

PROHIBITING ADOPTION BY SAME-SEX COUPLES: IS IT IN THE "BEST INTEREST OF THE CHILD?"

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I. INTRODUCTION

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people.¹

While the family unit remains at the center of the societal structure today, the interpretation of the word "family" has evolved through the years.² The United States Census Bureau defined the traditional family unit as "two or more persons related by birth, marriage, or adoption who reside in the same household."³ Many Americans, however, tend to adopt a broader definition than that used by the courts and legislatures, with one survey showing that a majority

1. DeBurgh v. DeBurgh, 250 P.2d 598, 601 (Cal. 1952).

2. Mary Patricia Treuthart, *Adopting a More Realistic Definition of Family*, 26 GONZ. L. REV. 91, 96 (1990/1991).

3. *Id.* at 96.

of individuals define family as "a group of people who love and care for one another."⁴ Current perceptions of family transcend the limitations of bloodlines.⁵ The general population's perception is a reflection of the vast array of families found today, from single parent families to step families, to families headed by grandparents. In fact, the United States Census Bureau reported that thirty percent of children are born out-of-wedlock,⁶ and one-half of all marriages end in divorce.⁷ "The dramatic increase in non-traditional families has, therefore, led to an evolution in the meaning of family."⁸

But while most non-traditional families seem to be gaining support in courts and legislatures across the country, one such non-traditional family—the gay or lesbian family—is still fighting for recognition as a family unit, especially in the area of adoption. Social stereotypes, state statutory prohibitions,⁹ and lack of objective judicial standards make adoption a difficult—and in some states, an impossible¹⁰—option for gay and lesbian couples wishing to raise children.

This Note focuses on the hurdles faced by same-sex couples attempting to adopt a child. Part II begins by stating the goal of the adoption process. Part III gives a synopsis of how states treat this issue and how they are divided. Part IV looks at the "best interest of the child" standard as the predominant consideration of the courts when deciding adoption issues. Part V analyzes the constitutionality of certain state actions, specifically, the statutory prohibition of adoption by gay and lesbian couples. Finally, Part VI touches on Iowa policy concerning this evolving issue, pointing out that the focus needs to remain on the best interest of the child rather than the sexual orientation of the adoptive parents.

II. ADOPTION'S ROOTS

"Adoption is a creature of statute which endows the adoptive parents with all of the legal rights and responsibilities associated with parenthood"¹¹ Every state has constructed its own laws for adoption, and these laws, by their

4. *Id.* at 97.

5. *Id.* at 96-97.

6. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 76, 81 (118th ed. 1998).

7. *Id.* at 114.

8. Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT. 782, 798-99 (1997).

9. See, e.g., FLA. STAT. ANN. § 63.042(3) (West 1997) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

10. See, e.g., *id.* (prohibiting adoption by homosexuals).

11. 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW & PRACTICE 1-1 (2000).

terms, are to be liberally construed so as to ensure the best interest of the child.¹² However, the laws are not uniform or consistent in their interpretation from one jurisdiction to the next.¹³ Constitutionally, states have broad discretion in limiting adoption because adopting a child is not viewed as an individual's fundamental right.¹⁴

The lack of uniformity in adoption laws is most apparent in the area of same-sex couple adoption.¹⁵ Advocates for adoption by same-sex couples believe judges have too much discretion in adoption cases in which to interject personal prejudices against homosexuals.¹⁶ "While several states . . . recogniz[e] that gays and lesbians should be allowed to adopt children or legalize the parental relationships that they have already formed with children, other states have tried to ensure that adoptions by gays and lesbians can never occur by prohibiting them altogether."¹⁷ Despite the divergence found in this particular area of adoption law, the "individual and social issues both reflected in and shaped by adoption laws and practice are basically the same in every jurisdiction."¹⁸

A. *The Traditional Goal*

Traditionally, adoption was to take place only when every aspect of the adoption was ideal—when everything was a perfect, or close to a perfect, match between the child and the parents who wished to adopt.¹⁹ Circumstances were ideal when the child's personal characteristics matched those of the adoptive parents in every way possible, including physical attributes, religion, intellectual ability, and other characteristics deemed important.²⁰ In fact, many agencies

12. See, e.g., ALASKA STAT. § 25.23.005 (Michie 1999) (stating the chapter on adoption could be construed liberally in the best interest of the adopted child with due regard given to the rights of all persons affected by the child's adoption); IOWA CODE § 600.1 (2001) (stating the chapter on adoption should be construed liberally with paramount consideration given to the best interests of the person to be adopted and due consideration given to the adoptive parents); N.J. REV. STAT. § 9:3-37 (1993 & Supp. 2000) (stating the adoption act should be liberally construed to the end that the best interest of children be promoted with due regard given to the rights of all persons affected by an adoption).

