that such an adoption will be in the child's best interests.¹⁷

A. Consent

The consent provisions of the adoption statutes make consent by a child's parent(s) or legal guardian a jurisdictional prerequisite to adoption. Unless certain statutory exceptions apply, a child may not be adopted without at least one legal parent's consent.¹⁸ Consent provisions

¹⁵ See Zuckerman, *supra* note 1, at 736 n.24.

¹⁶ *E.g.*, CAL. CIV. CODE § 224 (West 1982); ALASKA STAT. § 25.23.040 (1983); OR. REV. STAT. § 109.312 (1987).

¹⁷ *E.g.*, CAL. CIV. CODE § 227 (West Supp. 1987); ALASKA STAT. § 25.23.120(c) (1983).

¹⁸ The California Civil Code provides that the only circumstances under which a child may be adopted without the consent of a legal parent are:

1. When the father or mother has been judicially deprived of the custody and control

protect the legal rights of parents by ensuring that their child is not adopted without their knowing and voluntary agreement. These provisions also protect the child by ensuring that once willingly placed in an adoptive home, he or she will not be removed because the adoption took place without the natural parent or parents' knowledge.¹⁹

In an independent adoption, the legal parent(s) of a child choose the party by whom they wish their child to be adopted. The child may not be adopted unless the parent(s) have designated a specific adoptive parent or parents and have consented to the adoption by such person(s).²⁰ Once the parent(s) have consented to the adoption, the court must decide whether the petition should be granted. If the court determines that the adoption would not be in the child's best interests, the legal parent or parents retain their full legal rights to the child unless and until they designate and consent to another party's adoption of the child and that adoption is granted by the court.²¹

Similarly, in a stepparent adoption, the legal parent or parents of the child must consent to the child's adoption by the stepparent.²² In such an adoption, the sole or custodial parent of the child desires to create a legally binding status out of an already existing stepparent-child relationship. A state agency responsible for reviewing adoption petitions must ordinarily interview²³ and investigate potential adoptive parents and submit recommendations to the court.²⁴ However, no home study is required in cases of stepparent adoption unless requested *sua sponte* by the court or by an interested third party.²⁵ If parental consent by either a

of the child . . . [or has] voluntarily surrendered his right to the custody and control of the child. . . .

2. Where the father or mother of any child has deserted the child without provision for its identification.

3. Where the father or mother has relinquished the child for adoption [to an adoption agency] as provided in Section 224m

CAL. CIV. CODE § 224 (West 1982). See also ALASKA STAT. § 25.23.050 (1983 & Supp. 1987); OR. REV. STAT. § 109.312 (1987).

This Article does not address those adoptions which occur after a child has been relinquished to an adoption agency or in which parental rights have been terminated.

¹⁹ See, e.g., OR. REV. STAT. § 109.381 (1987) (providing that "[a]fter the expiration of one year from the entry of a decree of adoption in this state the validity of the adoption shall be binding on all persons.") Oregon case law clearly states that the purpose of this law is to preclude the possibility of a "drastic interruption" of the adoptive home after a child has acquired a new status "both in fact and in law." *Campbell v. Kindred*, 26 Or. App. 771, 772, 554 P.2d 599, 600 (1976).

²⁰ E.g., *Adoption of Driscoll*, 269 Cal. App. 2d 735, 739, 75 Cal. Rptr. 382, 385 (1969).

²¹ *Id.* at 738, 75 Cal. Rptr. at 385.

²² For example, section 226.9 of the California Civil Code provides in part:

[I]n case of an adoption of a child by a stepparent where one natural or adoptive parent retains his or her custody and control of the child, the consent of either or both parents must be signed in the presence of a county clerk, probation officer, or county welfare department staff member of any county of this state.

CAL. CIV. CODE § 226.9 (West Supp. 1987).

²³ E.g., CAL. CIV. CODE § 226.5 (West Supp. 1987).

²⁴ E.g., CAL. CIV. CODE § 226.6 (West Supp. 1987).

²⁵ E.g., CAL. CIV. CODE § 227a (West Supp. 1987).

sole or both legal parents is not given to the adoption, the stepparent will not ordinarily be granted legal parental rights.²⁶

B. Best Interests

Once it has been established that a parent has willingly consented to the adoption of his or her child, a second requirement must be met before the adoption can be granted.²⁷ As noted by Zuckerman, "[t]he 'best interests of the child' standard is the 'hallmark of American adoption.'"²⁸ Originally applied in child custody disputes,²⁹ this standard has now been codified in the adoption statutes of many states.³⁰ It requires that, prior to creating a legal relationship where none had previously existed, the court must determine whether the adoption will be in the child's "best interests."

Where the best interests standard prevails, its satisfaction must be the court's sole or paramount concern.³¹ Although some states have attempted to establish statutory criteria which may aid courts in determining the child's best interests,³² these criteria are not comprehensive. Moreover, the discretion granted to the courts ultimately leaves the term

²⁶ In some instances, the court may use its discretion to dispense with the consent of a non-custodial parent. For example, when a non-custodial parent willfully fails to support and communicate with his or her child for a period of at least one year. *See, e.g., In re Murray*, 86 Cal. App. 3d 222, 150 Cal. Rptr. 58 (1978) (consent of father who willfully failed to support but had not failed to communicate with children was required for stepparent adoption). However, section 226.9 of the California Civil Code requires that at least one parent's consent to the adoption must be obtained. CAL. CIV. CODE § 226.9 (West Supp. 1987).

²⁷ *See, e.g., CAL. CIV. CODE § 227(a)* (West Supp. 1987); ALASKA STAT. § 25.23.120(c) (1983).

Other statutes may be more specific in their requirements. For example, Oregon's statute provides that a court may grant an adoption only if it is "satisfied as to the identity and relations of the persons, that the petitioner is of sufficient ability to bring up the child and furnish suitable nurture and education . . . and that it is fit and proper that such adoption be effected." OR. REV. STAT. § 109.350 (1983).

²⁸ Zuckerman, *supra* note 1, at 735 (citing Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 177 (1983-84)).

²⁹ *Id.* at 736.

³⁰ *E.g., CAL. CIV. CODE § 227* (West Supp. 1987); ALASKA STAT. § 25.23.120(c) (1983).

³¹ The doctrine that the "overriding concern in adoption cases is 'the best interest of the child'" is well grounded in California adoption case law. *Adoption of Michelle T.*, 44 Cal. App. 3d 699, 704, 117 Cal. Rptr. 856, 858 (1975) (citing CAL. CIV. CODE § 227). The welfare of the child is not merely a requirement which must be satisfied before an adoption may be granted, it is the court's sole governing factor in adoption proceedings. *See, e.g., Reeves v. Bailey*, 53 Cal. App. 3d 1019, 1022, 126 Cal. Rptr. 51, 54 (1975); *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985) ("The paramount concern in any custody determination is 'what appears to be for the best interests of the child.'") (footnote omitted) (citing *Carle v. Carle*, 503 P.2d 1050, 1055 (Alaska 1972)).

If a court fails to consider the best interests of the child in determining whether to grant an adoption, its decision may be reversed on appeal or remanded back to the lower court for further findings. *See, e.g., Adoption of Michelle T.*, 44 Cal. App. 3d 699, 117 Cal. Rptr. 84 (court of appeal reversed lower court and granted adoption, finding that the lower court had abused its discretion by denying an adoption petition solely because of the advanced age of the petitioners); *Adoption of Jason R.*, 88 Cal. App. 3d 11, 151 Cal. Rptr. 501 (1979) (stepfather's suit to set aside an adoption was remanded back to the trial court due to the lower court's failure to take the best interests of the child into account in making its determination).

³² *See, e.g., section 4608 of the California Civil Code* which states:

largely undefined. Accordingly, the decision of what is best for a child is left for trial court judges to decide on a case-by-case basis. In each case the crucial question arises: what is in the best interests of a child and how should those interests be determined?

In the 1970s, the groundbreaking book *Beyond the Best Interests of the Child*³³ was published. The authors, experts in the fields of law³⁴ and child psychology,³⁵ found that the child placement laws of the time reflected an ignorance about the psychological and emotional needs of children. This ignorance led to judicial custody determinations which were not in the best interests of the children concerned and often ran directly contrary to those interests.

In response to this legislative and judicial lack of knowledge and the resulting state of affairs, the authors of *Beyond the Best Interests of the Child* provided a set of guidelines to be used by courts and others involved in child placement and custody determinations.³⁶ Since the book's publication, these guidelines have been adopted by courts to aid them in making best interests determinations with regard to child placement and welfare.³⁷

A major consideration in any legal decision concerning the placement of a child is whether that placement safeguards the child's need for continuity of relationships.³⁸ The two fundamental requirements for a child's healthy growth are continuity and consistency. "Continuity of

§ 4608. Best interest of child; considerations

In making a determination of the best interest of the child in any proceeding under this title, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse against the child. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against the child" means child abuse as defined in subdivision (g) of Section 11165 of the Penal Code.

(c) The nature and amount of contact with both parents.

CAL. CIV. CODE § 4608 (West Supp. 1988).

³³ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979) [hereinafter *BEYOND THE BEST INTERESTS*].

³⁴ Joseph Goldstein, Professor of Law, Science and Social Policy at Yale University Law School.

³⁵ Anna Freud, Director of Hampstead Child-Therapy Clinic, and Albert J. Solnit, Professor of Pediatrics and Psychiatry at Yale University, and Director of the Yale University Child Studies Center.

³⁶ See *BEYOND THE BEST INTERESTS*, *supra* note 33, at 31, 40, 49. The guidelines established by the authors are that placement decisions: (1) "should safeguard the child's need for continuity of relationships," (2) "should reflect the child's, not the adult's, sense of time," and (3) "must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions."

³⁷ See, e.g., *In re B.G.*, 11 Cal. 3d 679, 692 n.18, 523 P.2d 244, 253, 114 Cal. Rptr. 444, 453 (1974); *In re Adoption of S., D. and D.*, 22 Or. App. 304, 538 P.2d 947 (1975). See also *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982) (case applies the concept of psychological parenthood, but does not cite *BEYOND THE BEST INTERESTS*, *supra* note 33).

³⁸ *BEYOND THE BEST INTERESTS*, *supra* note 33, at 31.

relationships, surroundings, and environmental influence are *essential* for a child's normal development."³⁹

As a child grows, a myriad of physical, emotional, intellectual, social and moral changes occur which inevitably create inner turmoil.⁴⁰ A child's normal emotional development and positive sense of self will continue only if these inner changes and their ensuing difficulties are "offset by stability and uninterrupted support from external sources."⁴¹ If this stability is lacking, the child may be severely affected.⁴² Accordingly, a strong external support system in the form of one or more consistent and reliable adult figures is necessary for the healthy growth and development of any child.

A child's ability to develop a strong emotional attachment to an adult does not rely on the existence of a biological relationship. As stated in *Beyond the Best Interests of the Child*:

Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development⁴³

. . . .
 . . . [F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "*psychological*" parent in whose care the child can feel valued and "wanted."⁴⁴

The child's feeling of being loved, valued and wanted is created by a consistent and dependable tie with an adult, and does not exist only by virtue of a blood relationship. "The role [of psychological parent] can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult"⁴⁵

The psychological parent-child relationship, far from depending on a biological tie, may even flourish outside of the confines of the traditional nuclear family. Neither the number of adults or children in a family unit nor their legal relationship to one another are determinative of the development of an emotional and psychological bond between a child

³⁹ *Id.* at 31-32 (emphasis added).

