# COMMENT

## Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*

### I. INTRODUCTION

Most adults take for granted their right, through marriage and adoption, to legally protect their relationship with children. A substantial segment of adults, however, cannot take this right for granted. In some states these individuals are denied the right to have a legal relationship with their partners' children because they are lesbians.[1]

This proscription denies children whose parents are in a committed lesbian relationship the same legal and psychological protections found in legally recognized families. Yet, all children, regardless of their parents' sexual orientation, have a need for stability and predictability.[2] Children already living in a household with two established parental figures—one natural, the other nonbirth—have an interest in securing the same rights other children are afforded, namely: inheritance rights; child support, if the parents separate; benefits accruing from social security, pension plans, and health insurance; and continuity of relationship with both parents.[3]

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1. New Hampshire is an example of one of these states. *See* N.H. REV. STAT. ANN. § 170-B:4 (1987). *See also infra* note 89.

2. McDaniels v. Carlson, 108 Wash. 2d 299, 310, 738 P.2d 254, 261 (1987). The Washington Supreme Court, in *McDaniels*, recognized that child experts have determined that stability and predictability in a parent child relationship are important factors in the child's development. The importance of stability and predictability overrides the existence of the additional factor that one of the child's parents is not biologically related. *Id. See generally In re* Aschauer, 93 Wash. 2d 689, 695 n.5, 611 P.2d 1245, 1249 n.5 (1980); *In re* Marriage of Allen, 28 Wash. App. 637, 648, 626 P.2d 16, 23 (1981); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979); E. ERICKSON, CHILDHOOD AND SOCIETY (1963); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969-70); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

3. *See generally infra* note 4.

The rights and needs of children in these nontraditional families could be recognized through second parent adoptions.[4] In essence, a second parent adoption is the adoption of a child by the partner of the child's natural or legal parent. For example, suppose a lesbian couple, Emily and Lynn, decide to have a child. Emily conceives the child through artificial insemination. Lynn, the nonbirth parent, then petitions the court to adopt Emily's child and the court grants this adoption without terminating Emily's parental rights. The child then has two legal parents through the second parent adoption process.

In 1988 and 1989, three Washington courts joined the courts of three other states in granting second parent adoptions.[5] This Comment examines the issue of second parent adoptions in Washington and concludes that they do not contravene established legal principles. First, Part A describes the second parent adoptions granted in Washington and other states. Part A also shows that second parent adoptions are legally necessary. Second, Part B examines the Washington adoption statute[6] and determines that it is permissive of second parent adoptions. Finally, Part C evaluates whether second parent adoptions satisfy the legislative requirement of providing for the best interests of the child.[7] This Comment concludes that, all other variables being equal,[8] second parent adoptions do not contravene the legislative intent.

To avoid the difficulties and issues involved with the existence of a known other legal parent, this Comment presumes that the natural mother is unmarried and was artificially inseminated by an unknown donor.[9] This Comment also

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4. Second parent adoption is a new term that was first introduced in the literature by Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986). *See also* Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96 (1987).

5. *See In re* Child 1 and Child 2, No. 89-5-00067-7 (Thurston County Super. Ct. Nov. 16, 1989); *In re* the Interest of E.B.G., No. 87-5-00137-5 (Thurston County Super. Ct. Mar. 29, 1989); *In re* Adoption of (Child A and Child B), No. 88-5-00088-9 (Spokane County Super. Ct. June 23, 1988).

6. WASH. REV. CODE § 26.33.010-.901 (1989).

7. WASH. REV. CODE § 26.33.010 (1989).

8. In a proposed second parent adoption, any person can request that a preplacement investigation be conducted by a local adoption agency to evaluate all variables conducive to raising the child, for example, a child's exposure to adult males, family income, etc. *See infra* notes 47-49 and accompanying text.

9. Washington's artificial insemination statute provides:

(1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man

presumes that the petition for adoption is not for a joint adoption, but it is a petition for adoption of a child already living in the particular household. Additionally, this Comment refers almost exclusively to lesbian mothers, but the same analysis should apply to situations involving gay fathers as well as unmarried heterosexual parents.

### *A. Second Parent Adoptions Have Been Granted in Washington and Other States*

Second parent adoptions resemble stepparent adoptions, with the exception of the element of marriage.[10] They are most applicable to situations in which the adults, desiring to share parenting responsibilities, are unwilling or unable to marry.[11]

In stepparent adoptions, the rights of the natural custodial parent are not terminated; the natural custodial parent merely consents to the adoption by his or her spouse. A stepparent adoption, however, does terminate the legal relationship between the non-custodial natural parent and the child. In Washington[12] and in other states, the general rule is that natural non-custodial parental rights are terminated when an adoption is granted; however, when a stepparent adopts the child of his or her spouse an exception to this rule applies and the rights of the natural custodial parent remain intact.[13]

Second parent adoptions, like stepparent adoptions, do not require the natural mother to relinquish her parental rights and responsibilities; rather, they permit the nonbirth parent to assume parental rights and responsibilities in conjunction with the natural parent.[14] Thus, through second parent adoption, it is possible for a child and a lesbian nonbirth parent to obtain

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not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . . (2) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as *if he were not the natural father* of a child thereby conceived *unless* the donor and the woman *agree in writing* that said donor shall be the father.

WASH. REV. CODE § 26.26.050 (1989) (emphasis added).

10. Patt, *supra* note 4, at 118; Zuckerman, *supra* note 4, at 729.

11. Patt, *supra* note 4, at 96.

12. WASH. REV. CODE § 26.33.150(4) (1989). It is implicit in the statute and case law that by joining in the petition for a stepparent adoption, the natural custodial parents' rights are not terminated. *See also In re* Gargan, 21 Wash. App. 423, 587 P.2d 545 (1981).

13. *See In re* Jessica W., 122 N.H. 1052, 453 A.2d 1297 (1982).

14. *See* sources cited *supra* note 4.

the protection of a relationship sanctioned by the law if the nonbirth parent is permitted to adopt the child through a second parent adoption.[15] In addition to providing children with basic economic protection, allowing a nonbirth parent to adopt ensures that the adoptive parent has the authority to deal with schools, doctors, and other agencies.[16] Furthermore, the rights of both the nonbirth parent and the child would be protected

15. *Id.* If a court denies a lesbian nonbirth parent the opportunity to adopt merely because of her sexual orientation, it opens the door for the argument that its decision has violated the Washington privileges and immunities clause. WASH. CONST. art. I, § 12 (1889).