13. 1 HOLLINGER ET AL., *supra* note 11, § 1.01[1], at 1-5.

14. Epstein & Mukherjee, *supra* note 8, at 801; see *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (stating there is "neither a fundamental right nor a privacy interest in adopting a child.").

15. Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 92 (1996).

16. David P. Russman, Note, *Alternative Families: In Whose Best Interest?*, 27 SUFFOLK U. L. REV. 31, 31 (1993).

17. Mishra, *supra* note 15, at 92.

18. 1 HOLLINGER ET AL., *supra* note 11, § 1.01[3], at 1-17.

19. *Id.* § 3.06[1], at 3-40.

20. *Id.*

preferred to leave a child in an institutional setting rather than place the child in a home that did not reflect similar characteristics of the particular child.²¹ Obvious problems arose from these procedures, making the adoption process a difficult and inflexible one.²² Restrictions put on adoption left many children caught in the system.²³

B. Today's Goal

Under today's standard, the focus of adoption is to provide the child with a permanent home.²⁴ Discarding the requirement that the child match the adoptive home in every way possible, agencies, as well as the courts, today emphasize the importance of a home's suitability for a child.²⁵ "As a result, this lessened emphasis on stringent, superficial requirements has opened the door for non-traditional petitioners to adopt when they are 'suitably qualified to care for and rear the child', and when 'the best interests of the child will be promoted.'"²⁶ Recent judicial decisions²⁷ and legislative proposals²⁸ have furthered the principle that one's affiliation with a particular class of people alone should not preclude one's eligibility to adopt.

The best interest of the child is the paramount concern of a court in placement of that child.²⁹ Numerous factors converge and influence this standard, including the home environment of the parents, stability of the parents, the time a parent and child spend together, the support—both physical and

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Judith A. Lintz, Note, *The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children*—In re Adoption of Charles B., 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990), 16 U. DAYTON L. REV. 471, 478 (1991) (quoting State ex rel. Portage County Welfare Dep't v. Summers, 311 N.E.2d 6, 12 (Ohio 1974)).

27. See *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) ("The fact that appellant is bisexual is not unlawful nor, standing alone, does it render him unfit to be a parent."); *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993) (holding that although the legislature may not have envisioned same-sex partners, they did not limit the categories of persons entitled to adopt); *In re Opinion of the Justices*, 530 A.2d 21, 24-26 (N.H. 1987) (holding there must be a rational relationship between exclusion of a group and governmental purpose to preclude eligibility for adoption).

28. 1 HOLLINGER ET AL., *supra* note 11, app. 4A, at 4A-1. In 1994, The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Adoption Act (UAA). *Id.* The Act recognized a broad right to adopt, despite marital status, sexual orientation, religion, and other general characteristics, asserting that no individual would be "categorically excluded by the Act from being considered as a . . . prospective adoptive parent." *Id.* at 4A-15.

29. 2 AM. JUR. 2D *Adoption* § 136 (1994).

emotional—the child receives from the parents, the quality of the relationship between parent and child, sexual conduct and criminal background of the parents, as well as other factors the court deems appropriate.³⁰ Entrusted with broad discretion, the trial court has the ultimate authority in determining the best interest, preempting even the wishes of the child.³¹ In doing so, the court must acknowledge, not only the *physical* well-being, but also the *psychological* well-being of a child caught up in the placement process.³²

This standard, broad in its scope, may leave judges at odds in trying to determine the best interest of the child.³³ Personal biases or social stereotypes may influence the decision, or a judge may authorize the placement of a child to reward or punish the adults.³⁴ “If a judge lacks accurate knowledge or relies on assumptions based on prejudices, the child’s best interests may be sacrificed.”³⁵ This point is illustrated by the courts’ inclination to place a child with a married couple, believing that marriage will guarantee stability and support the child’s best interest.³⁶

III. STATES’ RESPONSE

State statutes concerning the eligibility of homosexuals to adopt range from Florida’s statutory prohibition³⁷ to New Jersey’s recent endorsement of joint adoption by same-sex couples.³⁸ “For every decision that finds homosexual

30. See *infra* discussion Part IV.

31. 2 AM. JUR. 2D *Adoption* § 136 (1994).