⁴⁰ *Id.* at 32.

⁴¹ *Id.*

⁴² Research on the development of a psychological parent-child relationship shows that this tie does not form quickly or easily. It requires day-to-day interaction, consistency, stability and love. Once this attachment between child and adult has formed, however, it takes on a primary importance in the child's life, and any threat to this emotional security may have a drastic effect on the child's progress and growth. The consequences of such a threat may range from eating problems, sleeping difficulties and crying in infants, to separation anxiety in toddlers, and breakdowns and regression in speech, learning ability, social behavior and respect for self and others in the young child and adolescent. *Id.* at 32-34.

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 17 (emphasis added).

⁴⁵ *Id.* at 19.

and an adult. The crucial factor is to provide the child with the "opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his [or her] psychological parent."⁴⁶

Professor of Psychology Diane Ehrensaft conducted a study on the effects of shared parenting in households where the mother and father played virtually equal roles in the caretaking and upbringing of their children. The results of this study form the basis of her book *Parenting Together: Men and Women Sharing the Care of their Children*.⁴⁷ Her research found not only that men are equally capable of "mothering" children;⁴⁸ but that the children raised in these households are able to bond psychologically to both parenting figures.

In the chapter entitled "The Child with Two Mothers" Professor Ehrensaft refutes claims that "children raised by more than one mothering figure . . . will be confused by the diffusion of early mothering tasks between mother and other."⁴⁹ In fact, her findings show that "clinical observation and parent reports reveal no such untoward outcomes in children raised by both a mother and father—or, for that matter, by *any* two mothering figures."⁵⁰ Furthermore, other studies show that children are not limited to developing a psychological relationship with only one parental figure, but are "capable of sustaining attachments to at least two, if not three, significant others in their early life, as long as those people are salient figures in their care."⁵¹

Importantly, this research also shows that where the love and care necessary to the development of the psychological parent-child relationship exist, the gender of the person providing that care is irrelevant. Accordingly, a child who is raised by two psychological parents providing continuous and consistent support will bond to both of those parents, regardless of whether they are male and female, female and female, or male and male.

The legal relationship (or lack thereof) between the adult and child is equally irrelevant to determining whether a psychological parent-child

⁴⁶ *Id.* at 53.

⁴⁷ D. EHRENSAFT, *PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN* (1987).

⁴⁸ *Id.* at 11. Ehrensaft defines "mothering" as "the social and psychological acts that are done by the primary caretaker, regardless of the gender of the person doing them." *Id.* at 9. In response to the question "Can a man mother?" Ehrensaft responds: "We have already been provided with enough data to say, 'Yes, he certainly can. In fact, any human being who can provide psychological and physical nurturing and respond appropriately to a child's signals can "mother".'" *Id.* at 11.

⁴⁹ *Id.* at 187.

⁵⁰ *Id.*

⁵¹ *Id.* at 186. Ehrensaft cites the following studies as support: Schaffer & Emerson, *The Development of Social Attachments in Infancy*, 29 MONOGRAPHS OF SOC. RES. IN CHILD DEV. No. 3, 1-77; H.R. SCHAFFER, *MOTHERING* (1977); Irvine, *Children in Kibbutzim: Thirteen Years Later*, 7 J. OF CHILD PSYCHOLOGY AND PSYCHIATRY 167 (1966). *Id.* at 264 n.5.

relationship exists. The authors of *Beyond the Best Interests of the Child* use the term "common-law adoptive parent" to describe "those psychological parent-child relationships which develop outside of either placement by formal adoption or by the initial assignment of a child to his biological parents."⁵² According to the authors, such relationships may develop "when a parent, without resort to any legal process, leaves his or her child with a friend or relative for an extended period of time"⁵³ or when a child is living with foster parents.⁵⁴ In such a situation, although no legal or biological relationship exists, the adult and child develop a strong emotional tie and "all the psychological elements implied in a parent-child relationship are present and functioning effectively."⁵⁵

Since a child is able to bond to more than one psychological parent at a time, he or she may develop a psychological parent-child relationship with an unrelated adult *and* a legal parent if the legal parent includes this other adult in the continual care of the child. When this bond is formed between the child of a sole legal parent and a psychological parent, it may be necessary to legally recognize this relationship in order to permanently protect the best interests of the child.

This, in essence, is the situation with which second parent adoption is concerned. There is no question whether a psychological parent-child relationship has formed, for it clearly has. The only question is how to protect this crucial relationship in the event of the death or legal incompetency of the sole legal parent, or in the event of a split between the two adults. For it is events such as these which pose the greatest threat to a child's relationship with the important adult figures in his or her life who do not have the legal status of "parent."

1. Continuity in the Event of a Family Breakup

Maintaining continuity is crucial when the status of the relationship between a child's psychological parents changes. Custody laws may recognize the importance of continuity of care by mandating a preference for joint custody between parents whenever possible.⁵⁶ However, in a family unit where the child is being raised by both a legal parent and a psychological parent, there is no legal protection of the psychological parent's relationship with the child. Should an estrangement occur

⁵² BEYOND THE BEST INTERESTS, *supra* note 33, at 27. Although the authors use the term "common-law adoptive parent" and urge that these types of relationships receive legal recognition, they acknowledge that the term is not currently being used in law. *Id.* at 26-27.

⁵³ *Id.* at 27.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ For example, California Civil Code section 4600(b)(1) provides that custody should be awarded in the following order of preference according to the best interests of the child: "To both parents jointly . . . or to either parent." CAL. CIV. CODE § 4600(b)(1) (West Supp. 1988).

between the two parents, the child is assured of a continuing relationship with his or her legal parent, but no law guarantees ongoing contact with the other primary adult in his or her life. A second parent adoption by a psychological parent would ensure legal recognition of the relationship between that parent and child, and thereby allow for continuous, ongoing contact with both parents.

In addition, when a family unit disintegrates, valid concerns may arise as to the continued financial support and inheritance rights of the child. In deciding how to best protect a child's interests, future support and inheritance are important factors that a court should consider.

When a child is raised by two parents (whether or not they live together), there will usually be an arrangement whereby both parties contribute towards the child's well-being. One parent may stay home to take care of the child while the other works to support the family, or both parents may work and combine their incomes. In the event the parents part, the child's accustomed way of life can be subject to drastic changes.

The magnitude of the alteration which occurs, however, may depend in part on whether the parents are both legal parents. As will be shown, many statutory provisions require the legal parent of a child to be responsible for the child's support, maintenance and education.⁵⁷ Upon adoption by a psychological parent, the child becomes the legal responsibility of that parent as well. Therefore, a second parent would become legally obligated to support and maintain the child, regardless of the status of the relationship between the parents. In addition, in some states only the legal child of a person is able to inherit through intestate succession⁵⁸ or through bequest to "lawful issue."⁵⁹ Furthermore, if, due to a breakup, the legal parent is forced to apply for welfare in order to provide for the child, some states have laws that require the non-custodial legal parent to reimburse the state via support payments.⁶⁰ These laws, however, cannot be applied unless there is a legal second parent.

2. Death or Incapacity of the Sole Legal Parent

The maintenance of a continuous relationship between a child and a stable, familiar, adult figure is crucial in the event of the death or incapacity of a child's legal parent. Second parent adoption ensures that if a sole legal parent dies, becomes incapacitated or unable to make decisions concerning the child's welfare, the child's psychological parent has the continuing right to act with parental authority. This assurance cannot be

⁵⁷ For further discussion of the statutory obligation of support, see text accompanying notes 165-191.

⁵⁸ See, e.g., *In re Adoption by A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (1977).

⁵⁹ See, e.g., *id.* at 545, 378 A.2d at 89.

⁶⁰ See, e.g., CAL. CIV. CODE § 248 (West 1982).

guaranteed by any other legal relationship between the child and psychological parent, including that of de facto parent or legal guardianship.

a. De Facto Parenthood

Some states, such as California, recognize the status of de facto parenthood by granting a concerned party who is not the legal parent of a child standing to participate in various proceedings regarding the child's welfare.⁶¹ The California Supreme Court has used the term "de facto parent" to refer to "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."⁶² This term has been used interchangeably with the term "psychological parent" by California courts.⁶³

Furthermore, the California Supreme Court has recognized the interest of a de facto parent in "the companionship, care, custody and management of the child"⁶⁴ as a "substantial one"⁶⁵ as well as noting that de facto parenthood has statutory sanction. Section 4600 of the California Civil Code provides that "when an award of custody to the parent would be detrimental next in order of preference stands 'the person or persons in whose home the child has been living in a wholesome and stable environment.'"⁶⁶ Since section 4600 governs "any proceeding where there is at issue the custody of a minor child,"⁶⁷ the status of de facto parent entitles one to be a party in at least eight separate proceedings in California.⁶⁸

The California courts have also recognized that the development of a de facto or psychological parent-child relationship does not necessarily depend on the existence of permanent cohabitation. In a 1983 case, a California appellate court explicitly held that full-time residency is not an absolute requirement for a finding of psychological parenthood.⁶⁹ The case, *Guardianship of Phillip B.*, involved a developmentally disabled child who resided in an institution but spent weekends with and was regularly visited by the parties trying to establish de facto parenthood. The

⁶¹ *E.g.*, *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); *Martin v. Sand*, 444 A.2d 309 (Del. 1982). Other states may grant standing to a concerned third party without expressly conferring the status of de facto parent on the party.

⁶² *In re B.G.*, 11 Cal. 3d 679, 692 n.18, 523 P.2d 244, 253 n.18, 114 Cal. Rptr. 444, 453 n.18 (1974) (citing *BEYOND THE BEST INTERESTS*, *supra* note 33, at 98).

⁶³ *See, e.g.*, *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 419, 188 Cal. Rptr. 781, 789 (1983).

⁶⁴ *In re B.G.*, 11 Cal. 3d at 693, 523 P.2d at 254, 114 Cal. Rptr. at 454.

⁶⁵ *Id.* at 692, 523 P.2d at 253, 114 Cal. Rptr. at 453.

⁶⁶ *Id.* at 693, 523 P.2d at 253, 114 Cal. Rptr. at 453 (quoting CAL. CIV. CODE § 4600).

⁶⁷ *Id.* at 696, 523 P.2d at 255, 114 Cal. Rptr. at 454.

⁶⁸ *Id.* (citing Bodenheimer, *The Multiplicity of Child Custody Proceedings — Problems of California Law*, 23 STAN. L. REV. 703, 704-05 (1971)).

⁶⁹ *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 421, 188 Cal. Rptr. 781, 790 (1983).

court found that the frequency and quality of the child's visits with the de facto parents "provided an adequate foundation to establish the crucial parent-child relationship."⁷⁰

Similarly, in the recent case of *Jhordan C. v. Mary K.*,⁷¹ the California Court of Appeal declared in dictum that the fact that the woman petitioning for de facto parent status did not live with the child on a day-to-day basis would not be the decisive factor in such a decision. The court stated that "[a] person with whom a child does not reside full-time usually cannot be considered a de facto parent. De facto parent status is, however, legally possible under such circumstances."⁷²

While a state's recognition of de facto parent status may indicate a willingness to recognize the psychological parent-child relationship, de facto parenthood does not offer the type of ongoing legal protection necessary to best protect a child's interests. Although a de facto parent may be granted standing in various custodial proceedings,⁷³ this status only provides a vehicle to get into court. While de facto status allows the concerned person to become a party to any proceedings regarding the child's welfare,⁷⁴ that person must petition the court for each subsequent situation that arises in order to have any permanent or ultimate decision-making power regarding the health, welfare and legal protection of the child.⁷⁵

b. The Legal Guardianship

In the event of a legal parent's death or incapacity, the form of legal protection that is probably relied upon most often is legal guardianship. Like de facto parenthood, however, a guardianship of the child fails to adequately protect the child's long-term relationship with his or her psychological parent, and is also problematic because of its effect on the natural parent's rights.