Justice Utter of the Washington Supreme Court argues that Washington is not bound by the limits imposed by the U.S. Supreme Court's interpretations of various civil rights, and Washington can grant more rights than the federal fourteenth amendment's Equal Protection Clause. Utter, *Independent Interpretation of the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 499 (1984); Washington has specifically accepted this responsibility. *Id.* at 493, 499, citing State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (Washington Supreme Court conferring more limitations in searches and seizures under article I, section 7 of the Washington Constitution than under the federal Constitution, citing Alderwood Assocs. v. Environmental Council, 96 Wash. 2d 230, 635 P.2d 108 (1981) (Washington Supreme Court conferring more protection for freedom of speech under article II, section 7 of the Washington Constitution than under the federal Constitution)); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (holding that the state privileges and immunities clause may be construed to provide greater protection to individual rights than that afforded by the United States Constitution's fourteenth amendment); *see also* Bowman v. Waldt, 9 Wash. App. 562, 513 P.2d 559 (1973) (holding that rulings by the U.S. Supreme Court construing the fourteenth amendment to the United States Constitution are not binding on state courts construing similar language of article I, section 12 of the Washington Constitution).

*But see* Gaylord v. Tacoma School Dist. No. 10, 85 Wash. 2d 348, 535 P.2d 804 (1975) (where a gay teacher was fired from his job because he claimed to be a homosexual, and the court found, under the direction of a now repealed sodomy statute, that a claim of homosexuality was equivalent to stating one had engaged in sodomy, and therefore, that one had engaged in illegal activity; the *Gaylord* court did not consider a privileges and immunities argument); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (where the court did discuss fourteenth amendment equal protection in the context of two gay men seeking to marry each other and concluded that a statute that distinguishes between certain classes of persons is generally presumed to be constitutional and will be upheld if it rests upon some reasonable and rational basis; only classifications that are "inherently suspect" must meet the test of "compelling state interest").

While the *Singer* court determined that homosexuals are not a suspect class, it did not analyze all of the necessary steps to finding a particular class suspect. *Id.* at 261-62, 522 P.2d at 1195-96. The court merely stated that homosexuals are not suspect. The court also determined that Washington does not recognize an intermediate level of scrutiny. *Id.* at 262-63 n.13, 522 P.2d at 1196-97 n.13. Thus, under a rational basis test, the *Singer* court reasoned that the couple could be denied the right to marry because marriage is defined as the union between a man and a woman. The legislative intent was to protect the institution of marriage and its procreative aspect. *Id.* at 259, 522 P.2d at 1195.

16. Zuckerman, *supra* note 4, at 742.

in the event the relationship between the nonbirth parent and the natural parent dissolved.[17]

Gradually, several states—Alaska, California, Oregon, and Washington—have begun to permit second parent adoptions using the same principles and legal processes involved in step-parent adoptions.[18] The Washington courts have authorized three second parent adoptions.[19] In *In re the Interest of E.B.G.*, the natural and nonbirth parents were successful in their efforts to obtain approval of a second parent adoption despite opposition by the guardian ad litem.[20]

In Alaska, a superior court judge granted a second parent adoption by a lesbian mother's partner.[21] The parental rights of the natural mother were not severed and the mother's lesbian partner was permitted to be a legally-recognized second parent.[22] In Oregon, a natural mother, who gave birth after being artificially inseminated, and her partner desired to have the child adopted by the nonbirth parent.[23] The child had been

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17. *Id.*; *see also* Patt, *supra* note 4, at 106.

18. *See supra* notes 10-14 and accompanying text.

19. *See* cases cited *supra* note 19.

20. Report of Guardian ad Litem, *In re* the Interest of E.B.G., No. 87-5-00137-5 (Thurston County Super. Ct. Mar. 29, 1989) (the only Washington second parent adoption that has been contested) [hereinafter Report of Guardian ad Litem]; *see also In re* the Interest of E.B.G., No. 87-5-001137-5 (Thurston County Super. Ct. Mar. 29, 1989). *But see In re* Jason C., 129 N.H. 762, 533 A.2d 32 (1987) (New Hampshire does not permit unmarried cohabitating adults to petition for joint adoption); Rich, *Sexual Orientation in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 782-3 (1988) (citing appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335, 727 P.2d 830 (1986) (noting the illegality of homosexual acts and upholding a decision denying a bisexual the opportunity to adopt a child)).

21. *In re Adoption of a Minor Child*, No. 1-JU-86-73 PIA (Alaska Super. Ct. Mar. 3, 1987).

> 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 interest 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 the 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.

Patt, *supra* note 4, at 130 n.227 (citing Report of Guardian ad Litem, *In re* Adoption of a Minor Child, No. 1-JU-86-73 PIA (Alaska Super. Ct. Mar. 3, 1987)); *see also In re* Adoption of A.O.L., No. 1-JU-85-25 (Alaska Super. Ct. July 23, 1985).

22. *In re* Adoption of a Minor Child, No. 1-JU-86-73 PIA.

23. *See In re* Adoption of M.M.S.A., No. D-8503-61930 (Or. Cir. Ct., Multinomah

parented by both adults since birth.[24] The Oregon court permitted the adoption without severing the natural mother's rights and responsibilities.[25] California has also permitted four second parent adoptions, two by lesbian partners[26] and two by unmarried heterosexual partners.[27]

In each of the states that have granted second parent adoptions, the paramount factor underlying the decisions has been the same as in all adoption cases: the best interests of the child.[28] However, adoptions are a creature of statute, not common law. If a court determines that the statute is not permissive of second parent adoptions, then it is unnecessary to reach a consideration of the best interests of the child standard.[29] Once it is determined that the statute is permissive of second parent adoptions, the courts have discretionary power to grant the adoption if it is in the child's best interests. It is the thesis of this Comment that second parent adoptions can be granted by all Washington courts reviewing such petitions.

### 1. Second Parent Adoptions Are Legally Necessary

A question which must be addressed before evaluating the Washington adoption statute and the best interests of the child standard is whether there is an alternative to adoption. In the final analysis, adoption is the only real means to protect the legal rights of both the child and the nonbirth parent.[30] Other

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County Sept. 4, 1985). In Oregon, the adoption statute provides that "[a]ny person may petition . . . for leave to adopt[,]" OR. REV. STAT. § 109.310(1) (1985), although, an adoptive parent must be twenty one years or older. OR. REV. STAT., § 109.425(4) (1983).

24. *In re* Adoption of M.M.S.A., No. D-8503-61930.

25. *Id.*

26. *See In re* Petition of Carol—Adopting Parent, No. 18364 (Cal. Super. Ct., City and County of San Francisco Nov. 7, 1988); Adoption Petition of Nancy, Adopting Parent, No. 18086 (Cal. Super. Ct., City and County of San Francisco Sept. 28, 1987).

27. *See In re* D.J.L., No. A-28345 (Cal. Super. Ct. Apr. 17, 1984); Patt, *supra* note 4, at 98 (citing *In re* Adoptive Parent, No. A-10169 (Cal. Super. Ct. Apr. 25, 1986).

The California adoption statute provides that an adoptive parent shall be at least 10 years older than the unmarried prospective minor adoptee. CAL. CIV. CODE, § 222(a) (West 1982).

28. *See In re* L.A., 597 P.2d 513 (Alaska 1979); Adoption of Michelle Lee T., 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975); *In re* Adoption of Sarkissian, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963); *In re* D., 24 Or. App. 601, 547 P.2d 175, *cert. denied*, 429 U.S. 907 (1976). In Alaska and Washington the "best interests" test actually appears in the adoption statute. ALASKA STAT. § 25.23.120(c) (1983); WASH. REV. CODE § 26.33.010 (1986).