32. JOSEPH GOLDSTEIN ET AL., *THE BEST INTEREST OF THE CHILD* 5 (1996).

33. *Id.* at 81.

34. Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 739 (1999); GOLDSTEIN, *supra* note 32, at 81.

35. Lin, *supra* note 34, at 744 (quoting Steve Suseoff, Comment, *Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 856 (1985)).

36. Epstein & Mukherjee, *supra* note 8, at 803.

37. FLA. STAT. ANN. § 63.042 (West 1997).

38. See Matthew Futterman, *Gay Couple Allowed to Adopt a 2nd Child*, THE STAR LEDGER (Newark), at 35, May 18, 1999, available at 1999 WL 2980286; *Gay Couple Get Approval for Their Second Joint Adoption* <http://niz.com/NZ/Queer/OUT/news_199905/messages/632.html> (May 17, 1999). Most jurisdictions, rather than granting the traditional joint adoption, have instead sanctioned the second-parent adoption in which the rights of the biological parent are not terminated as in the traditional adoption. See Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986) (discussing the benefits of secured parent adoption and the similarities of stepparent adoption, and suggesting judges should grant second parent adoptions under existing statutes when it is in the child’s best interests); see also, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding that Massachusetts law did not preclude same-sex cohabitants from jointly adopting a child); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (holding Vermont

Mr. Jackman, the plaintiffs, had voluntarily disclosed that they were homosexuals to the Florida Department of Health and Rehabilitative Services (HRS) on an application for parenting classes.⁵¹ Each was denied the opportunity to adopt based on their homosexuality and the requirements outlined under section 63.042(3) of the Florida Statutes.⁵² The trial court held section 63.042(3) was void for vagueness, and found the statute violated the plaintiffs' right of privacy and equal protection.⁵³ HRS appealed to the district court of appeals which overturned the lower court's decision.⁵⁴ The court of appeals highlighted the fact that the United States Supreme Court had held in *Bowers v. Hardwick*⁵⁵ the regulation of homosexual activity was not violative of federal due process.⁵⁶ Further, the court of appeals reasoned the statute did not constitute a governmental intrusion into the private lives of the state's citizens because the statute only barred the statutory privilege to adopt a child when it is known the applicant was homosexual.⁵⁷ Explaining its analysis, the court pointed out "[s]ection 63.042(3) denies one group of natural persons the opportunity to adopt based upon their known sexual activities. It does not require public disclosure of personal matters . . . [Section 63.042(3)] does not compel unwarranted inquiry concerning private matters."⁵⁸ The court noted that the plaintiffs volunteered the information concerning their sexual orientation.⁵⁹

Additionally, the court held adoption in the State of Florida was not a private matter, but that the individual was requesting the adoption privilege, and the state was compelled to make a decision concerning the best interest of the child.⁶⁰ The court sided with the then-existing rationale of the New Hampshire Supreme Court, which held the opportunity to adopt an unrelated child did not constitute a fundamental right,⁶¹ and further recognized that the United States Supreme Court had held the decision to engage in homosexual conduct was not a fundamental right.⁶² As such, the court used a rational basis review in which the statute was presumed constitutional,⁶³ and Florida asserted a legitimate governmental purpose for this prohibitory statute:

51. State, Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d at 1211.

52. *Id.* at 1212; see *supra* text accompanying note 43.

53. State, Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d at 1212.

54. *Id.* at 1212-13.

55. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

56. State, Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d at 1215 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

57. *Id.*

58. *Id.* at 1216.

59. *Id.*

60. *Id.*

61. *Id.* at 1217 (citing *In re Opinion of the Justices*, 530 A.2d 21, 24 (N.H. 1987)).