Guardianship places care, custody and control of the child and charge of the child's education in the hands of a guardian.⁷⁶ A guardian has broad powers. For example, a guardian's powers may include the ability to fix the residence of the child anywhere within the state without

⁷⁰ *Id.*

⁷¹ 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986).

⁷² *Id.* at 397 n.9, 224 Cal. Rptr. at 537 n.9 (citing *Guardianship of Phillip B.*, 139 Cal. App. 3d at 420-21, 188 Cal. Rptr. at 789-90).

Although it may be true that most de facto parents reside in the home of the legal parent and the child, this Article does not share Zuckerman's assumption that the parties are always "nonmarital cohabitants," Zuckerman, *supra* note 1, at 729. The foregoing authority clearly indicates that, at least in California, cohabitation is not an absolute prerequisite to the establishment of a legally recognizable de facto parent-child relationship.

⁷³ *In re B.G.*, 11 Cal. 3d 679, 693, 523 P.2d 244, 254, 114 Cal. Rptr. 444, 454 (1974).

⁷⁴ *Id.*

⁷⁵ *Id.* at 692-93, 523 P.2d at 253-54, 114 Cal. Rptr. at 453-54.

⁷⁶ *E.g.*, CAL. PROB. CODE § 2351 (West 1981).

the court's permission and outside the state with the court's permission.⁷⁷ In addition, although parental rights are not legally terminated, the authority of a parent over his or her child ceases upon appointment of a guardian.⁷⁸ Since a sole parent in the context of a second parent adoption wishes the psychological parent to have authority to act in addition to, and not instead of, the legal parent, a guardianship is not a satisfactory alternative.

A legal parent's nomination of a child's guardian⁷⁹ may be subject to investigation and approval by the court in the event of the parent's death or incapacity.⁸⁰ If under state law the court is not obligated to appoint the guardian nominated by the parent,⁸¹ then a relative or other person may file a petition for the appointment of a guardian on behalf of the minor.⁸² Even if the court does appoint the guardian nominated by the parent, that appointment may still be open to challenge. For example, section 2651 of the California Probate Code provides that "The ward . . . or any relative or friend of the ward . . . or any interested person may apply by petition to the court to have the guardian . . . removed."⁸³ Upon a finding of any of the statutory causes sufficient for removal,⁸⁴ the guardianship may be revoked,⁸⁵ and a new guardian appointed by the court.⁸⁶

Furthermore, an appointed guardian does not have unlimited power, and he or she may be unable to prevent events such as the adoption of the child by a third party. In California, courts have the power to grant a third-party adoption even if the legal guardian does not consent.⁸⁷

In sum, second parent adoption is the only legal option that protects

⁷⁷ *E.g.*, CAL. PROB. CODE § 2352 (West Supp. 1988).

⁷⁸ *E.g.*, *In re Rauch*, 103 Cal. App. 2d 690, 694, 230 P.2d 115, 117 (1951) (citing CAL. CIV. CODE § 204 (West 1982)).

⁷⁹ *See, e.g.*, CAL. PROB. CODE § 1500 (West 1981) in which the nomination requirement is set out.

⁸⁰ *See, e.g.*, CAL. PROB. CODE § 1513 (West Supp. 1988). The standard which governs the court in these appointments is California Civil Code section 4600, which provides that a custody award to a non-parent must first go to "the person or persons in whose home the child has been living in a wholesome and stable environment," and then "[t]o any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child." CAL. CIV. CODE § 4600(b) (West Supp. 1988).

⁸¹ *E.g.*, CAL. PROB. CODE § 1513 (West Supp. 1988).

⁸² *E.g.*, CAL. PROB. CODE § 1510 (West 1981).

⁸³ CAL. PROB. CODE § 2651 (West 1981).

⁸⁴ CAL. PROB. CODE § 2650 sets out a long list of causes for which a guardian may be removed, including, *inter alia*, "gross immorality" and "any other case in which the court in its discretion determines that removal is in the best interests of the ward." CAL. PROB. CODE § 2650(e), (i) (West 1981). In states with laws and court decisions unfavorable to homosexuals, provisions such as these could be used to challenge the appointment of a psychological parent who is the same-sex partner of the nominating parent. However, the court must accord weight to the fact that a guardian has been nominated by a parent when making a best interests determination. CAL. PROB. CODE § 2450 (West Supp. 1988).

⁸⁵ CAL. PROB. CODE § 2653 (West 1981).

⁸⁶ CAL. PROB. CODE § 2670 (West 1981).

⁸⁷ *E.g.*, *In re Santos*, 185 Cal. 127, 131, 195 P. 1055, 1057 (1921).

the child by ensuring that he or she will continue to live under those circumstances which are most familiar to him or her. In the event of the death or incapacity of the sole legal parent, the child will remain with the person who has cared for the child as his or her own, and whom the child loves and regards as a parent.

C. Determining Best Interests When a Parent is Lesbian or Gay

To some, the fact that a parent is lesbian or gay may seem to be a contradiction in terms. However, a significant number of lesbians and gay men are parents.⁸⁸ As of 1976, the number of lesbian mothers in the United States was estimated at 1.5 million.⁸⁹

Since lesbian and gay couples are denied the right to legally marry,⁹⁰ a child born into or raised in such a family is *a fortiori* deprived of the right to the protection of two legal, psychological parents. In these cases, second parent adoption vests the rights and obligations of parenthood in those individuals who have agreed to take legal responsibility for the rearing of a child.

Since the best interests standard allows for so much discretion by lower courts, many have used the homosexuality of a parent as the deciding factor in custody determinations.⁹¹ Other courts, however, have recognized that sexual orientation⁹² in and of itself cannot provide the basis

⁸⁸ Zuckerman, *supra* note 1, at 746 n.101. Zuckerman cites a study which estimates the percentage of lesbians in the U.S. to be ten percent, fifteen to twenty percent of whom are parents. *Id.* at 732 n.12 (citing Rand, Graham & Rawlings, *Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials*, J. HOMOSEXUALITY, Winter 1982, at 27); see also Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 857 n.23 (1985) (Comment).

According to Lesbian Rights Project Directing Attorney Roberta Achtenberg, "[t]he vast majority of the lesbians and gay men who become parents do so within the context of a marital (or non-marital) heterosexual relationship; often before becoming cognizant of their homosexual orientation, or at least before acknowledging it to themselves or the world." R. ACHTENBERG, *supra* note 8, at 1. However, more recently, an increasing number of lesbians and gay men are choosing to have children, either alone or with a partner, after "coming out," using methods like artificial insemination, adoption, or foster parenting.

⁸⁹ Hunter and Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976). See also Zuckerman, *supra* note 1, at 746 n.101.

⁹⁰ See *supra* note 7.

⁹¹ *E.g.*, Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980); *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976); Newsome v. Newsome, 42 N.C. App. 415, 256 S.E.2d 849 (1979); Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985) (homosexuals are unfit and improper custodians as a matter of law).

Due to the hostility shown by some states to lesbian and gay parents, lesbians, gays and attorneys who are considering filing petitions for second parent adoption should not institute such actions without carefully assessing the parties' vulnerabilities. The effect of filing a second parent adoption petition is to place the parties' living situation under the close scrutiny of the State Department of Social Services and the court, and hence, to allow for the possibility of further intervention by the State.

⁹² One author defines the term "sexual orientation" by distinguishing it from "sexual preference":

As to the expression "sexual preference," widely used in discussions of same-sex attractions and relationships, some people who are comfortably bisexual may indeed choose

for a denial of custody or visitation.⁹³ This has been the case in California since 1967 when the court in *Nadler v. Superior Court*, in a per curiam opinion, expressly rejected the notion that a mother's homosexuality necessarily rendered her an unfit and improper person to have custody as a matter of law.⁹⁴

The courts in these cases find that granting a parent custody or visitation rights is not contrary to the child's best interests unless there is a nexus, or proven causal connection, between harm to the child and the parent's behavior, condition or status. Accordingly, neither a mother who has overnight male guests,⁹⁵ nor a father who is a quadriplegic⁹⁶ will be denied custody of a child without a showing that the child's welfare has been adversely affected by the parent's behavior or condition. The nexus standard is equally applicable to matters concerning a parent's sexual orientation in both custody disputes and petitions for second parent adoption.

As Zuckerman notes,

In a second parent adoption case, the court is not considering whether to place a child in a lesbian [or gay] home environment. The child already lives with lesbian [or gay] parents. Rather, the court must evaluate whether the child will benefit by having two legal parents Lesbians [and gay men] 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.⁹⁷

II. MANDATORY VS. DIRECTORY INTERPRETATION OF ADOPTION STATUTES REQUIRING THE TERMINATION OF PARENTAL RIGHTS

Before a court may make a finding that a second parent adoption is in a child's best interests, it must first determine whether it has the power to grant such an adoption under the existing adoption statutes.⁹⁸ The

relationships with members of their own sex, and their orientation may properly be described as a "preference." In most cases, however, a person is compelled by deep and immutable orientation toward same-sex relationships. "Preference" implies that homosexuals, unlike heterosexuals, choose their sexual identity, which they do not . . .

Susoeff, *supra* note 88, at 858 n.27 (citation omitted).

⁹³ See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Bezio v. Patenaude*, 381 Mass. 563, 410 N.E.2d 1207 (1980); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 1986); *Armanini v. Armanini*, 5 Fam. L. Rep. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979); *Stroman v. Williams*, 291 S.C. 376, 353 S.E.2d 704 (S.C. Ct. App. 1987); *Cabalquinto v. Cabalquinto*, 100 Wash. 2d 325, 669 P.2d 886 (1983) (en banc).

⁹⁴ 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

⁹⁵ *In re Marriage of Wellman*, 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980).

⁹⁶ *In re Marriage of Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979).

⁹⁷ Zuckerman, *supra* note 1, at 759.

⁹⁸ See ALA. CODE § 26-10-1 to -30 (1986 & Supp. 1987); ALASKA STAT. § 25.23.010 to -240 (1983 & Supp. 1987); ARIZ. REV. STAT. § 8-101 to -145 (1974 & Supp. 1987); ARK. STAT. ANN. § 9-9-101 to -223 (1987); CAL. CIV. CODE §§ 221-230.8 (West 1982 & Supp. 1987);

willingness of a court to even consider a claim for a second parent adoption may vary greatly, depending on the express provisions of the state statutes and the type of construction that these statutes are given.

In most states, statutory language will not expressly prohibit second parent adoptions. For example, California law provides that "[a]ny unmarried minor child may be adopted by any adult person"⁹⁹ and that "[a]ny person desiring to adopt a child may for that purpose petition" the proper court.¹⁰⁰ However, the statutes of some other states do specifically list the parties who are eligible to adopt.¹⁰¹ The way in which courts interpret these provisions will depend largely on how the adoption statutes are construed.