29. Patt, *supra* note 4, at 111.

30. Zuckerman, *supra* note 4, at 743 (describing an actual situation where the maternal grandparents intervened eight years after the natural mother died, and were

forms of protection such as legal wills, guardianship status, and custody do not offer the same legal protections.

If a natural parent makes a legal will, and names the nonbirth parent as the person she desires to parent her child upon her death, the will could be contested.[31] For example, the natural parent's free will may be found invalid upon a showing of undue influence, thereby defeating the appointment of a testamentary guardian.[32] If the nonbirth parent died testate leaving property to the child, the nonbirth parent's heirs could also attempt to invalidate her legal will by showing undue influence.[33] If the nonbirth parent died intestate, the child would not be considered "issue" for purposes of distribution under the Washington descent and distribution statute.[34]

The natural parent could identify the nonbirth parent as a testamentary guardian before she dies.[35] However, guardianship status is controlled by the court and may be denied or terminated at any time.[36] Appointment as a guardian also does

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awarded custody of the child despite the fact that the child had lived with the nonbirth parent for fourteen years); *see also infra* notes 131-32 and accompanying text.

31. *But see* Report of Guardian ad Litem, *supra* note 20 (suggesting, without supporting authority, that courts would be unlikely to alter the intent of a will).

32. Undue influence, while difficult to prove, must be established by the persons contesting a legal will. Influence is undue if it overcomes the free will of the testator and replaces it with the will of the person exerting the influence. The testator must remain a free agent when making a legal will. Circumstantial evidence of a confidential relationship between the testator and the beneficiary is an important factor in establishing undue influence. M. REUTLINGER & W. OLTMAN, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION 87, 92 (1985).

33. *Id.*

34. WASH. REV. CODE § 11.04.015 (1989) (provides for the plan of distribution to surviving spouses, issue, parents, brothers or sisters, grandparents, or aunts and uncles of the decedant); WASH. REV. CODE § 11.02.005(4) (1989) ("issue includes all the lawful lineal descendants of the ancestor and all lawfully adopted children").

35. *See* WASH. REV. CODE § 11.88.080 (1989) which provides the following:

> When either parent is deceased, the surviving parent of any minor child may, by his last will in writing appoint a guardian or guardians . . . of his minor child, whether born at the time of making such will or afterwards, to continue during the minority of such child or for any less time, and every such testamentary guardian of the estate of such child shall give bond in like manner and with like conditions as required by WASH. REV. CODE § 11.88.100 and 11.88.110, and he shall have the same powers and perform the same duties with regard to the person and estate of the minor as a guardian appointed as aforesaid.

*See also* Report of Guardian ad Litem, *supra* note 20 (suggesting that a legal will is sufficient legal protection).

36. *In re* Guardianship of Adamec, 100 Wash. 2d 166, 175, 667 P.2d 1085, 1089-91 (1983) (the court's authority to appoint a guardian does not deprive the court of its broad jurisdiction); *In re* Hallauer, 44 Wash. App. 795, 797, 723 P.2d 1161, 1164 (1986) ("guardianships are equitable creations of the courts and it is the court that retains

not confer the right to custody of a child.[37]

Finally, if the natural parent and the nonbirth parent decide to separate, there is no established right for the nonbirth parent to have custody or visitation privileges.[38] By statute, Washington permits "nonparents" to petition for child custody.[39] However, the standard for defeating a natural parents' rights in a custody battle is very high.[40]

The limitations of legal wills, guardianship, and custody suggest that the only method for completely protecting the relationship between a child and its nonbirth parent is for the Washington courts to permit second parent adoptions.

### *B. Second Parent Adoptions Are Authorized by Washington's Adoption Statute*

Thus far, this Comment has demonstrated that second parent adoptions are similar to stepparent adoptions, and that they are legally necessary to protect a child's relationship with his or her nonbirth parent. This section evaluates the Washington adoption statute and concludes that second parent adoptions do not contravene the statutory language.

Adoptions authorized by statute are the legal means by which persons who are unable to bear children, or who are unmarried, or both, can create a legal relationship with chil-

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ultimate responsibility for protecting the ward's person"); Seattle-First Nat. Bank v. Bromers, 89 Wash. 2d 190, 200, 570 P.2d 1035, 1041 (1977) (guardians are considered officers of the court and the court has jurisdiction over guardian and ward).

*See also* WASH. REV. CODE § 11.88.020 (1989) (stating in part: "No person is qualified to serve as a domiciliary guardian who is . . . a person the court finds unsuitable."); WASH. REV. CODE § 11.92.010 (1989) (stating in part: "Guardians . . . shall at all times be under the general direction and control of the court making the appointment.").

37. *In re* Marshall, 46 Wash. App. 339, 343, 731 P.2d 5, 8 (1986).

38. Shapiro & Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271 (1985-86) (when the lesbian parents separated, the nonbirth mother agreed to pay child support but had to petition the court for visitation privileges; the court determined that she was entitled to reasonable rights of visitation) (citing Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct. Sept. 4, 1984)).

39. WASH. REV. CODE § 26.10.010-.913 (1989).

40. *In re* Marriage of Allen, 28 Wash. App. 637, 648-49, 626 P.2d 16, 23 (1981); *see also* WASH. REV. CODE § 26.10.190 (1986 and Supp. 1989) (providing in part that, "the court shall retain the custodian . . . unless . . . the child's present environment is detrimental to his or her physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child").

dren.[41] In Washington, adoptions are considered a "creature of statute," which traditionally means the statute must be strictly construed.[42] Adoptions are also considered a privilege, not a right, and the burden of establishing fitness as an adoptive parent is on the petitioner.[43]

In 1984, the entire Washington adoption statute was repealed and replaced by a revised statute.[44] The legislative history of the revised statute indicates that "a child's best interests should be the foremost consideration in adoption proceedings."[45] The legislative intent provision in the statute indicates that: "the purpose of adoption is to provide stable homes for children . . . . The guiding principle must be determining what is in the best interest of the child."[46] The term "best interest" is not defined in the act.

The statute does require the appointment of someone approved by the court to prepare pre- and post-placement reports.[47] The pre-placement report must contain information concerning: "the fitness of the person requesting the report as an adoptive parent[,] . . . the home environment, family life, health, facilities, and the resources of the person requesting the report . . . ."[48] The post-placement report must contain "[a]ll reasonably available information concerning the physical and mental condition of the child, home environment, family life, health, facilities and resources of the petitioners and any other facts and circumstances relating to the propriety and advisability of the adoption."[49] These three provisions suggest that the adoption statute requires a particularized determination of best interest based upon the facts and circumstances of the specific family before the court.

The adoption statute also specifically addresses situations

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41. Comment, *Best Interests of Children and the Interests of Adoptive Parents: Isn't it Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749 (1989).

42. *Id.* at 755; *see also In re* Adoption of Henderson, 97 Wash. 2d 356, 644 P.2d 1178 (1982).