62. *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

63. State, Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d at 1219.

[W]hatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood. Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years. Without reliance upon any unsubstantiated notion that a homosexual parent could 'teach' a child to become a homosexual, HRS maintains that the legislature may still decide that the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models.⁶⁴

The effect of this statute has in some instances been disturbing and has flown in the face of the public policy goal of ensuring the best interest of the child. In *Ward v. Ward*,⁶⁵ although there was dispute over just what effect Mary Frank Ward's homosexuality had on her eleven-year-old daughter, C.W., the trial court reversed custody from Mary to John Andrew Ward, the young child's father, who had been convicted of the second-degree murder of his first wife and served eight and one-half years in prison for that conviction.⁶⁶ The court reasoned that although divorced parents are entitled to a social life subsequent to the divorce, this right "cannot be confuse[d] . . . with the entirely separate issue as to whether post-divorce conduct has affected the best interests of young children."⁶⁷

Supporters of the Florida decision in *Ward v. Ward* assert the sexual conduct of the lesbian mother had an adverse effect on the development of her child and argue placement with the convicted father was actually the best option for C.W.⁶⁸ Arguably, the court's decision in *Ward* did not reflect the best interest

64. *Id.* at 1220.

65. *Ward v. Ward*, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996).

66. *Id.* at 252.

67. *Id.* at 254 (citing *Murphy v. Murphy*, 621 So. 2d 455, 458 (Fla. Dist. Ct. App. 1993)).

68. *Id.* at 252. The record in this case showed that C.W.'s problematic behavior included: "asking her step-mother if she had 'ever been in love with a woman;' inappropriate play

of the child. The court may have disguised a possible bias against homosexuals behind the best interest of the child standard. In determining the best interest of the child, a parent or guardian's sexual orientation and conduct may be considered as a factor in the overall analysis of what is truly in the best interest of any particular child,⁶⁹ but sexual orientation should never be a *per se* bar against eligibility in adoption.

Allowing such a law to stand demands a court presume a parent is unfit because that individual falls within a particular class—homosexuals.⁷⁰ This opens the door for improper decisions, as custody may be awarded to a heterosexual parent who is not truly fit to care for the physical and psychological needs of the child.⁷¹ This approach cannot be in the best interest of the child—the statute in effect cuts off consideration of any other factors that are typically involved in the process of custody decisions.⁷²

Although Florida is the sole state to statutorily ban adoption by homosexuals, other states have accomplished the same result by interpretation of state laws. In a 1994 case, *In re Lace*, the Supreme Court of Wisconsin barred the adoption by a mother's female cohabitant of the mother's daughter.⁷³ The mother and her partner had been living together for four years and had shared equally in raising the child.⁷⁴ They had also symbolically solemnized their relationship.⁷⁵ The couple simultaneously filed petitions to adopt and to terminate the parental rights of the legal father.⁷⁶ At the adoption hearing, the legal father of the child consented to the termination of his parental rights and to the adoption by the mother's partner.⁷⁷ The Community Adoption Center recommended the adoption, and a social worker from the center testified that this proposed adoption would be in the best interest of the child.⁷⁸ Despite the fact it had determined the adoption was in the best interest of the child, the circuit court ruled the mother's partner was not eligible to adopt and the child was not eligible for adoption.⁷⁹

with dolls; and stating 'her mama . . . and [appellant's female partner] sleep together. They do . . . some of the things that's in the [R-rated] movies.'" *Id.* at 252-53.

69. See Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 726 (1998).

70. *Id.* at 729.

71. *Id.* at 730.

72. *Id.*

73. *In re Lace*, 516 N.W.2d 678, 686 (Wis. 1994).

74. *Id.* at 680.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 680-81.

79. *Id.* at 681.

Although recognizing this adoption was considered by all, *including* the court, to be in the best interest of this particular child, the Wisconsin Supreme Court affirmed the lower court's decision to deny the adoption petition.⁸⁰ The supreme court explained "the child's best interests, by itself, does not authorize a court to grant the adoption."⁸¹ The court found the child ineligible for adoption because both biological parents had not terminated their rights—as required under the statute—in order for an adoption to be granted.⁸² Further, the court found the stepparent exception inapplicable to nonmarital partners.⁸³ Even though the mother's partner lived with the child, shared in her raising, and the mother and her partner had taken part in a marriage-like ceremony, the mother's partner was not considered a stepparent.⁸⁴

The opinion drew a strong dissent from two justices. Justice Heffernan began his dissent by pointing to section 48-01(2) of the code, which states the adoption statutes are to be interpreted liberally in order to reach the objective of the chapter—"the important public policy of the best interests of the child."⁸⁵ Reiterating that everyone involved in this particular case believed this adoption was in the best interest of the child, Justice Heffernan asserted the majority ignored the legislature's clear intent to use a best interest of the child standard:⁸⁶