Adoption is a creature of statutory construction, unknown at com-

COLO. REV. STAT. § 19-4-101 to -127 (1986 & Supp. 1987); CONN. GEN. STAT. ANN. § 45-61a to -69c (West 1981 & Supp. 1987); DEL. CODE ANN. tit. 13 §§ 901-929 (1981 & Supp. 1986); D.C. CODE ANN. § 16-301 to -315 (1981 & Supp. 1987); FLA. STAT. ANN. § 63.011 to -291 (West 1969 & Supp. 1985-86); GA. CODE ANN. § 74-401 to -422 (Harrison 1981 & Supp. 1986); HAW. REV. STAT. § 578-1 to -17 (1985); IDAHO CODE § 16-1501 to -1513 (1979 & Supp. 1987); ILL. ANN. STAT. ch. 40, para. 1501-1529 (Smith-Hurd 1980 & Supp. 1987); IND. CODE ANN. § 31-3-1-1 to -12 (West 1979 & Supp. 1987); IOWA CODE ANN. § 600.1-.25 (West 1981 & Supp. 1987); KAN. STAT. ANN. § 59-2101 to -2105 (1983 & Supp. 1986); KY. REV. STAT. ANN. § 199.011-.590 (1982 & Supp. 1986); LA. REV. STAT. ANN. § 9:401-.441 (West 1965 & Supp. 1987); ME. REV. STAT. tit. 19, §§ 531-538 (1964 & Supp. 1987); MD. FAM. LAW CODE ANN. § 5-301 to -330 (1984 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 210, §§ 1-14 (West 1987); MICH. COMP. LAWS ANN. § 710.20-70 (West Supp. 1987); MINN. STAT. ANN. § 259.21-.49 (West 1982 & Supp. 1988); MISS. CODE ANN. §§ 93-17-1 to -31, 93-17-51 to -69 (1972 & Supp. 1987); MO. ANN. STAT. § 453.010-170 (Vernon 1986 & Supp. 1988); MONT. CODE ANN. § 40-8-101 to -128 (1987); NEB. REV. STAT. § 43-101 to -146 (1984); NEV. REV. STAT. § 127.010-186 (1985); N.H. REV. STAT. ANN. § 170-B:1 to -B:26 (1977 & Supp. 1987); N.J. STAT. ANN. § 9:3-37 to -56 (West Supp. 1987); N.M. STAT. ANN. § 40-7-29 to -65 (1978 & Supp. 1987); N.Y. DOM. REL. LAW §§ 109-117 (McKinney 1977 & Supp. 1988); N.C. GEN. STAT. § 48-1 to -38 (1984 & Supp. 1985); N.D. CENT. CODE § 14-15-01 to -23 (1981 & Supp. 1987); OHIO REV. CODE ANN. § 3107.01-.19 (Anderson 1980 & Supp. 1986); OKLA. STAT. ANN. tit. 10 § 54 (West 1987); OR. REV. STAT. § 109.305-.500 (1987); PA. STAT. ANN. tit. 23 §§ 2101-2910 (Purdon Supp. 1987); R.I. GEN. LAWS § 15-7-1 to -26 (1981 & Supp. 1987); S.C. CODE ANN. § 20-7-1650 to -1890 (Law. Co-op. 1976 & Supp. 1987); S.D. CODIFIED LAWS ANN. § 25-6-1 to -20 (1984 & Supp. 1987); TENN. CODE ANN. § 36-1-101 to -140 (1984 & Supp. 1987); TEX. FAM. CODE ANN. § 16.01-.12 (Vernon 1986 & Supp. 1988); UTAH CODE ANN. § 78-30-2 to -19 (1987); VT. STAT. ANN. tit. 15 §§ 431-454 (1974 & Supp. 1987); VA. CODE ANN. § 63.1-220 to -238 (1987); WASH. REV. CODE ANN. § 26.33.010-.901 (1986); W. VA. CODE § 48-4-1 to -15 (1986 & Supp. 1987); WIS. STAT. ANN. § 48.81-.975 (West 1987); WYO. STAT. § 1-22-101 to -116 (1977 & Supp. 1987).

⁹⁹ CAL. CIV. CODE § 221 (West 1982).

¹⁰⁰ CAL. CIV. CODE § 226 (West Supp. 1988).

¹⁰¹ *E.g.*, Alaska law provides:

- (a) The following persons may adopt:
 - (1) A husband and wife together;
 - (2) an unmarried adult;
 - (3) the unmarried father or mother of the person to be adopted;
 - (4) a married person without the other spouse joining as a petitioner, if the person to be adopted is not the other spouse, and if
 - (A) the other spouse is a parent of the person to be adopted and consents to the adoption; or
 - (B) the petitioner and the other spouse are legally separated; or
 - (C) the failure of the other spouse to join in the petition or to agree to the adoption is excused by the court

ALASKA STAT. § 25.23.020(a) (1983).

mon law.¹⁰² Although the general rule is that statutes in derogation of the common law are to be strictly construed,¹⁰³ the codes of various states expressly provide that this rule of construction does not apply to the adoption statutes.¹⁰⁴ Some states, however, do require strict construction.¹⁰⁵

Regardless of the type of construction legally required, the only way to comply effectively with the adoption statutes is to ensure that they are construed in a way which will sustain, rather than defeat, their purpose. Since the overriding objective of adoption statutes is to protect and promote the welfare and well-being of children, these statutes must be interpreted in a manner which allows a court to provide for a child's interests when it has determined that those interests are best served by granting an adoption. A strict interpretation that would prevent a court from granting an adoption in these situations would be contrary to the statutes' very purpose and objective.

Construction may play the most important role when a statutory scheme has a provision which requires the termination of parental rights upon the adoption of a child by another. By their terms, these statutes seem to pose a barrier to second parent adoption. Using California Civil Code section 229 as a typical example of this type of statutory provision, the following analysis demonstrates how rules of statutory interpretation, case history, and considerations of public policy may be used to support the argument that the application of these termination provisions should be waived in cases of second parent adoption.

Section 229 of the California Civil Code provides: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."¹⁰⁶ If read and applied literally, this statute would require that in any adoption (be it independent, stepparent or second parent) the legal parent or parents of a child must relinquish their parental rights in order for the child to be adopted. This, however, has not been the case. In spite of section 229, California courts have granted many different types of adoptions which do not comply with its literal requirements.¹⁰⁷

¹⁰² Estate of Jobson, 164 Cal. 312, 315, 128 P. 938, 939 (1912); see also Estate of Calhoun, 44 Cal. 2d 378, 380, 282 P.2d 880, 882 (1955).

¹⁰³ 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 58.03, at 711 (4th ed. 1984).

¹⁰⁴ E.g., OR. REV. STAT. § 109.305 (1984); CAL. CIV. CODE § 4 (West 1982); see also Adoption of Barnett 54 Cal. 2d 370, 377, 354 P.2d 18, 22, 6 Cal. Rptr. 562, 566 (1960).

¹⁰⁵ Alaska case law holds that statutes relating to adoption are to be strictly construed. Hammer v. Hammer, 16 Alaska 203 (D. Alaska 1956). However, as can be seen *supra* in the discussion accompanying notes 13-14, this strict construction requirement has not prevented Alaska courts from granting second parent adoptions in at least two cases.

¹⁰⁶ CAL. CIV. CODE § 229 (West 1982). The analysis used in this section of the Article may be applied to any state statute which provides for the termination of all parental rights upon adoption. See *infra* notes 108, 113.

¹⁰⁷ See *infra* discussion accompanying notes 127-133.

There are two possible interpretations of section 229.¹⁰⁸ One is that the application of section 229 is mandatory and that the adoption of a child by a third party inescapably and completely terminates the rights of a natural or legal parent. The other interpretation is that the statute is a directory provision, to be construed liberally in conjunction with the broader purpose of the adoption statutes as a whole.

The question of whether the application of a statute is mandatory is an issue of statutory interpretation.¹⁰⁹ A mandatory interpretation of section 229 would require a complete cutoff between the legal parent and the adopted child, as well as between the natural or legal parent and the adopting parent.

A mandatory interpretation requires the conclusion that the legislature viewed the benefits of a complete cutoff as so essential to the legislative scheme that the court should refuse to permit an adoption that does not result in a complete cutoff, even though the parties do not wish the protections offered by a complete cutoff and a complete cutoff is not in the child's best interests.¹¹⁰

A directory interpretation of section 229 would allow for an adoption decree that does not terminate the rights of the natural or legal parent if that parent and the adopting parent both consent to a waiver of the protections of section 229 and the court finds that such a waiver is in the child's best interests.¹¹¹ In a second parent adoption, the parent of a child has consented to vesting the psychological parent with the rights and responsibilities of parenthood without surrendering those same rights or responsibilities her or himself. Similarly, the psychological par-

¹⁰⁸ The following analysis of the interpretation of CAL. CIV. CODE § 229 is partially derived from the analysis of a similar Alaska adoption statute (ALASKA STAT. § 25.23.130(a)(1) (1983)) presented by the petitioner in *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

In 1985, section 25.23.130(a)(1) provided in part that the effect of a final decree of adoption was "to relieve the natural parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the natural parents." ALASKA STAT. § 25.23.130(a)(1) (1983). In *Adoption of A.O.L.*, the petitioner successfully argued that this provision of the Alaska adoption statutes could be waived if the natural parent, adopting parent, and the child (through a guardian ad litem) all consented to the adoption, and if the court found that the adoption was in the best interests of the child. Memorandum in Support of Petition for Adoption at 3, *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

In 1986, this provision of the Alaska statute was amended to add a section (c), which provides that "[n]othing in this chapter prohibits an adoption that allows visitation between the adopted person and that person's natural parents or other relatives." ALASKA STAT. § 25.23.130(c) (Supp. 1987).

¹⁰⁹ 2A N. SINGER, *supra* note 103, § 57.01.

¹¹⁰ Memorandum in Support of Petition for Adoption at 4, *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

¹¹¹ In *Adoption of a Minor Child*, the court expressly found that the mutual consent of the natural parent, the adoptive parent and the child (through a guardian ad litem), combined with a finding by the court that the adoption is in the child's best interest was sufficient to waive application of the termination provision. Findings of Fact and Conclusions of Law at 4, *In re Adoption of a Minor Child*, No. 1-JU-86-73 (Alaska Super. Ct. Feb. 6, 1987).

ent desires the privileges and obligations of parenthood, but does not wish to deprive the natural or legal parent of the same.

Since a second parent adoption postulates a situation in which the legal parent and another adult desire to care and provide for the child jointly and with each other's consent, a directory interpretation is crucial to the success of this type of adoption.

A. Statutory Language

The language of statutes like section 229 would ordinarily support a mandatory interpretation, since they specify that "from the time of the adoption" the parents of an adopted child are "relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no right over it."¹¹² However, this support for a mandatory interpretation is not completely unequivocal. As the petitioner construing a similar statute in an Alaska second parent adoption case suggested, "[t]he language 'relieve' does imply that a favor is being granted to the natural [or legal] parent—the benefit to him or her of an adoption proceeding—or that the parent has done something which justifies relieving him [or her] of these rights—such as non-support or abandonment."¹¹³

Read in conjunction with other provisions of the statutory scheme which provide for the protection of the parent through the requirement of consent¹¹⁴ and the protection of the child through a judicial finding as to best interests,¹¹⁵ the use of the word "relieved" supports an interpretation which would allow the legal parent to waive the "relief" of termination where both of these interests have been sufficiently protected. Alone, this argument probably cannot provide an adequate foundation for the directory interpretation offered by this Article. When read in conjunction with the purpose and case history of the adoption statutes, however, it is one more factor in support of a directory interpretation.