43. *In re* Infant Boy John Doe, 74 Wash. 2d 396, 403, 444 P.2d 800, 804 (1968); *see also infra* notes 47-49 and accompanying text.

44. WASH. REV. CODE §§ 26.32.010-.916 was replaced with WASH. REV. CODE §§ 26.33.010-.901.

45. HOUSE JUDICIARY COMMITTEE, MEMORANDUM ON H-2832/84-ADOPTION REFORM, (Oct. 6, 1983) (H. Reinert, Counsel) [hereinafter ADOPTION REFORM].

46. WASH. REV. CODE § 26.33.010 (1989).

47. WASH. REV. CODE § 26.33.180-200(1) (1989).

48. *Id.*; *see also* WASH. REV. CODE § 26.33.220 (pre- and post-placement investigation in stepparent adoption not required unless ordered by the court).

49. WASH. REV. CODE § 26.33.190(2) (1989).

involving parents' voluntary relinquishment of children to a state department, or agency, or to an adoptive parent or parents, involuntary relinquishment of children and termination of parental rights, and stepparent adoptions.[50] More importantly, however, the statute neither affirmatively permits nor prohibits second parent adoptions; the primary guiding principle is the given language and the legislative intent that the "best interests of the child" be the determining factor.

### 1. Identifying Those Who May Adopt

The statute does contain one specific criterion, other than the "best interests" standard, for determining whether to grant an adoption. The specific criterion is the eligibility of the petitioner to adopt.

In 1955, the Washington adoption statute specifically identified the classes of people who could adopt, namely an unmarried person, a husband and wife, or a spouse in a stepparent adoption.[51] In 1984, the language identifying the classes of persons who may adopt was changed to a generic "any person" and an age and competency requirement was added. In particular, the current statute states in part: "Any person who is legally competent and who is eighteen years of age or older may be an adoptive parent."[52]

Arguably, the change in language to "any competent per-

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50. WASH. REV. CODE § 26.33.080 (1989); WASH. REV. CODE § 26.33.100 (1989).

51. WASH. REV. CODE § 26.32.020 (1955) ("Any person not married, or any husband and wife jointly, or either spouse, when the object of adoption is the child of the other spouse may petition . . . for leave to adopt.").

52. WASH. REV. CODE § 26.33.140 (1989). See *In re* Adoption of a Minor Child, No. 1-JU-86-73 PIA (Alaska Super. Ct. Mar. 3, 1987) for an example of an application of an adoption statute containing more detailed definitions. Alaska specifically lists the categories of persons who may adopt and yet it has permitted two second parent adoptions.

Specifically, the 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 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). *See also* sources cited *supra* note 21.

son" does not affect a nonbirth parent's right to petition the court to adopt. The statutory language of "who may adopt" does not define the nature of families created by adoption, but only the competency of the individuals seeking to adopt—competency meaning that the petitioner is both "competent" and at least "eighteen years of age."[53]

The above argument regarding competency and age is similar to the argument rejected by the Washington Court of Appeals in *Singer v. Hara*.[54] In *Singer*, two men seeking to marry each other were denied a marriage license. The gay couple argued that when the legislature changed the language regarding who may contract to marry from "males of the age twenty-one and females of the age eighteen" to "persons of the age of eighteen years, who are otherwise capable," the legislature intended to remove the limitation permitting only males and females to marry.[55] The change to "persons otherwise capable," they argued, meant that the legislature did not intend to define the "competency of marriage but only the competency of individuals seeking to marry."[56] The appeals court rejected this argument, stating that the legislative changes merely intended to equalize the age requirements between males and females and did not intend to permit two persons of the same sex to marry.[57]

The legislative changes in the marriage statute to "persons otherwise capable" and the adoption statute to "any competent person" are vastly different. In the marriage statute, the legislature merely intended to equalize the previous age differences; once the ages were equalized, it became unnecessary to distinguish between males and females. Consequently, the legislature merely used the generic term "persons otherwise capable."[58]

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53. *In re* the Interest of E.B.G., No. 87-5-00137-5 (Thurston County Super. Ct. Mar. 29, 1989) Trial Brief of Co-Petitioners, [hereinafter Trial Brief].

WASH. REV. CODE § 26.33.140(2) (1989) does not define "competency." However, WASH. REV. CODE § 11.88.010(1) (1989) defines an "incompetent" as "any person who is . . . [u]nder the age of majority[,] . . . or [i]ncompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself."

54. 11 Wash. App. 247, 249, 522 P.2d 1187, 1189 (1974).

55. *Id.* at 249, 522 P.2d at 1189. This limitation appears at WASH. REV. CODE § 26.04.010 (1986).

56. *Singer*, 11 Wash. App. at 249, 522 P.2d at 1189.

57. *Id.*

58. *Id.*

In contrast to the former marriage statute provision, the former adoption statute provision identified who may adopt, but did not use discriminatory language based on age or any other factor. The provision originally used marital status as a basis for determining which class of persons could adopt. In the revised statute, the legislature reidentified this class as a generic "any competent person" and added an age requirement. In essence, the two adoption provisions are the same because, technically, all "competent persons" are either married or unmarried. Therefore, the change neither broadened nor narrowed the scope of who may adopt. A lesbian nonbirth parent would be permitted to adopt under either provision because she is technically "an unmarried person."

Another difference between the changes in the marriage statute and the changes in the adoption statute was illustrated by the *Singer* court's determination that other provisions of the marriage statute continue to refer to "males" and "females." Because of the continuing references in the marriage statute to "males and females," the court concluded that the legislature did not intend to authorize same sex marriage.[59] In comparison, the adoption statute continues to refer to classes of persons in the adoption decree. The decree must state "as a *minimum* the following information: . . . whether the petitioner or petitioners are husband and wife, stepparent or a single parent . . . ."[60]

One plausible reading of this provision is that a lesbian nonbirth parent cannot adopt because the child would then have two single parents. More specifically, it is possible that "[the nonbirth parent] is not or would not be, if the adoption were granted, a *single* parent, since the [child] already has a parent."[61] However, it is also plausible that the "single parent" language refers not to the child's status to its parents, but rather, refers to the marital status of the petitioner.[62] Again, a lesbian nonbirth parent is a single person and could be so identified in the adoption decree. Additionally, the language of the

59. *Id.* at 249-50, 522 P.2d at 1189; *see also* Report of Guardian ad Litem, *supra* note 20 (suggesting that the adoption decree continues to refer to classes of persons adopting).

60. WASH. REV. CODE § 26.33.250 (1)(c)(1989) (emphasis added).

61. Report of Guardian ad Litem, *supra* note 20, at 6 (emphasis added).

62. Trial Brief, *supra* note 53 at 6; Amicus Memorandum of Points and Authorities: Whether Washington State Law Permits Same Gender Adoptions, by Northwest Women's Law Center at 6, *In re* the Interest of E.B.G., No. 85-5-00137-5 (Thurston County Super. Ct. Mar. 29, 1989) [hereinafter Amicus Memorandum].

provision states that, "*as a minimum*," the information must be provided. The "as a minimum" language suggests that a nonbirth parent could be identified as a second parent without contravening the statutory language.