Given the shrinking percentage of children that are raised in two-parent families, and the shrinking percentage of children who receive even minimally adequate care regardless of family structure, the public interest is enhanced by granting legal recognition of two-parent families that do

80. *Id.*

81. *Id.*

82. *Id.* at 683. The court relied on the following statute:

Who may be adopted. Any minor who meets all of the following criteria may be adopted:

(1) Except as provided under § 48.839(3)(b) or if an appointment of guardianship has been made under § 48.831, a minor whose parental rights have been terminated under subchapter VIII or in another state or a foreign jurisdiction.

(2) A minor who is present within the state at the time the petition for adoption is filed.

WIS. STAT. ANN. § 48.81 (West 1997). The Wisconsin legislature subsequently amended this provision. WIS. STAT. ANN. § 48.81 (West Supp. 2000). The author believes the amended provision parallels the outcome of this case.

83. *In re Lace*, 516 N.W.2d at 684. The stepparent exception allows the new spouse of a biological parent to adopt a child with the termination of only one parent's rights instead of both. *Id.* at 683 n.8.

84. *Id.* at 680-81.

85. *Id.* at 688 n.2 (Heffernan, J., dissenting).

86. *Id.* at 693 (Heffernan, J., dissenting).

further the express objective in § 48.01(1)(g) of "provid[ing] children in the state with permanent and stable family relationships."⁸⁷

B. Sanctioning of Adoption

On the opposite end of the spectrum are those states which have sanctioned adoption by same-sex couples. New Jersey first addressed this issue in 1993 in *In re Adoption of a Child by J.M.G.*⁸⁸ The plaintiff sought to adopt the biological child of her lesbian partner.⁸⁹ The plaintiff and the biological mother had been involved in a committed relationship for ten years, jointly owned a home, and agreed to raise the child together when the biological mother became artificially inseminated in 1988.⁹⁰

Reports were made to the court by a guardian ad litem and the Children of the World—an independent investigative organization—recommending that granting the adoption would be in the best interest of the child.⁹¹ The court granted the adoption, recognizing "there can be a psychological parent-child relationship between a child and someone other than the child's biological parent"⁹² The court acknowledged the importance in protecting the child from the potential emotional trauma inherent in terminating this psychological relationship.⁹³ Further, the court addressed the potential for harassment the child may face in the future:

Some courts have allowed the stereotypes and public disapproval from some quarters . . . to affect their decisions in these matters. "Courts sometimes allow the risk of harassment and stigmatization to be decisive without any evidence proving that harassment . . . will occur without supporting evidence. Moreover, they should recognize that community disapproval will not necessarily adversely affect children." Indeed, if there is ever any harassment or community disapproval, this court should have no role in supporting or tacitly approving such behavior.⁹⁴

The court ultimately stated that no reason existed to treat sexual orientation with any more weight than any other factor in adoption decisions, and sexual orientation should be treated as dispositive only if it was shown to have a severe

87. *Id.* at 689-90 (Heffernan, J., dissenting).

88. *In re Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993).

89. *Id.* at 551.

90. *Id.*

91. *Id.*

92. *Id.* at 552 (quoting *Hoy v. Willis*, 398 A.2d 109, 112 (N.J. Super. Ct. App. Div. 1978)).

93. *Id.*

94. *Id.* (quoting *SEXUAL ORIENTATION AND THE LAW* 128 (Harv. L. Rev. eds., 1990)).

adverse effect on the child.⁹⁵ Concluding the opinion, the court stated this case had come to the court during a "time of great change" in which families no longer fit into the formula of the traditional family.⁹⁶ Ultimately, the court found the plaintiffs were "providing a secure, stable, and nurturing environment for the child . . . [which] is to be commended."⁹⁷ The Vermont Supreme Court was the first state high court to sanction an adoption by a lesbian couple, laying a trail for other courts to follow.⁹⁸ Courts of other states have begun to construe their state statutes to allow for changes in social mores that will further the best interest of the children in the adoption process.⁹⁹

Initially, various states began to authorize same-sex couple adoptions by allowing second-parent adoptions by lesbian couples, in which one individual would adopt the biological or legal child of her partner without terminating the rights of the second biological parent.¹⁰⁰ Thirteen states have now explicitly sanctioned adoption of children by homosexuals, whether by joint adoption or second-parent adoption.¹⁰¹

IV. JUDICIAL INTERPRETATION OF THE BEST INTEREST OF THE CHILD STANDARD

By 1988, courts began utilizing the best interest of the child standard.¹⁰² This test requires the court to decide what best furthers the needs and interests of the child, and to resolve the dispute in accordance with that standard.¹⁰³ The test

95. *Id.* at 553.