B. Legislative History

California Civil Code section 229 was enacted in its current form in 1872, and available legislative history does not provide much insight into the reasoning behind its enactment.¹¹⁶ However, in addressing the rationale of section 229 and other adoption statutes, the California Supreme Court has noted:

When the original adoption statutes were enacted, adoptions were infre-

¹¹² CAL. CIV. CODE § 229 (West 1982).

¹¹³ See Memorandum in Support of Petition for Adoption at 5, *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. filed April 10, 1985).

¹¹⁴ CAL. CIV. CODE § 224 (West 1982).

¹¹⁵ CAL. CIV. CODE § 227 (West Supp. 1987).

¹¹⁶ CAL. CIV. CODE § 229 (West 1982).

quent and most often occurred when the parents consented to the adoption of their child by persons known to them, or as a consequence of the assumption of care and custody of an orphan by a blood relative. Under present-day conditions it may be the better social policy to substitute the relationship of the adoptive family for that of the blood relatives. With many children placed for adoption by agencies licensed for that purpose, there has developed a demand for secrecy as to the identity of the blood relatives, and in most cases, for all practical purposes, an adopted child is entirely cut off from his natural family relationships.¹¹⁷

Given this focus on agency adoptions and the need to respect natural parents' desire for secrecy, it is reasonable to conclude that the legislature never considered the issue of severing parental rights when both the legal and adopting parent(s) do not desire it and when severance is not in the child's best interests.

Even if this application of the statute had been considered by its drafters, the California Court of Appeal has noted that the interpretation of legislation dealing with children and the family "must be given elastic operation if it is to cope with changing economic and social conditions."¹¹⁸ In order to do so, California and other states adhere to the maxim that "[l]egislation is properly considered in *pari materia* [i.e., in conjunction with statutes pertaining to the same subject matter] with previous and subsequent legislative enactments."¹¹⁹ Therefore, when interpreting termination statutes like section 229, courts must look not only to the specific legislative history, but also to the overall purpose and structure of the state's adoption statutes.

C. Underlying Purpose

The purpose of a statute as a whole is crucial when inquiring into the proper construction of one of its provisions. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent"¹²⁰ This concept of a whole statutory purpose has been used by many courts in interpreting statutory provisions.¹²¹

As shown above in Part I, the overriding purpose of the adoption statutes is the promotion of the child's well-being.¹²² In most cases, this purpose is served by adopting the child into a family and severing the legal ties between the natural or legal parent(s) and the child. This sever-

¹¹⁷ *In re Estate of Calhoun*, 44 Cal. 2d 378, 387, 282 P.2d 880, 886 (1955).

¹¹⁸ *Estate of Woodward v. Newton*, 230 Cal. App. 2d 113, 119, 40 Cal. Rptr. 781, 784 (1964) (quoting 2 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 5102 (3d ed. 1943)).

¹¹⁹ *Id.* (quoting 2 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 5101 (3d ed. 1943)). Alaska and Oregon courts have also applied the *in pari materia* rule to adoption statutes. *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982); *In re Adoption of McClesky v. Oregon State Pub. Welfare Comm'n*, 4 Or. App. 308, 477 P.2d 235 (1971).

¹²⁰ 2A N. SINGER, *supra* note 103, at § 46.05.

¹²¹ *See id.*, § 46.05, at 93 n.1.

¹²² *See supra* discussion accompanying note 28.

ance not only protects the natural parent or parents' interest in secrecy,¹²³ but also protects the child from the burden of owing duties and obligations to two families. This latter concern was expressed by a California court which stated:

[T]he effect of an adoption under our Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parent by blood is superseded. The duties of a child cannot be owed to two fathers at the same time.¹²⁴

This conflict does not arise in a second parent adoption, regardless of whether the child has one or two legal parents. If there is only a sole parent, there is no second family to create a conflict for the child. But even if (as was the situation in one Alaska case)¹²⁵ the child has two legal parents, both legal parents must consent to the shared legal parenting of the psychological parent before a second parent adoption may be granted. Accordingly, the goal of protecting the child from conflicting duties and of providing the natural parent(s) with secrecy would not require the severance of all ties between the legal parent(s) and the child. Rather, the best interests of the child would mandate the preservation of the child's relationship with those legal parents who are also his or her functional and psychological parents.¹²⁶

In sum, the objective of the adoption statutes to protect the interests of both the natural or legal parent(s) and the child through the consent and best interests requirements is not frustrated by a directory interpretation of statutory provisions like section 229 of the California Civil Code. The legal parent's informed consent has been obtained, and the protection of the child has been the overriding consideration for the legal parent, the adoptive parent, and the court.

D. Case History

Case law is another source which may be used to contradict the notion that statutory provisions like section 229 require complete severance of parental rights in the context of second parent adoption. This support may be found in cases where the courts have liberally construed

¹²³ See *supra* discussion accompanying note 117.

¹²⁴ *In re Estate of Jobson*, 164 Cal. 312, 316-17, 128 P. 938, 939 (1912).

¹²⁵ *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

¹²⁶ See *supra* text accompanying note 51 for a discussion of the ability of a child to bond to at least two psychological parents. Although it does not benefit the child for the courts to grant the legal status of parent too freely, it also may not serve the child's interests to be denied a legal relationship with those persons who have acted as his or her psychological parents. In special cases, this may warrant the extension of a legal parent-child relationship to more than the two legal parents traditionally allowed. See *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985) discussed *infra* more fully in the text accompanying notes 236-242.

adoption statutes in order to promote the welfare and well-being of children.

1. Stepparent and Joint Adoptions

The history of stepparent adoptions in California and the early struggles of the courts to reconcile these adoptions with statutory provisions may be readily analogized to the current status of second parent adoptions. This analogy illustrates how adoption statutes have historically been liberally construed in order to permit adoptions which are now regularly granted, but would have been prohibited had a strict construction of the statutory requirements been applied. The application of Civil Code section 229 is a prime example.

Although section 229 provides no explicit exceptions to its application, since 1925 California courts have implicitly waived the application of that section to allow stepparent adoptions. In a stepparent adoption, a natural or legal parent of a child consents to that child's adoption by his or her spouse, yet does not forfeit any of his or her own parental rights.¹²⁷

In a 1925 case,¹²⁸ the California Supreme Court analyzed the issue of whether the adoption of a mother's two children by her second husband "had the effect of legally severing her parental relationship toward the children."¹²⁹ The court held that "notwithstanding the provisions of Civil Code section 229," the adoption did not have this effect.¹³⁰ The court found that it was plain from the record of the adoption proceedings, wherein the parties expressly stated their intention to maintain joint custody and control of the children, that they "did not intend to thereby sever the parental relationship between the mother and the children."¹³¹ Accordingly, the order of adoption relieving "all other persons" of any parental duties or responsibilities toward the children "save that of the mother"¹³² was deemed valid by the Supreme Court, which found the implication and fair result of the proceeding to be the mother's retention of her parental relationship toward the children "legally as well as by

¹²⁷ Although several provisions of the adoption statutes mention the "adoption of a child by a stepparent where one natural or adoptive parent retains his or her custody and control of the child" (see, e.g., CAL. CIV. CODE §§ 226.9, 227(a) (West Supp. 1988)), no provision expressly states that § 229 shall not apply to stepparent adoptions. When the first stepparent adoption was granted in 1925 (see *infra* note 128), no mention of stepparent adoption appeared anywhere in the statute. The term was first used six years later in a 1931 amendment to CAL. CIV. CODE § 226 which excepted stepparent petitioners from various requirements involving notification of the Department of Social Services of the pending adoption. See CAL. CIV. CODE § 226 (West Supp. 1988).

¹²⁸ *Marshall v. Marshall*, 196 Cal. 761, 239 P. 36 (1925).

¹²⁹ *Id.* at 766, 239 P. at 38.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 767, 239 P. at 38.

blood.”¹³³ A strict construction of section 229 would not have permitted the court to reach this desirable and now commonplace result, but would have required severance—a result which neither satisfied the child’s best interests nor protected the legal parent(s)’ rights.

Joint adoption (i.e., adoption by two persons at the same time) is an analogous situation in which courts have laid important groundwork for second parent adoptions. States which have provided for the joint adoption of a child by two people who are not married to one another have already crossed the barrier of marital status with regard to a child’s best interests. These states may therefore be less reluctant to grant concurrent parental rights to a psychological parent in a non-marital situation. Although not directly reliant on the language of termination statutes, joint adoption is an excellent example of liberal statutory construction.

In 1894, the California Supreme Court was presented with the question of whether California law permitted the joint adoption of a child in a case which concerned the legal status of a residuary legatee who claimed to have been adopted by both her uncle and his wife upon her mother’s death.¹³⁴ Acknowledging that no express authority for joint adoption existed in the Code, the court stated that it knew “of no reason why both [husband and wife] may not unite in an application for the adoption of a child as the child of both, or why in such a case the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses.”¹³⁵

Instead of emphasizing a rigid interpretation of the adoption statute, the court focused on the benefit that would accrue to the child as a result of becoming the legal child of both of these parents. The court found that “such procedure would seem to be in entire harmony with the object of the law”¹³⁶ and that “by doing so the adopted child is made to assume in a general sense the same position in the family which it would occupy if it were the natural child of both, born in lawful wedlock.”¹³⁷

Although this first joint adoption occurred within the context of a marriage, California courts have granted joint adoptions to non-married couples, including homosexual couples.¹³⁸ Within the context of marriage or outside of it, the same manifest objective applies: providing children with the highest level of protection possible by ensuring that they

¹³³ *Id.*

¹³⁴ *In re Estate of Williams*, 102 Cal. 70, 36 P. 407 (1894).

¹³⁵ *Id.* at 79, 36 P. at 409.

¹³⁶ *Id.*

¹³⁷ *Id.* at 80, 36 P. at 409 (quoting *Krug v. Davis*, 87 Ind. 590, 594 (1882)).

¹³⁸ *E.g.*, *In re A. and R., Adopting Parents*, No. 17350 (Cal. Super. Ct., Alameda County April 8, 1986); *In re N. and D., Adopting Parents*, No. 17945 (Cal. Super. Ct., San Francisco County Feb. 24, 1986). Since the petitioners in both cases were lesbian couples, these joint adoptions in particular illustrate the power of courts to liberally construe adoption statutes. (Further information available from the Lesbian Rights Project, 1370 Mission Street, Fourth Floor, San Francisco, California 94102).

are the legal responsibility of adults who have agreed to care for and raise them as their own.

2. Adoptive Relationships Which Retain Legal Ties to the Child's Natural Family

Strong support for the directory interpretation of statutory termination provisions may also be found in court decisions which have allowed the grandparents, siblings and even natural parents of a child to retain legal rights towards the child in the form of visitation after he or she has been adopted by another. A strict interpretation of a termination provision requiring severance of *all* ties upon adoption would not permit continuing visitation rights. Nevertheless, the courts of several states have ordered that visitation with members of a child's natural family be granted despite similar termination provisions.

In some cases, the literal requirements of the termination provision would forbid a legal order for visitation to a member of the natural family, even though both the natural family and the adoptive parents desire that visitation be granted. But where the application of this provision would not be in the best interests of the child, courts have been willing to waive it. For example, in the New York case of *In re Adoption of Anthony*,¹³⁹ the child's adoptive parents supported the granting of visitation rights to the child's siblings, despite New York's termination statute. Looking to the special circumstances of the case (the child's knowledge of his adoption, his ongoing relationship with his siblings, and the adoptive parents' acknowledgment of the importance of that relationship), the court found that contact and visitation with the siblings was "necessary" to promote the child's best interests¹⁴⁰ and refused to apply the statute.