Finally, the *Singer* court also looked to other statutes dealing with marital issues, such as the community property statute, and noted that the language of these provisions still referred to "husband and wife." Thus, "the legislature did not contemplate that sexual equality included provision for same-sex marriage."[63]

In comparison, other Washington statutes dealing with children and parents clearly show that the legislature did not intend to define the nature of families. For example, in the Uniform Parentage Act, the legislature specifically provided that the "[p]arent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[64] This provision suggests that a parent and child relationship, created through adoption or any other legal means, is a relationship between the adopting parent and the child. Thus, the adopting parent's relationship with other adults is irrelevant to her petition to adopt. The only time the court need consider the petitioner's relationship to other adults is when another adult joins in the petition or when the court considers the best interest of the child.

### 2. Definition of Parent

In addition to identifying who may adopt, the adoption statute also defines the term "parent." The statute defines "parent" as "the natural or adoptive mother or father of a child."[65] This phrase suggests, through the use of the disjunctive "or," that a parent may be one of the following: an adoptive mother or a natural mother or an adoptive father or a natural father.[66]

The critical term to be defined is "parent" not "parents."[67]

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63. *Singer*, 11 Wash. App. at 250 n.3, 522 P.2d at 1189 n.3.

64. WASH. REV. CODE § 26.26.020 (1989).

65. WASH. REV. CODE § 26.33.020(8) (1989).

66. Masunaga v. Gapasin, 52 Wash. App. 61, 757 P.2d 550 (1988) (holding that the term "or" is presumed to be used in the disjunctive unless indicated otherwise); *see also* Judge's Report of Proceedings, *In re* the Interest of E.B.G., No. 87-5-00137-5 (Thurston County Super. Ct. Mar. 29, 1989) [hereinafter Judge's Report].

67. If the statute sought to define "parents," the language could still be read in such a way as to permit second parent adoptions. Grammatically, the phrase "the

Only one of the possible definitions of a parent is intended to apply to any one parent. Thus, when the court considers an adoption where the family will be composed of two parents, the definition does not on its face require that any particular two of them are meant to be joined together. If the legislature intended to limit the definition it probably would have defined "parents" as "the natural or adoptive mother, but not both, and the natural or adoptive father, but not both."

This interpretation of the definition of "parent" is especially plausible when one considers that some children have two parents of the same sex through subsequent remarriage of a parent and stepparent adoption.[68] While the statute does not specifically identify "stepparent" within the definition of "parent," such adoptions are contemplated.[69] In fact, many children are accustomed to having a stepmother and a natural mother, or a stepfather and a natural father.[70] Therefore, the definition should be read to suggest that neither "natural" nor "adoptive" mothers or fathers are exclusively permissible.

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natural or adoptive mother or father of a child" could be interpreted in several different ways. For example, it could mean: (a) mother of a child that is either adoptive or natural, but not both; (b) mother of a child that is either adoptive or natural, or both; (c) adoptive mother of a child or natural mother of a child, but not both; or (d) adoptive mother of a child or natural mother of a child, or both. (father may be substituted for mother in each interpretation). *See* Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A.J. 310, 312 (1960). If you tabulate the phrase and infer the normal inclusive "or" you get this: Mother that is: (1) adoptive; (2) natural; or (3) both. *See id.*

Expression (b) is the normally preferred grammatical reading, regardless of whether the language is mandatory or permissive. Expression (d), which appears to be different, is substantively the same as expression (b) because it is usually inferred that, if you may or must have a mother that is either adoptive or natural or both, you may also have both an adoptive mother and a natural mother. Therefore, a child could have both an adoptive mother and a natural mother or an adoptive father and a natural father. *Id.*

68. Although these children may have two parents, one psychological or biological, and one legal, a stepparent adoption does terminate the noncustodial parent's legal rights and responsibilities. *See generally In re* Gargan, 21 Wash. App. 423, 587 P.2d 545 (1981).

69. *Id.*; *see also* WASH. REV. CODE § 26.33.150(4) (1989).

70. Judge's Report, *supra* note 66, at 5-6. The Judge stated:

> We have many children who, during the course of their lifetimes between their conception and the age of 14, go through a natural father, a stepfather, or conversely, a natural mother, maybe a stepmother, and maybe an adoptive mother, all which may continue to exist or existed at one time or other during the course of this child before they reach [the] . . . age of majority . . . . It is not easy for them to distinguish all of these relationships sometimes, but it certainly has never been argued that the fact that there may be multiple parental relationships as to one child, would not prohibit adoption.

### 3. Termination of Parental Rights

When a third party seeking to be legally identified as a parent petitions the court to adopt, the adoption terminates the natural parent's rights and responsibilities toward the child.[71] However, the language of the Revised Code of Washington, section 26.33, does not require this termination: "The entry of a decree of adoption divests any parent or alleged father who is not married to the adoptive parent or *who has not joined in the petition for adoption* of all legal rights and obligations in respect to the adoptee, except past-due child support obligations."[72] This provision does not limit those who may join in the petition for adoption.

To avoid having the natural parent's rights terminated in a second parent adoption proceeding, the natural parent must "join in the petition" for adoption.[73] As in a stepparent adoption, joining in the petition for adoption does not mean that the natural parent is also petitioning to adopt.[74] Joinder is simply a procedure whereby the natural parent consents to the adoption and the court recognizes that her rights are not terminated.

Furthermore, the court has discretion to terminate a legal parent and child relationship in any adoption case.[75] Normally, these termination provisions are used in traditional voluntary/involuntary relinquishment situations or stepparent adoption situations. However, since the stautory language is discretionary, the court would not be required to terminate the natural parent's rights and responsibilities in a second parent adoption. The second parent adoption process would work the same as the stepparent adoption process. The only difference is that the two parents are not legally married in the second parent adoption proceeding.

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71. WASH. REV. CODE § 26.33.260 (1989).

72. *Id.* (emphasis added).

73. WASH. REV. CODE § 26.33.150(4) (1989) ("[I]f the petitioner is married, the petitioner's spouse shall *join in the petition.*" (emphasis added)).

74. WASH. REV. CODE § 26.33.150(1) and (4) (1989).

75. WASH. REV. CODE § 26.33.130(1) (1989) ("If the court determines [that termination is necessary] . . . the court shall enter an appropriate order terminating a parent-child relationship.").

WASH. REV. CODE § 26.33.130(3) (1989) provides: "The parent-child relationship may be terminated with respect to one parent without affecting the parent-child relationship between the child and the other parent."