96. *Id.* at 554-55.

97. *Id.* at 555.

98. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 194 (1995); see also *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993) (permitting adoption by a same-sex couple).

99. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (granting the joint petition for adoption by two unmarried cohabiting women, one of whom was the biological mother, when the women had a stable relationship, shared parenting responsibilities, the child considered both women to be her parents, and the child would benefit from the legal recognition of the mother's partner as her parent); *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d at 1276 (holding that when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, termination of a natural mother's rights is unreasonable and unnecessary).

100. See Zuckerman, *supra* note 38, at 730; Markey, *supra* note 69, at 746-47.

101. See Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 52.

102. Felicia E. Lucious, Note, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 S.U. L. REV. 171, 175 (1994).

103. *Id.*

couple will suffer from homophobic bias in the form of teasing, harassment, and badgering.¹²⁵

Quite glaringly, the censure of same-sex adoption has revolved around the lifestyle of same-sex couples. Due in large part to the *Bowers v. Hardwick* decision that sanctioned criminalization of homosexual activity in the state of Georgia, a blemish of immorality has attached to homosexuality.¹²⁶ Moreover, adoption laws are purely statutory privileges granted at the discretion of a particular state rather than granted under federal law. Thus, homosexuals have no relief available to them if they reside in a state that prohibits adoption by same-sex couples.¹²⁷

The lack of objective standards for the courts to use in developing this area of the law has resulted in a wide disparity in the placement of children across the nation.¹²⁸ Although the best interest of the child standard is used universally, courts differ in their interpretations of precisely what encompasses the child's best interest.¹²⁹ History has demonstrated that courts often rule the best interest of the child does not involve homosexual parents.¹³⁰

The best interest of the child standard offers wide latitude to placement agencies, as well as the judicial system, in reaching decisions that may prove flawed and destructive due to misinformation or bias.¹³¹ "If a judge lacks accurate knowledge or relies on assumptions based on prejudice, the child's best interests may be sacrificed."¹³² Judges often discount expert testimony and research that advocates for the placement of children with competent homosexual

their children to be heterosexual, then lesbian and gay couples cannot influence their children to be homosexual. *Id.*

125. *Id.* at 771. Although this argument does have substantial merit, many factors mitigate the social stigma experienced by a child of a same-sex couple. Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 568 n.588 (1990); see also Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978). Research demonstrates that ridicule, due to the parents' sexual orientation, occurs at a low frequency. Polikoff, *supra*, at 568 n.588. Further, the teasing does not seem to have any long-term effects. Green, *supra*, at 696 (1978).

126. Epstein & Mukherjee, *supra* note 8, at 806-07; see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

127. Mishra, *supra* note 15, at 121.

128. Lin, *supra* note 34, at 769.

129. Mishra, *supra* note 15, at 91-92 (stating that courts have diverged sharply in the best interest of the child standard when dealing with adoptions by gays and lesbians).

130. *Id.*

131. Lin, *supra*, note 34, at 744.

132. Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 856 (1985).

parents.¹³³ It is nearly impossible to determine if the ruling was due to a judge's own bias or the expert's lack of persuasiveness to the court.¹³⁴

There is a high cost of permitting the "traditional family" ideology to determine the outcome of lesbian-mother family disputes Children in lesbian-mother families, as much as children in other nontraditional families, need the legal system to recognize that their families do not conform to the one-mother/one-father model. They need judges to tailor legal rules that reflect the reality of their lives.¹³⁵

V. CONSTITUTIONAL ISSUES

The right to marry and the right to raise a family are among the most prized rights bestowed upon American citizens.¹³⁶ However, states grant these rights to those families consisting of a husband, wife, and children, and in effect have closely guarded the traditional notion of a familial unit.¹³⁷