Similarly, in a Maryland case¹⁴¹ the natural mother, father and adoptive stepmother of two children all consented to a decree of adoption which provided that the natural mother's right to visitation with her children would be preserved.¹⁴² Two years after the decree was issued, it was brought before the court when the parties were attempting to resolve a visitation problem. When confronted with the visitation clause, the court invalidated the decree *sua sponte* based on the belief that the children's adoption by the stepmother could not be conditioned upon the natural mother's visitation rights.¹⁴³ On appeal, the decree was reinstated, with the court holding that an adoptive and natural parent may "enter into any agreement with respect to visitation rights between the child and the natural parent so long as the visitation is in the best interest of the child

¹³⁹ 448 N.Y.S.2d 377, 113 Misc. 2d 26 (1982).

¹⁴⁰ *Id.* at 381, 113 Misc. 2d at 30-31.

¹⁴¹ *Weinschel v. Strople*, 466 A.2d 1301 (1983).

¹⁴² *Id.* at 1303.

¹⁴³ *Id.* at 1304.

and public policy does not prevent such visitation."¹⁴⁴

In other cases, courts have overcome both termination statutes and the objections of the child's adoptive family in order to grant visitation rights. In California, for example, grandparents, siblings and other kin have been allowed to maintain actions seeking visitation against the adoptive parents' wishes and in spite of Civil Code section 229.¹⁴⁵ The courts in those cases have bypassed the requirements of the termination statutes by establishing a two-part test for granting visitation which requires that "any determination of the merits of granting visitation . . . be based upon a weighing of the dual consideration of whether doing so is in the best interests of the child and would not unduly hinder the adoptive relationship."¹⁴⁶

Similarly, in a New Jersey case,¹⁴⁷ a natural mother was granted visitation over the objections of the adoptive parents and in spite of a termination statute.¹⁴⁸ The boy, who had run away several times to see his mother, was faced with the possibility of being declared incorrigible by the Juvenile Court. Under those circumstances, the court reversed the order denying the mother visitation rights and remanded the case to the lower court for a hearing to determine the best interests of the child.¹⁴⁹

Strict compliance with a mandatory interpretation of the termination statutes in these states would have prevented courts from granting any visitation rights in the aforementioned cases. Yet these courts recognized in certain cases that an adopted child may need to be provided with continued legal access to members of his or her natural family. In order to promote such access, these judges considered the broad purpose of the adoption statutes and looked in their final determination to promotion of the child's well-being. By applying a directory interpretation of the adoption statutes, the courts have adhered to the mandate that adoption statutes must be construed with only one purpose in mind: serving the child's best interests.

III. RESOLVING ISSUES OF CUSTODY, VISITATION AND SUPPORT

Once it has been established that a second parent adoption is in keeping with the child's best interests and is not barred by statute, issues

¹⁴⁴ *Id.* at 1305.

¹⁴⁵ *Johnson v. Fallon*, 181 Cal. Rptr. 414 (1982); *Reeves v. Bailey*, 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975); *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969).

¹⁴⁶ *Johnson v. Fallon*, 181 Cal. Rptr. 414, 418-19 (1982). *See also* *People ex. rel. Sibley v. Shepard*, 54 N.Y.2d 320, 329, 429 N.E.2d 1049, 1053 (1981), in which a New York court used this test to grant a grandparent visitation over the objection of the adoptive parents. Although the state had a statute which provided a grandparent with the right to seek visitation, such could be granted only once the court had found that it would be in the child's best interests and would not hinder the adoptive relationship. *Id.* at 329, 429 N.E.2d at 1053.

¹⁴⁷ *Katterman v. DiPiazza*, 151 N.J. Super. 209, 376 A.2d 955 (1977).

¹⁴⁸ *Id.* at 210, 376 A.2d at 956.

¹⁴⁹ *Id.* at 211, 376 A.2d at 957.

of custody, visitation and support may arise after the adoption has been granted. Although a judge may be vested with the power and jurisdiction to grant a second parent adoption, it is not readily apparent that the parties to the adoption will be able to return to court to have disputes resolved after the adoption has taken place, since most issues regarding custody, visitation and support arise in the context of marital dissolution or modification proceedings. Therefore, where a child's legal parents are not married, other means of access to court must be found in order to secure these rights.

A. The Uniform Parentage Act

The Uniform Parentage Act¹⁵⁰ (UPA) is a proposed comprehensive statutory scheme which may be used by nonmarried legal parents as well as their children to establish and enforce the spectrum of legal duties and obligations inherent in the parent-child relationship. Several states have adopted the UPA or a modified version thereof.¹⁵¹

The UPA permits claimants to establish the existence of a legal parent-child relationship.¹⁵² Such an action may be brought to determine the existence or nonexistence of a father-child relationship or mother-child relationship.¹⁵³ As defined by the UPA, a "parent and child relationship" is the legal relationship existing between a child and his or her natural or adoptive parent(s) "incident to which the law confers or imposes rights, privileges, duties, and obligations."¹⁵⁴ The parent-child relationship extends equally to every parent and every child, regardless of the marital status of the parents.¹⁵⁵ Any interested party may bring an action to determine the existence of a father-child relationship,¹⁵⁶ and section 21 provides that, insofar as practicable, these UPA provisions which apply to father-child relationships apply to mother-child relationships as well.¹⁵⁷

The legal relationship existing between a child and an adoptive parent may be established by showing proof of adoption.¹⁵⁸ Since UPA section 2 provides that the parent-child relationship extends equally to every parent and every child, regardless of the parents' marital status,¹⁵⁹ either

¹⁵⁰ UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1973).

¹⁵¹ These states are: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1973).

¹⁵² UNIF. PARENTAGE ACT § 3, 9B U.L.A. 297-98 (1973).

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 1, 9B U.L.A. 296.

¹⁵⁵ *Id.* § 2, 9B U.L.A. 296.

¹⁵⁶ *Id.* § 6(b), 9B U.L.A. 302.

¹⁵⁷ *Id.* § 21, 9B U.L.A. 334.

¹⁵⁸ *Id.* § 3(3), 9B U.L.A. 298.

¹⁵⁹ *Id.* § 2, 9B U.L.A. 296.

parent in a second parent adoption would be able to bring an action to establish the existence of a parent-child relationship.

The order or judgment of the court in an action brought under the UPA to determine the existence or non-existence of a parent-child relationship is determinative for all purposes.¹⁶⁰ In addition, and most importantly for purposes of second parent adoptions, the court's judgment or order is not limited to determining whether or not a parent-child relationship exists. Such judgment or order

may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child.¹⁶¹

The court has continuing jurisdiction to modify a judgment or order for purposes of future education and support,¹⁶² as well as to modify orders made under the UPA section quoted above.¹⁶³ In certain cases, courts may also make pendente lite orders of visitation and support upon a preliminary determination of paternity while the final determination is pending.¹⁶⁴

In sum, the UPA permits any legal parent of a child, regardless of the parent's marital status or gender, to bring an action to determine parentage. This action gives the court continuing jurisdiction over the parties and allows it to make determinations as to matters of custody, visitation, child support and all other matters pertaining to the best interests of the child.

B. Support and Maintenance

Even if custody and visitation provisions similar to the UPA are not available in a certain state, all states have statutes which protect a child's basic right to maintenance and support. These statutes usually provide the child with the right to support and education up to or beyond the age of majority.¹⁶⁵

Ordinarily a child has a right to support from his or her parents, and both parents have an equal responsibility to provide that support.¹⁶⁶ This inalienable right belongs to the child, and courts have held that par-

¹⁶⁰ *Id.* § 15(a), 9B U.L.A. 324.

¹⁶¹ *Id.* § 15(c), 9B U.L.A. 324.

¹⁶² *Id.* § 18(1), 9B U.L.A. 331.

¹⁶³ *Id.* § 18(2), 9B U.L.A. 331.

¹⁶⁴ *See, e.g., In re B.G.*, 11 Cal. 3d 679, 695-96, 523 P.2d 244, 255-56, 114 Cal. Rptr. 444, 455-56 (1974). *See also* Gadbois v. Superior Court, 126 Cal. App. 3d 653, 656-57, 179 Cal. Rptr. 19, 21-22 (1981).

¹⁶⁵ *See, e.g., CAL. CIV. CODE* § 196.5 (West Supp. 1988).

¹⁶⁶ *See, e.g., In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986) (citing *CAL. CIV. CODE* §§ 196, 206, 242); *Carr v. Marshman*, 147 Cal. App. 3d 1117, 1121, 195 Cal. Rptr. 603, 606 (1983).

ents may not transfer or avoid their legal responsibility and moral duty to support their child.¹⁶⁷ This obligation may not be contracted away between the parents,¹⁶⁸ and continues regardless of a parent's marital status¹⁶⁹ or lack of custody.¹⁷⁰

Although support determinations may be made at the time of marital dissolution,¹⁷¹ the statutes discussed below do not make marital dissolution a necessary condition for a support determination. The main factor in a support determination is not the marital status of the parents, but the right of a child to support, maintenance and education.¹⁷²

The Uniform Civil Liability for Support Act (UCLSA) was enacted in order to "promote and facilitate the use of the Uniform Reciprocal Enforcement of Support Act"¹⁷³ (URESAs). The purpose of the URESAs¹⁷⁴ is to provide for enforcement of out-of-state duties of support, and the UCLSA supplies states with a uniform definition of these duties.¹⁷⁵ The UCLSA as codified in California provides that "[e]very individual shall support his or her spouse and child, and shall support his or her parent when in need."¹⁷⁶ The Act gives the county as well as the obligee the right to sue the obligor on behalf of the obligee to enforce the right of support.¹⁷⁷

Although the main purpose of the UCLSA is to provide states with a uniform set of provisions to enforce out-of-state obligations, the Act may also automatically activate other state statutes governing support.¹⁷⁸ Most basic support statutes provide that a civil suit may be brought on a child's behalf to enforce the "equal responsibility [of the father and mother] to support and educate their child in the manner suitable to the child's circumstances."¹⁷⁹ Such an action may be brought on the child's behalf by either parent or by the child's guardian ad litem.¹⁸⁰ When this action is brought by a parent, the judgment is binding on the child, pro-

¹⁶⁷ *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P.2d 613 (1954).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 188 Cal. Rptr. 31 (1982).

¹⁷⁰ *E.g.*, *Armstrong v. Armstrong*, 15 Cal. 3d 942, 947, 544 P.2d 941, 943, 126 Cal. Rptr. 805, 807 (1976).

¹⁷¹ *See, e.g.*, CAL. CIV. CODE § 4700 (West Supp. 1988).

¹⁷² *See, e.g.*, CAL. CIV. CODE §§ 196, 206, 242 (West 1982 & West Supp. 1987).

¹⁷³ UNIF. CIVIL LIABILITY FOR SUPPORT ACT, 9 U.L.A. 171 commissioner's prefatory note (1954). California, Maine, New Hampshire and Utah have adopted the Act.

¹⁷⁴ UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381 (1968).

¹⁷⁵ UNIF. CIVIL LIABILITY FOR SUPPORT ACT, 9 U.L.A. 172 commissioner's prefatory note (1954).

¹⁷⁶ CAL. CIV. CODE § 242 (West Supp. 1988).

¹⁷⁷ UNIF. CIVIL LIABILITY FOR SUPPORT ACT § 8, 9 U.L.A. 182 (1954).