### 4. Strict Interpretation

Even though the provisions referring to termination of parental rights seem to contain discretionary language, adoption statutes must be strictly construed because they do not derive from the common law.[76] Therefore, opponents suggest that second parent adoptions are impermissible because the legislature did not specifically authorize or permit adoptions by lesbian nonbirth parents.[77]

At first glance, the opponents' argument is persuasive; however, it disregards the caselaw and established principles of statutory interpretation. Washington courts have wavered from strict interpretation when the resulting construction conflicts with the statute's purpose. In such instances, the courts have looked at the adoption statute as a whole, not as isolated parts.[78] In interpreting any statute with ambiguous language, the courts determine and give effect to the intent of the legislature.[79]

The argument that second parent adoptions are not permissible because the legislature did not specifically authorize them is also unpersuasive since the legislature, in 1984, removed statutory classifications based on marital status and all other factors except age and competency. The change was presumably intended to provide stable homes for children and insure the best interests of the child.[80] It is equally likely that the legislature did not specifically exclude second parent adoptions because it "did not intend to disqualify any prospective adoptive parent based on gender or sexual [orientation]."[81]

Both opponents and proponents of second parent adoption

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76. *In re* Santore, 28 Wash. App. 319, 326, 623 P.2d 702, 707 (1981).

77. Report of Guardian ad Litem, *supra* note 20, at 5.

78. *See, e.g.*, *In re* Santore 28 Wash. App. at 327, 623 P.2d at 707 (citing *In re* Adoption of Hickey, 18 Wash. App. 259, 261, 567 P.2d 260, 261 (1977); Gebhardt v. Warren, 399 Ill. 196, 203-04, 77 N.E.2d 187, 191 (1948); and *In re* McFarland, 223 Mo. App. 826, 830, 12 S.W.2d 523, 525 (1928)).

> Although adoption statutes being in derogation of the common law, should be strictly construed they should not be given a construction so narrow and technical as to defeat their manifest intent and beneficial aims. . . . There need not be strict compliance with each and every provision of the adoption statutes even though such provisions may be couched in mandatory language.

*In re* Santore, 28 Wash. App. at 326-7, 623 P.2d 707.

79. *In re* Lehman, 93 Wash. 2d 25, 27 604 P.2d 948, 949 (1980); State v. Douty, 20 Wash. App. 608, 614, 581 P.2d 1074, 1078 (1978), *rev'd on other grounds*, 92 Wash. 2d 930, 603 P.2d 373 (1979).

80. Amicus Memorandum, *supra* note 62, at 4-5.

81. *Id.* at 6.

are correct in asserting that there is no legislative history reflecting the legislature's position on this issue. Revision Comments from the 1984 session merely reflect the legislature's intent to make the "best interests of the child" the foremost consideration in any adoption proceeding.[82]

Because the legislature may not have contemplated this type of adoption when it made the 1984 revisions, critics might also argue that it has not yet addressed the issue of second parent adoptions. Realistically, it is not possible for legislators to consider every possible factual situation which might fall within the purview of the statute they enact. Recognizing this, the trial court judge in *In re the Interest of E.B.G.* determined that if the factual situation falls within the purview of the language, even though it may not have been contemplated specifically by the legislature, and there is no language prohibiting the situation, then there is no reason to preclude the adoption.[83] Thus, the legislation should be interpreted in light of all of the conceivable factual situations that may occur.

Furthermore, even under strict construction, the statute can be interpreted as being broadly permissive of many different factual situations.[84] A narrowly structured statute, as opposed to a broadly permissive statute, would identify categorical limits relating to factors such as ethnic backgrounds, criminal histories, whether two sisters could adopt a child, or whether there was an upper age limit for an adoptive parent.[85] A narrowly structured statute would also indicate that a court does not have discretionary power to grant an adoption except within the categorical limits. A narrowly structured statute would then negate the legislature's intent that courts determine what is in the best interest of the child. The Washington adoption statute simply does not pose any categorical limits except minimum age and competency.[86]

Finally, other states' courts have interpreted adoption statutes, some of which have even more specific criteria than Washington's age and competency criteria,[87] as permissive of second parent adoptions. None of the statutes in the states that have granted second parent adoptions explicitly provide

82. *See* ADOPTION REFORM, *supra* note 45, at 1.
83. Judge's Report, *supra* note 66, at 4-5.
84. *Id.* at 5.
85. Trial Brief, *supra* note 53, at 4.
86. *Id.* at 7.
87. *See* cases and statutes cited *supra* notes 28, 51.

that homosexuals may adopt.[88] The states which find it necessary to limit adoptions to heterosexual individuals have explicitly excluded homosexuals from the adoption process.[89] In Washington and in the other states granting second parent adoptions, the criteria for determining whether to permit the adoption is the "best interests of the child" standard.[90]

### C. *Second Parent Adoptions Are in the Child's Best Interests*

The Washington State Legislature has specifically given courts the power to grant an adoption if they determine that it is in the child's best interests.[91] Thus, Washington has embodied in its statutes and caselaw the notion that in each decision governing the adoption of a child the "best interests of the child" remains the paramount goal.[92] The "best interests of

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88. *Id.*

89. For example, New Hampshire has limited adoptions to heterosexual persons: Specifically as follows, any individual not a minor and not a homosexual may adopt:

I. Husband and wife together.
II. An unmarried adult.
III. The unmarried father or mother of the individual to be adopted.
IV. Any foster parent.
V. A married individual without the other spouse joining as a petitioner, if the individual to be adopted is not his spouse; and if
(a) The other spouse is a parent of the individual to be adopted and consents to the adoption;
(b) The petitioner and the other spouse are legally separated; or
(c) The failure of the other spouse to join in the petition is excused by the court by reason of prolonged unexplained absence, unavailability, or circumstances constituting an unreasonable withholding of consent.

N.H. REV. STAT. ANN. § 170-B:4 (1988).

The general court has chosen over the years to enact statutes relative to adopting children and providing foster care in order to further the best interests of our state's children. These statutory enactments of the state do not involve intrusion into the private lives of consenting adults, but rather further the public and governmental interest in providing . . . for children. . . . The general court finds that, as a matter of public policy, the provision of a healthy environment and a role model for our children should exclude homosexuals. . . . Additionally, the general court finds that being a child in such [adoption] programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce.

*Id.* (legislative intent accompanying statute).

90. *See* cases and statutes cited *supra* note 28.

91. WASH. REV. CODE § 26.33.010 (1989); *see supra* note 45 and accompanying text.

92. WASH. REV. CODE § 26.33.010 (1989). This section provides the following:

The legislature finds that the purpose of adoption is to provide stable homes for children. Adoptions should be handled efficiently, but the rights of all parties must be protected. *The guiding principle must be determining what is in the best interest of the child.* It is the intent of the legislature that this chapter be used only as a means for placing children in adoptive homes and

the child" standard considers economic, psychological, and social factors.[93] Essentially, the test requires the court to consider these factors, and determine how each may be furthered given the particular circumstances.[94]

There is an increasing diversity of the types of families that can meet the goal of the "best interests of the child" standard. For example, families contributing to the diversity include single parent families, custodial and stepparent families, foster families, heterosexual and homosexual non-marital families,[95] families created through artificial insemination, and families created by adoption. These family structures are not exclusive of each other; rather, the origins of a particular existing family may derive from a previous family structure.