A. Due Process and Equal Protection Analysis

The Fourteenth Amendment's Due Process Clause ensures to all citizens the right to life, liberty, and property free from governmental interference.¹³⁸ Also established under the text of this Amendment is the right to family autonomy,¹³⁹ freedom of marriage,¹⁴⁰ and freedom to bear children.¹⁴¹

Courts have skirted around granting adoptions to same-sex couples by holding that adoption is not considered a fundamental right guaranteed under the Due Process Clause.¹⁴² Relying on *Bowers v. Hardwick* as its authority, the

133. Lin, *supra* note 34, at 770.

134. *Id.*

135. Polikoff, *supra* note 125, at 561.

136. Epstein & Mukherjee, *supra* note 8, at 782.

137. *Id.*

138. See U.S. CONST. amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

139. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (endorsing personal autonomy of family free from governmental intrusion).

140. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (holding that the right of liberty includes the right to procreate, bear children, and maintain familial relationships).

141. See, e.g., *Griswold v. Conn.*, 381 U.S. 479, 485-86 (1965) (holding that marital status encompasses the right to procure and use contraceptives).

142. See *State, Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1217 (Fla. Dist. Ct. App. 1993); *In re Opinion of Justices*, 530 A.2d 21, 26-27 (N.H. 1987).

Florida District Court of Appeal in *State, Department of Health and Rehabilitative Services v. Cox* overcame a Due Process challenge to the state's adoption statute by holding that adoption was not a fundamental liberty and homosexual conduct was not a fundamental right.¹⁴³

Additionally, the Florida District Court held that the plaintiff's challenge to the Florida prohibition statute did not warrant strict scrutiny review, but rather upheld the statute applying rational basis review.¹⁴⁴ The court determined that homosexuals did not belong to a suspect class warranting a strict scrutiny review, and further, the court refused to extend that status in the present case.¹⁴⁵ As for rational basis review, the court reasoned that because Florida had the responsibility to ensure a safe and healthy environment for the children in its jurisdiction, Florida's decision to prohibit homosexuals from adopting children was a legitimate goal of avoiding social and psychological problems those children would face growing up in a household with homosexual parents.¹⁴⁶ Pointing out that most children will grow up to be heterosexual, the court held the best interest of Florida's children would be served by placing them with heterosexual parents who could teach them how to relate to the opposite sex.¹⁴⁷

B. *Conflict Between Constitutionality and the Best Interest of the Child*

By having a strict statutory prohibition against same-sex couples adopting children, Florida turns a blind eye and refuses to consider an individual's ability to parent.¹⁴⁸ Additionally, those states which do not have a strict statutory prohibition, but interpret the best interest of the child as excluding homosexuals from the adoption process, also do a grave injustice to those children who are in need of parental role models. "Their income level, educational background, home life, and potential love and emotional support for the child did not matter in terms of [Florida's] view of their ability to parent."¹⁴⁹

Absent a showing of harm, it is in the best interest of a child to have and maintain a relationship with a parent who loves that child. This rule must hold, regardless of the race, gender, or sexual orientation of that person. . . .

143. *State, Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d at 1217-18; see *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that there is no fundamental right to engage in homosexual conduct).

144. *State, Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d at 1218-20.

145. *Id.* at 1218.

146. *Id.* at 1220.

147. *Id.*

148. See generally FLA. STAT. ANN. § 63.042 (West 1997 & Supp. 2000).

149. Markey, *supra* note 69, at 745.

There is strong, consistent evidence that children of gay parents fair at least as well as their peers raised by heterosexual families.¹⁵⁰

VI. IOWA'S POLICY

Iowa Code section 600.1 on adoption reads: "This chapter shall be construed liberally. The best interest of the person to be adopted shall be the paramount consideration in interpreting this chapter."¹⁵¹ No specific prohibition exists that precludes same-sex couples from adopting.¹⁵² Additionally, the Iowa Code specifies that if the Iowa Department of Human Services decides to provide adoption services, it shall espouse rules that make "the overriding criterion . . . be a preference for placing a child in a stable home environment as expeditiously as possible."¹⁵³ Pre-placement investigation shall include the following: a determination of whether the petitioner's home is suitable for the placement of a child,¹⁵⁴ how the petitioner's "emotional maturity, finances, health, relationships, and any other relevant factor may affect the petitioner's ability to accept, care, and provide a minor person to be adopted with an adequate environment as that person matures,"¹⁵⁵ and whether the petitioner has been convicted of a crime or holds a record of child abuse.¹⁵⁶