¹⁷⁸ *See, e.g.*, CAL. CIV. CODE § 242 (West Supp. 1988).

¹⁷⁹ *E.g.*, CAL. CIV. CODE § 196 (West 1982).

¹⁸⁰ For example, California Civil Code section 4703 provides:

When a parent has the duty to provide for the support, maintenance, or education of his child and willfully fails to so provide, either parent, or the child by his guardian ad litem, may bring an action in the superior court against the errant parent for the support, maintenance, or education of the child.

CAL. CIV. CODE § 4703 (West 1983).

vided the parent acted "in a proper representative capacity."¹⁸¹

Although historically the term "child" has been construed to mean "minor child,"¹⁸² some states have provisions which permit the duty of support of an unmarried child to continue to be imposed past the age of majority as long as certain conditions (e.g., enrollment in high school) are met.¹⁸³

Other statutes base the duty of support on need, rather than age. For example, section 206 of the California Civil Code imposes a duty upon the father, mother and child of any person to "maintain such person to the extent of their ability."¹⁸⁴ This duty may only be imposed, however, if it is shown that the person is "in need" and "unable to maintain himself by work."¹⁸⁵ Although the duty imposed by a basic support statute usually ends with the emancipation of the minor (either by reaching the age of majority or by marriage), statutes like California Civil Code section 206 continue parental support beyond emancipation for needy children unable to support themselves by work.¹⁸⁶

Statutes that provide for this additional support may be limited if the court retains the power to modify its award in the event circumstances change, i.e., if the inability to work is not a permanent condition.¹⁸⁷ Many of the cases brought under such provisions deal with the issue of continuing support for an adult child who is unable to support him or herself.¹⁸⁸

Other statutes provide the county with the right to recover support from a noncustodial parent in the event that the custodial parent is forced to apply for welfare funding because of the nonsupport of the non-

¹⁸¹ Ruddock v. Ohls, 91 Cal. App. 3d 271, 285, 154 Cal. Rptr. 87, 96 (1979). The court distinguishes this holding from one in which an agreement is entered into by a mother without court approval which provides for support to be paid by the father who acknowledges paternity, and by which the child is not bound if s/he has not been joined as a party. *Id.* at 282.

¹⁸² See, e.g., Rebensdorf v. Rebensdorf, 169 Cal. App. 3d 138, 143 n.4, 215 Cal. Rptr. 76, 78 n.4 (1985) (citing *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 855-56, 153 Cal. Rptr. 26 (1978)); *Wilkins v. Wilkins*, 95 Cal. App. 2d 605, 607, 213 P.2d 748, 749 (1950); *Putnam v. Putnam*, 51 Cal. App. 2d 696, 699, 125 P.2d 525, 527 (1942). See also CAL. CIV. CODE §§ 4351, 4700 (West Supp. 1988).

¹⁸³ E.g., CAL. CIV. CODE § 196.5 which provides:

The duty imposed by Section 196 shall continue to exist as to any unmarried child who has attained the age of 18, is a full-time high school student, and resides with a parent, until such time as he or she completes the 12th grade or attains the age of 19, whichever first occurs.

CAL. CIV. CODE § 196.5 (West Supp. 1988).

¹⁸⁴ CAL. CIV. CODE § 206 (West 1982).

¹⁸⁵ *Id.*

¹⁸⁶ *Bryant v. Swoap*, 48 Cal. App. 3d 431, 436, 121 Cal. Rptr. 867, 871 (1975).

¹⁸⁷ *Rebensdorf v. Rebensdorf*, 169 Cal. App. 3d 138, 143, 215 Cal. Rptr. 76, 78 (1985). Although this is also true of a support determination under CAL. CIV. CODE § 196, in those cases such a decision relies on the court's perception of the parent's ability to support, while under CAL. CIV. CODE § 206 all that would presumably be needed for support to be cut off would be for the child to start earning an income.

¹⁸⁸ See, e.g., *Rebensdorf v. Rebensdorf*, 169 Cal. App. at 184; *Levy v. Levy*, 245 Cal. App. 2d 341, 53 Cal. Rptr. 790 (1966); *In re Dudley* 239 Cal. App. 2d 401, 48 Cal. Rptr. 790 (1966).

custodial parent. In these situations, the noncustodial parent is obligated to reimburse the county for the support,¹⁸⁹ and the county may take appropriate civil and/or criminal action¹⁹⁰ to enforce this obligation.

Since these statutes are based on the premise that a child has a right to basic support from adults who have the legal duties and obligations of parents, these laws are not conditioned upon those adults being married to one another. Accordingly, they may be effectively used by both parents and children who are parties to a second parent adoption.

IV. SECOND PARENT ADOPTIONS

The arguments in support of second parent adoptions are strongly bolstered by the several non-stepparent adoptions that have been granted in the United States in which the rights of the natural parent or parents have remained intact even after the granting of an adoption decree to a non-marital partner. These adoptions fall into three categories: those in which a child's natural parents are unwilling or unable to marry, those involving a heterosexual natural parent/psychological parent relationship, and those involving parents who are of the same sex.

Those cases involving both of a child's natural parents are distinct from the other two types of second parent adoptions since the adoption of an illegitimate child by the natural parent who is not married to the other natural parent may not be necessary to secure the rights and obligations of legal parenthood. As noted by one court, "an unwed father has the right to custody of his child as against the world with the exception of the mother of the child, except if the best interests of the child otherwise dictate."¹⁹¹ The United States Supreme Court has held that an unwed father has the right to notice and an opportunity to be heard before his parental rights may be terminated,¹⁹² and that his estate may pass to his child via intestate succession.¹⁹³

There may, however, be other rights which a natural parent may secure only through adoption. For example, a New Jersey adoption statute provides that "an adopted child shall be deemed lawful issue" of the adopting parent for purposes of inheritance.¹⁹⁴ If a natural parent were

¹⁸⁹ *E.g.*, CAL. WELF. & INST. CODE § 11350(a), (b) (West 1980).

¹⁹⁰ For example, California Penal Code section 270 provides:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars . . . or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

CAL. PENAL CODE § 270 (West Supp. 1987).

¹⁹¹ *In re Adoption by A.R.*, 152 N.J. Super. 541, 543, 378 A.2d 87, 88-89 (1977).

¹⁹² *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

¹⁹³ *Trimble v. Gordon*, 430 U.S. 762, 766 (1977).

¹⁹⁴ N.J. STAT. ANN. § 9:3-30(B) (West 1976) (current version at N.J. STAT. ANN. § 9:3-50(B) (Supp. 1987)).

to die without leaving a will (so that the rules of intestate succession would not apply), any bequest to the "lawful issue" of that parent would exclude an illegitimate child unless the parent adopted the child or married the child's legal parent.

In a New Jersey case involving this statute, the parents were unable to marry because the mother was legally incompetent.¹⁹⁵ Accordingly, the father's only means of preserving the child's collateral inheritance rights was through adoption. However, the state's termination statute required that the rights of the natural mother be terminated if such an adoption took place. Since neither party desired this outcome, the court held that it must read the statute "against the peculiar factual setting of this case, and with an application of common sense."¹⁹⁶ Noting that the adoption act should be construed liberally in order to protect children and adoptive and natural parents, the court held that the mother's incompetency and resulting inability to marry the father should not deprive the child of inheritance rights from or through his mother.¹⁹⁷ The court therefore interpreted the term "stepfather" as "including an acknowledged natural father . . . thus preserv[ing] the rights and obligations of the relationship between the child and his mother."¹⁹⁸

Although classified as a stepparent adoption, this situation more closely resembles what has been defined in this Article as a second parent adoption: an adoption granted to a person who is not the natural parent's spouse in order to protect a child's best interests (in this case inheritance rights) which does not result in the termination of the natural parent's parental status.

Similarly, in the case *In re Jessica W.*,¹⁹⁹ the child's natural mother consented to her child's adoption by the natural father with the belief that she would be able to retain her parental rights. The parents were legally able to marry, but did not desire to do so. The adoption was planned when the couple was living together.²⁰⁰ Subsequently, they separated and the father became the custodial parent. One month after the adoption decree was granted, the father informed the mother that he was terminating her visitation rights with the child.²⁰¹

The issue before the New Hampshire Supreme Court was whether the mother's conditional consent could be allowed under the state's adoption laws.²⁰² The court held that "interpreting [the adoption statutes] liberally, in order to permit adoptions of this nature to take place, is

¹⁹⁵ *In re Adoption by A.R.*, 152 N.J. Super. at 545, 378 A.2d at 89.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 89-90.

¹⁹⁹ 122 N.H. 1052, 453 A.2d 1297 (1982).

²⁰⁰ *Id.* at 1057, 453 A.2d at 1300.

²⁰¹ *Id.* at 1055, 453 A.2d at 1299.

²⁰² *Id.*

in accordance with the legislative intent to protect, not injure, adopted children such as Jessica."²⁰³ The case was reversed and remanded to the lower court to determine whether the mother's consent was actually conditioned on the retention of her legal status as the child's mother.²⁰⁴

Where the parties involved are a child's natural parent and non-natural psychological parent, the process has proven to be more complex. Courts have focused more heavily on the satisfaction of the best interests requirement in these cases rather than broadening the application of step-parent adoption provisions.

In April of 1984, a petition for second parent adoption was filed in San Diego by the psychological parent of a child.²⁰⁵ The petitioner was an unmarried adult male who had married the natural mother of the child in 1978, following the dissolution of her marriage to the child's natural father.

At the time of the marriage to the petitioner, the child was approximately one year and ten months old. During the course of the marriage, the petitioner submitted and filed a petition to adopt the child as a step-parent. However, prior to a ruling on the petition, the natural mother and petitioner separated. The marriage was subsequently dissolved.²⁰⁶

Since the time of the dissolution, and at the time of the filing for the second parent adoption, the petitioner had "maintained a warm and loving relationship with said minor including but not limited to exercising weekend visitation with said minor [and] . . . continu[ing] to visit with, care for and support said minor."²⁰⁷ The natural mother of the child submitted a declaration to the court stating that the child's natural father had willfully failed to support and/or communicate with the child in any way for over a year, and that he had "unilaterally relinquished any and all rights and privileges with reference to the care, custody, and support of said minor."²⁰⁸ The natural mother additionally declared: "I believe that it would be in the best interests of [the child] for the court to declare her free from the custody and control of her natural father . . . and grant petitioner's petition for adoption of [the child] subject to my retaining rights of custody and control of said minor."²⁰⁹

The San Diego Department of Social Services (DSS) subsequently failed to investigate the home of the petitioner or interview any of the parties to the petition on the grounds that the petition was not a valid

²⁰³ *Id.* at 1056-57, 453 A.2d at 1300.

²⁰⁴ *Id.* at 1058, 453 A.2d at 1301.

²⁰⁵ Petition for Adoption, *In re* Adoption Petition of D.J.L., No. A-28345 (Cal. Super. Ct., San Diego County filed April 17, 1984).

²⁰⁶ *Id.* at 1-2.

²⁰⁷ *Id.* at 2.

²⁰⁸ Declaration of P.A.R. at 2, *In re* Adoption Petition of D.J.L. (No. A-28345). This assertion by the mother was made in accordance with the requirement of CAL. CIV. CODE § 224 in order to dispense with father's consent before the child's adoption.