Furthermore, there is an increasing diversity in the range of parenting roles. Parenting roles are no longer confined to traditional mother/father images.[96] Fathers may "mother" and mothers may "father." Fathers may be custodial parents and mothers may be granted visitation rights. Two people of the same sex may also be parents to the same child through divorce and remarriage. Thus, some children often have two fathers or two mothers: one step, the other biological.[97]

Throughout the variety of family structures, there remains a central theme—the "best interests of the child." Therefore, the challenge to each adult participant is to make sure children live in an atmosphere in which their best interests can be met.

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not as a means for parents to avoid responsibility for their children unless the department, an agency, or a prospective adoptive parent is willing to assume the responsibility for the child.

*Id.* (emphasis added).

93. Comment, *supra* note 41, at 759.

94. *Id.*; *see also* WASH. REV. CODE § 26.09.004(3) (1989); statute cited *infra* note 104 (laying out statutory definition of basic parenting functions).

95. *See* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 211-12, 543 N.E.2d 49, 53-54, 544 N.Y.S. 2d 784, 788-89 (Ct. App. 1989). The *Braschi* court, holding that a homosexual couple may qualify as a "family" within the meaning of rent control laws, stated:

> a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.

96. *See* D. EHRENSOFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN (1987).

97. *See supra* notes 67-68 and accompanying text.

### 1. Psychosocial Health of Lesbians

The process of recognizing that the best interests of a child can be met in a second parent adoption begins by acknowledging the psychosocial health of homosexuals as individuals.[98] The American academic community has made great strides in the acceptance of homosexuality. The American Psychiatric Association, The American Psychological Association, The National Association of Social Workers, and the American Public Health Association have all issued statements affirming that homosexuality is not a mental illness or a deviant form of behavior.[99] Researchers Kirkpatrick and Morgan note that homosexual adults can function effectively sexually and socially, and are not any more distraught than their heterosexual counterparts.[100] Unfortunately, regardless of the strides made by the organizations which acknowledge the overall psychosocial well-being of homosexuals, a heterosexist attitude still prevails in this society.[101]

Despite this prevailing heterosexist attitude, however, some courts have made great strides in recognizing that homosexuals are not "unfit per se" to parent and that their sexual orientation is only one factor to consider in determining the best interests of a child.[102] The following section discusses how

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98. Zuckerman, *supra* note 4, at 751.

99. AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281-82, 380 (3d ed. 1980); AMERICAN PSYCHOLOGICAL ASSOCIATION, *1984 Rules of Council*, 40 AM. PSYCHOLOGIST 4 (1985); *see also* Zuckerman, *supra* note 4, at 749 n.116 (citing Hitchens, Martin, and Morgan, *Child Custody and the Homosexual Parent*, JUDGES' J., 33, 34 n.1. (Fall 1979)).

100. Kirkpatrick and Morgan, *Psychodynamic Psychotherapy of Female Homosexuality*, in J. MARMOR, HOMOSEXUAL BEHAVIOR: A MODERN REAPRAISAL 357, 362 (1980).

101. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979). Homophobia is the term more commonly used to to describe the obsessive or irrational fear of homosexuals; however, linguistically, it is incorrect. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 REV. L. AND SOC. CHANGE 923, 925 (1986). The term "heterosexism" more appropriately describes the condition labeled as homophobia. *Id.* Heterosexism is characterized as:

> [R]ather than an intense, irrational fear response that "phobia" denotes, what homophobics really manifest is a value system that esteems heterosexuality. Heterosexism assumes that heterosexual relationships are the only appropriate way to manifest love and sexuality. All that is not heterosexual does not exist. Heterosexism tries to wish away homosexuals.

*Id.*

102. *See infra* notes 103-10 and accompanying text.

progressive some courts have become in the area of homosexuality and parenting.

### 2. Lesbians as Parents

Through their examination of child custody issues, courts have recently considered whether a child's best interests can or cannot be met by lesbian parents. Custody cases allow broad judicial discretion and some judges have exercised that discretion to find a homosexual parent "unfit per se."[103] However, many judges have moved beyond the sexual orientation of parents to an evaluation of a parent's function,[104] and have concluded that an individual's sexual orientation is not determinative of his or her ability to be a good parent.

In 1983, the Washington Supreme Court, in *In re Marriage of Cabalquinto*, found that homosexuality was not, in and of itself, a bar to custody or visitation rights.[105] *Cabalquinto* made explicit what the Washington Supreme Court had previously held in *Schuster*, namely:

> [H]omosexuality in and of itself is not a bar to custody or to reasonable rights of visitation . . . . Visitation rights must be determined with reference to the needs of the child rather

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103. Patt, *supra* note 4, at 110 n.91 (citing 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 (N.Y. Sup. Ct. 1976); Newsome v. Newsome, 42 N.C. App. 415, 256 S.E.2d 849 (1979)). *But see* Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985) (homosexuals are unfit and improper custodians as a matter of law).

104. *See infra* notes 105-09 and accompanying text. *But see* WASH. REV. CODE § 26.09.004(3) (1989):

> "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:
>
> (a) Maintaining a loving, stable, consistent and nurturing relationship with the child;
>
> (b) Attending to the daily needs of the child such as feeding, clothing, physical care and grooming, supervision, health care and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
>
> (c) Attending to adequate education for the child, including remedial or other education essential to the best interest of the child;
>
> (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
>
> (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances;
>
> (f) Providing for the financial support of the child.

105. *In re* Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886 (1983).

> than the sexual preferences of the parent. The best interests of the child remain paramount.[106]

This holding parallels the movement in other states. For example, as far back as 1967, a California superior court struck down a presumption of "unfitness per se."[107] The court held that a parent's sexual orientation is only one factor to consider in determining the best interests of the child.[108] More recently, in Massachusetts and Indiana, courts have determined that the state cannot restrict visitation rights merely because a parent's lifestyle is not within the "societal mainstream."[109]

Studies have consistently supported what these more progressive courts are now beginning to recognize: the similarities between children raised by heterosexual parents and children raised by lesbian parents far outweigh the differences.[110] Furthermore, these courts also recognize the importance of a parent in a child's life regardless of the parent's sexual orientation or biological relation to the child.[111]

Although courts have begun to acknowledge the need to avoid separating children from their homosexual parents, they must also weigh other factors in any custody or second parent adoption proceeding. Important factors for the court to con-

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106. *Id.* at 329, 669 P.2d at 888 (upholding Schuster v. Schuster, 90 Wash. 2d 626, 585 P.2d 130 (1978)). The *Cabalquinto* majority noted that the trial judge may have abused his discretion in ruling that a gay parent could not have visitation privileges; however, the dissent reproached the trial court's handling of the case by acknowledging that the trial judge's "antipathy to homosexual living arrangements" was indeed the basis for his opinion and, as such, amounted to an abuse of judicial discretion. *Id.* at 331, 669 P.2d at 888 (Stafford, J., dissenting); *see also* Stroman v. Williams, 291 S. C. 376, 379, 353 S.E.2d 704, 707 (1987) (citing *Cabalquinto*). The concurring opinion affirmed the notion that judges are not in the business of "gratuitously judging the private lives of other people." *Id.* at 381, 353 S.E.2d at 707.