Case law in Iowa is non-existent on this controversial issue. However, a *Des Moines Register* article visited the debate after the Iowa Foster and Adoptive Parents Association awarded an Eldora, Iowa gay couple the Foster Parents of the Year Award for serving as foster parents to thirteen children since 1989, which included one they had adopted.¹⁵⁷ "The award shed light on the fact that the state Department of Human Services does not consider the sexual orientation of couples before it places children in foster homes."¹⁵⁸ The department's Division of Adult, Children, and Family Services bureau chief, Mary Nelson, confirmed that the state does not inquire into the sexual orientation of a foster care applicant.¹⁵⁹

150. *Id.* at 754-55; see also *In re Adoption of T.K.J.*, 931 P.2d 488, 492 (Colo. Ct. App. 1996) (barring lesbian partners from adopting each other's natural child because they were not married and because the children were not eligible for adoption under the state adoption statutes without each parent terminating her parent-child relationship with the child).

151. IOWA CODE § 600.1 (2001).

152. See generally *id.* §§ 600.1-.25.

153. *Id.* § 600.7A.

154. *Id.* § 600.8(1)(a)(1).

155. *Id.* § 600.8(1)(a)(2).

156. *Id.* § 600.8(1)(a)(3).

157. Holli Hartman, *Gay Couple Top Foster Parents*, DES MOINES REG., June 1, 1996, at 1M.

158. *Id.*

159. *Id.*

Iowa seems focused on the best interests of the children within its jurisdiction by considering all factors in a particular situation, without allowing the sexual orientation of the parent to override all other considerations. The Iowa Department of Human Services' policy coupled with the provisions of the Iowa Code do justice to the best interest of any child caught up in the adoption process.¹⁶⁰ The best interest of the child—not the sexual orientation of the adopting parents—should be the central issue in any adoption case. However, sexual orientation is a factor, in the midst of other considerations, when a court is assessing the best interest of a particular child.¹⁶¹ Furthermore, adoption statutes should be construed liberally to ensure that the best interest of the child is the overriding consideration. "While an adoptive parent's homosexuality is not a determinative factor, it still cannot be totally ignored. The court owes it to the child to find sufficient evidence to show that the prospective parent's homosexuality will not have an adverse effect on the child."¹⁶²

VII. CONCLUSION

Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and *two* [homosexual] adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is not reason in law, logic or social philosophy to obstruct such a favorable situation.¹⁶³

Non-traditional families are rapidly growing in number and courts must acknowledge the evolution of yet another new species of family in this nation.¹⁶⁴ One commentator suggests that "[s]ocial institutions and the law have not kept up with the changes in family life. As a result, many groups which function as families are not recognized as such, and are denied benefits which society bestows upon families which resemble the traditional model, if only superficially."¹⁶⁵ Estimates show that between six and fourteen million children in the United States have at least one parent who is homosexual—and the

160. See Hartman, *supra* note 157, at 1M; see also IOWA CODE §§ 600.1-.25 (suggesting that the sexual orientation should not be a factor when determining placement of children for adoption).

161. Lucious, *supra* note 102, at 191.

162. *Id.*

163. Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

164. Toby Solomon, *Adoption by Same-Sex Partners*, 175 N.J. LAW. 11, 13 (Mar. 1996).

165. Treuthart, *supra* note 2, at 92.

numbers are growing.¹⁶⁶ This issue can no longer be placed on the back shelf. Although courts consistently espouse that the goal of adoption is to strengthen the family and promote the best interest of a particular child, this public policy is dishonored when same-sex couples are denied the privilege of adoption.¹⁶⁷ The best interest of any child should remain at the core of the adoption process.

Courts would fair well in listening to the voice of the New Jersey Superior Court in a 1993 decision:

[W]hile the families of the past may have seemed simple formations repeated with uniformity (the so called "traditional family") families have always been complex, multifaceted, and often idealized. This court recognizes that families differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.¹⁶⁸

Jodi L. Bell

166. Kantrowitz, *supra* note 101, at 52.

167. Epstein & Mukherjee, *supra* note 8, at 812.

168. Adoption of J.M.G., 632 A.2d 550, 554-55 (N.J. Super. Ct. Ch. Div. 1993).