²⁰⁹ *Id.* at 3.

independent adoption.²¹⁰ The reasons cited by the DSS were: "1. The minor *does not* presently and *will not* in the future be living with the petitioner," and "2. The natural mother wishes to consent to this adoption *without* giving up any of her rights and the minor will continue to live with her."²¹¹

The petitioner filed a Motion to Compel Commencement of Investigation by the DSS on the grounds that even though the marriage between the petitioner and the child's mother was dissolved, "Petitioner has continued to and does enjoy a close relationship with Child. Petitioner and Child spend weekends together, go on trips and vacations together, Petitioner assists Mother with financial support of Child, and in all aspects Petitioner acts as the father of the Child."²¹² The motion also claimed that "[t]he Department of Social Services' problem is that this adoption does not neatly fit into any easy classification and that, apparently, is confounding to the agency,"²¹³ and argued that "regardless of the agency's confusion as to how to proceed, it is clear that, pursuant to California Civil Code section 226, et seq., the agency has a statutory duty to investigate."²¹⁴

The DSS filed a memorandum of points and authorities in opposition to the motion to compel.²¹⁵ In the memorandum, the Department argued that an adoption wherein the sole legal parent of the child consents to, and does not plan to relinquish any parental rights upon, the adoption of her child by the petitioning party, was not what was envisioned by statutory adoption law permitting independent adoptions.²¹⁶ The DSS further argued that "[i]t is the intention of the legislature and the courts, that an independent adoption shall include a placement of the minor outside of the home of the natural parent"²¹⁷ and that "[a]doption proceedings not in compliance with statutory mandates do not give the court jurisdiction on which to proceed."²¹⁸

In a subsequent hearing, the court rejected the arguments of the DSS and compelled an investigation of the petition.²¹⁹ The judge ordered the DSS to proceed with a home study and psychological evaluations of

²¹⁰ July 6, 1984 Report of the San Diego County Dep't of Social Services at 1, *In re* Adoption Petition of D.J.L. (No. A-28345).

²¹¹ *Id.* at 2.

²¹² Declaration of Donald J. Zaitzow in support of Motion to Compel Commencement of Investigation by San Diego Dep't of Social Services at 2, *In re* Adoption Petition of D.J.L. (No. A-28345).

²¹³ *Id.* at 6.

²¹⁴ *Id.*

²¹⁵ Memorandum of Points and Authorities in Opposition to Motion to Compel Commencement of Investigation, etc., *In re* Adoption Petition of D.J.L. (No. A-28345).

²¹⁶ *Id.* at 4, 6.

²¹⁷ *Id.* at 6.

²¹⁸ *Id.* at 8.

²¹⁹ May 23, 1985 Report of the San Diego County Department of Social Services at 4, *In re* Adoption Petition of D.J.L. (No. A-28345)

the mother, the child, and the petitioner.²²⁰ After a favorable home study was completed, the DSS filed its report, posing the question of whether or not the minor was free to be adopted. The report stated that the court would have to rule on the validity of the consent form signed by the birth mother. It noted that the consent form was not the standard independent adoption consent form in which the natural parent waives all of his or her parental rights.²²¹ The mother's consent forms, drafted by the petitioner's attorney, provided that she would retain her rights to the child. The report further stated that the mother had not signed the independent adoption forms "because these forms state that she would be giving up all her rights as the minor's parent, and she does not wish to do that. She wishes to remain the minor's mother, and intends that the minor will continue to live with her."²²²

The DSS then went on to recommend that the petition for adoption be granted "provided that the court finds the psychological evaluations are also favorable . . . and provided that the court finds the birth mother's consent to be valid, and agrees that the minor will continue to reside with the mother."²²³ In June 1985, the Superior Court for the County of San Diego granted the petition for this second parent adoption.²²⁴

A similar second parent adoption was granted in April 1985 in Riverside County, California. The petitioner, who was the child's psychological parent, had once been married to the child's mother but had never formally adopted or petitioned to adopt the child²²⁵ until after he and the child's mother were divorced.

Second parent adoptions have also been granted in cases where the natural and psychological parents are the same sex.²²⁶ Although some of these cases have not specifically focused on the gender of the parents in their decision-making process,²²⁷ others have proven to be a bit more

²²⁰ *Id.*

²²¹ *Id.* at 5.

²²² *Id.* at 4.

²²³ *Id.* at 6.

²²⁴ Decree of Adoption, *In re* Adoption Petition of D.J.L. (No. A-28345).

²²⁵ Decree of Adoption, *In re* Petition of Adopting Parent, No. A-10169 (Cal. Super. Ct., Riverside County April 25, 1985).

²²⁶ Such adoptions have been granted in Alaska, California and Oregon. See cases cited *supra* note 13.

²²⁷ In the Alaska case *In re Adoption of a Minor Child*, the child's guardian ad litem recommended that the adoption be granted to a lesbian couple who had coparented the child since birth. The guardian ad litem's report specifically acknowledged the lesbian relationship between the women, but refused to give that relationship any weight in the best interests determination or to discuss it further, noting that:

Except for the observations that [A] and [B] are the two adults in the household of which [the child] is an integral part, that [A] has accepted the role of primary caretaker for [the child] and that the household appears to have been successful and will likely continue to be successful for all three, this report will not address the relationship between [A] and [B]. Other than stated herein, the relationship does not directly affect [the child]. See, e.g., *SNE v. RLB*, 699 P.2d 875 (Alaska 1985) (mother's lesbian relationship irrelevant to custody determination if it does not directly affect child's well-being).

difficult.

For example, in a 1987 case,²²⁸ the petitioners were a lesbian couple who had lived together for eleven years and whose previous petition to jointly adopt a younger daughter had been granted in San Francisco one year earlier²²⁹ with very positive recommendations from the DSS.²³⁰ Prior to the joint adoption, one of the women had legally adopted another child whom the couple were raising together.²³¹

After the joint adoption was granted, the non-legal mother of the first child, with the consent of the legal mother, petitioned to adopt that child without terminating the legal mother's rights. The same social worker who had made a positive recommendation of the household for the previous joint adoption investigated this new petition and concluded that such adoption would be in the child's best interests.²³² The DSS, however, recommended that the court deny the petition, reasoning that "one parent is enough."²³³

The petitioners appealed the decision of the DSS to the Superior Court. At trial the court readily found that the adoption would be in the child's best interests and granted the adoption.²³⁴ In deciding whether the adoption should be granted, the court adhered to the mandate that the main focus in an adoption proceeding must be the best interests of the child, not the legal status of the relationship between the adopting parties.²³⁵

Another case of particular interest is the Alaska case of *In the Matter of the Adoption of A.O.L.*,²³⁶ in which both the legal mother and father of the child sought to retain their legal rights upon the child's adoption by a third person. While raising the child, the legal parents had shared parental privileges and responsibilities with the petitioner, a

Report of Guardian ad Litem at 10 n.8., *In re Adoption of a Minor Child*, No. 1-JU-86-73 P/A (Alaska Super. Ct. March 3, 1987).

The studies conducted on lesbian and gay parenting unanimously conclude that lesbians and gay men can provide stable and healthy environments for child rearing, and that children raised in these homes are indistinguishable from their counterparts raised in heterosexual households. For a comprehensive summary of these studies, see R. ACHTENBERG, *LESBIAN AND GAY PARENTING*, *supra* note 8.

²²⁸ *In re Adoption Petition of N.*, No. 18086 (Cal. Super. Ct., San Francisco County filed March 11, 1986).

²²⁹ Petitioner's Trial Brief at 2, *In re Adoption Petition of N.*, No. 18086 (Cal. Super. Ct., San Francisco County filed March 11, 1986).

²³⁰ Conversation with Roberta Achtenberg, attorney for petitioners, (October 1987).

²³¹ Petitioner's Trial Brief at 1-2, *In re Adoption Petition of N.* (No. 18086).

²³² *Id.* at 3.

²³³ *Id.*

²³⁴ Conversation with Roberta Achtenberg, attorney for petitioners, (October 1987).

²³⁵ See *supra* notes 28-31 and accompanying text. See also *MacGregor v. Unemployment Ins. Appeals Bd.*, 37 Cal. 3d 205, 213, 689 P.2d 453, 459, 207 Cal. Rptr. 823, 829 (1984) ("The state's policy in favor of maintaining secure and stable relationships between parents and children is equally as strong as its interests in preserving the institution of marriage.")

²³⁶ *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

woman who was the child's psychological parent.²³⁷ Both natural parents consented to an adoption of the child by the psychological parent provided it would not terminate any of their rights or responsibilities.²³⁸ The petitioner as well did not wish to deprive the natural parents of any of their rights.²³⁹ Furthermore, the child, through her guardian ad litem, also consented to the petitioner being accorded parental status without termination of the natural parents' rights.²⁴⁰

Although an Alaska statute seemed to require the termination of parental rights in the natural parent upon the child's adoption by another²⁴¹, the court applied a directory interpretation of the statute and found that it would be in the best interests of the child to be adopted by the psychological parent without severing any ties with her natural parents. Accordingly, the child now has three legal parents.²⁴²

These cases illustrate that a determination of what is in a child's best interests can only be made on an individual, case-by-case basis. The unbending application of broad categorizations that rely on the marital status of the parties or on blanket assertions that "one parent is enough" frustrate the basic purpose of adoption statutes to serve the best interests of the child. These artificial categories distract courts from the mandate that the welfare of the child is the primary concern in an adoption proceeding, and result in determinations made on the basis of factors subject to discriminatory and overbroad generalizations.

V. CONCLUSION

State law mandates that a child's best interests be the sole and overriding factor used by the courts in making determinations regarding the placement and custody of children. The existence of a psychological parent-child relationship is crucial to the healthy emotional and psychological development of a child, and unnecessary severance of this relationship may have traumatic consequences for a child's welfare.

In the case of second parent adoption, no problem exists with regard to whether a psychological parent-child relationship has developed between the child and another adult who is not married to the child's legal parent; it clearly has. The dilemma which does exist, however, is how to protect that relationship in the event of the death or incapacity of the legal parent or a split between the two adults. For although stop-gap measures like legal guardianship or de facto parenthood are useful in an

²³⁷ Memorandum in Support of Petition for Adoption at 21, *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

²³⁸ *Id.* at 3.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ ALASKA STAT. § 25.23.130(a)(1) (Supp. 1987).

²⁴² *In re Adoption of A.O.L.*, No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

emergency, they cannot guarantee the ongoing protection of the child by both the legal parent *and* another person who has consistently cared for him or her.

Without legal recognition of the relationship between the child and the psychological parent who is unable or unwilling to marry the child's legal parent, there is no way to permanently ensure the continuity and stability that is so crucial to a child's health and well-being. The best interests of the child thus become wholly dependent on the legal status of the relationship between the adults involved. This emphasis on marital status is clearly contrary to the premise on which adoption law is based: "the promotion of the welfare of children 'by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.'"²⁴³ The refusal to provide a child with legal protection of his or her psychological parents when these intimate bonds already exist defeats this very purpose. If, as noted by the authors of *Beyond the Best Interests of the Child*, "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development,"²⁴⁴ then it is the role of the courts to ensure that where these relationships already exist, they will be protected and encouraged to continue.

²⁴³ Department of Social Welfare v. Superior Court, 1 Cal. 3d 1, 6, 459 P.2d 897, 899, 81 Cal. Rptr. 345, 347 (1969) (quoting Adoption of Barnett, 54 Cal. 2d 370, 377, Adoption of McDonald, 43 Cal. 2d 447, 459 (1954), *In re Santos*, 185 Cal. 127, 130 (1921)).

²⁴⁴ BEYOND THE BEST INTERESTS, *supra* note 33, at 31-32.