107. *See* Nadler v. California Super. Ct., 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

108. *Id.* at 524, 63 Cal. Rptr. at 354.

109. Bezio v. Patenaude, 381 Mass. 563, 410 N.E. 2d 1207 (1980); D.H. v. J.H., 418 N.E. 2d 286 (Ind. Ct. App. 1981).

110. *See* Green, Mandel, Hotvedt, Gray & Smith, *Lesbian Mothers and Their Children: A Comparison With Solo-Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 2:167 (1986) [hereinafter *Comparison*]; Green, *The Best Interests of the Child With a Lesbian Mother*, 10 BULL. OF THE AM. ACAD. PSYCHIATRY & L. 1, 14 (1982) [hereinafter *Lesbian Mother*]; Golombok, Spencer, Rutter, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD. PSYCHOLOGY & PSYCHIATRY 4:551 (1983).

111. *See supra* notes 2, 105-10 and accompanying text.

sider are the effects of social stigma and any potential impacts on a child's psychosexual development.

### *a. Social Stigma*

Discrimination toward individuals who do not conform with mainstream society is a serious problem in this country.[112] Thus, we should not ignore any teasing and abuse a child might experience from peers because he or she lives in a lesbian household. However, society should not combat this lower form of social behavior by separating unique individuals from the mainstream. Fortunately, such segregation has not been this country's recent practice.[113]

For example, in 1984, the United States Supreme Court overruled a lower court decision to remove a child from the custody of a parent who had previously been awarded custody rights.[114] The Court held that a Caucasian mother's custody rights could not be terminated simply because she remarried a Black man and her Caucasian child, from a previous marriage, would now be stigmatized by having a Black father. The Court stated that racial prejudice and classifications cannot justify removing a child from the custody of a natural parent.[115] Specifically, a unanimous Supreme Court stated:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitu-

112. Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (it is indisputable that "homosexuals have historically been the object of pernicious and sustained hostility"); High Tech Gays v. Defense Industrial Clearance Office, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) (invalidating Defense Department practice of subjecting gay security clearance applicants to more exacting scrutiny than heterosexual applicants noting that "lesbians and gays have been the object of some of the deepest prejudice and hatred in American society").

113. Even the court in *Singer v. Hara* acknowledges, indirectly, that homosexuals have been subjected to prejudice: "We are not unmindful of the fact that public attitude toward homosexuals is undergoing substantial, albeit gradual, change." 11 Wash. App. at 262 n.12, 522 P.2d at 1196 n.12.

114. Palmore v. Sidoti, 466 U.S. 429 (1984).

115. *Id.* at 434.

> tional duty by bowing to the hypothetical effects of racial prejudice that they assume to be both widely and deeply held."[116]

This analysis, as applied to racial differences, can be extended to parental sexual orientation differences.[117] It necessarily follows that if judges allow prejudice to enter into the second parent adoption decision-making process, then their decisions will serve only to perpetuate misconceived notions about the lesbian community.[118] Therefore, while discrimination should not be ignored, neither should it be the basis of a custody or adoption decision.[119]

### *b. Psychosexual Development*

In addition to problems arising from social stigma, opponents of adoption by homosexuals have expressed concern over the psychosexual development of the children. To cite one example, in 1987 the New Hampshire Supreme Court opined, at the request of the state legislature, that the legislature could constitutionally exclude homosexuals from the adoption statute because homosexuals are not fit to adopt or foster parent.[120] The New Hampshire Supreme Court's finding of unfitness reflected a concern that if homosexuals are permitted to adopt or foster parent then the children will be more likely to become homosexual.[121]

The New Hampshire Court's concern, however, is not well supported by scientific research. Although most researchers

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116. *Id.* (quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

117. In the abstract, the analysis is the same; however, the United States Supreme Court has yet to decide whether homosexuals are a suspect class, like Black Americans, and are therefore entitled to equivalent "equal protection" under the fourteenth amendment.

118. Rivera, *supra* note 101, at 947-48.

119. With respect to custody, see S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (holding that "it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as lesbian"); M.P. v. S.P., 169 N.J. Super. 425, 438, 404 A.2d 1256, 1263 (1979) (community intolerance may cause children to "emerge better equipped to search out their own standards of right and wrong"). *But see* Thigpen v. Carpenter, 21 Ark. App. 194, 199, 730 S.W.2d 510, 514 (1987) ("it was contrary to the court's sense of morality to expose the children to a homosexual lifestyle"); Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985) ("the conditions under which this child must live daily . . . impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large").

120. Opinion of the Justices, 129 N.H. 290, 525 A.2d 1095 (1987).

121. *Id.* at 296, 525 A.2d 1099.

believe genetic, as well as environmental, factors play a part in psychosexual development,[122] they have not exclusively identified any specific genetic or environmental factor as the single source for sexual orientation development.[123]

In studies of lesbian mothers and their children, social scientists have determined that the incidence of homosexuality or bisexuality in children is no greater than the incidence in the population at large.[124] In fact, child development experts lack the necessary evidence to suggest that parenting by homosexuals will cause children to have a homosexual orientation.[125] Experts have determined that children of lesbian mothers show no differences in their gender identity, sex role behavior, or sexual orientation than children of heterosexual mothers.[126] This determination makes sense in light of the widely-held opinion that sexual orientation is developed by the age of five years.[127]

While social scientists do not find a difference between les-

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122. Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 818 n.137 (1984).

123. *Id.* The New Hampshire Supreme Court did note that the source of sexual orientation is still not well understood. Opinion of the Justices, 129 N.H. 296, 525 A.2d at 1099 (citing Suseoff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 883 n.194 (1985) [hereinafter *Children's Best Interests*]). However, the court found that "[g]iven the reasonable possibility of environmental influences, . . . the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity." *Id.*

Ironically, the New Hampshire Supreme Court relied in its argument on an article which argues in favor of parenting rights for homosexuals. In that article, the author, Suseoff, draws a different and seemingly more reasonable conclusion from the research: "everything on the subject has revealed that the incidence of same-sex orientation among the children of gays and lesbians occurs randomly and in the same proportion as it does among children in the general population; as they grow up, children adopt sexual orientations independently from their parents." *Children's Best Interests*, *supra*, at 882.

124. Golombok, *supra* note 110, at 568; *Comparison*, *supra* note 110, at 180. *See generally* Harris, Turner, *Gay and Lesbian Parents*, 12 HOMOSEXUALITY 2:101(1985).

125. *Id.*

126. *Comparison*, *supra* note 110, at 9; *see also Lesbian Mother*, *supra* note 110, at 188.

127. Note, *supra* note 122, at 818 n.137 (the author cites ten cases, articles, and studies affirming this point including the following: Baker v. Wade, 553 F. Supp. 1121, 1132 n.19 (N.D. Tx. 1982) (court found credible expert psychiatric testimony that sexual preference is probably fixed before age six); Ancafora v. Board of Educ., 359 F. Supp. 843, 848-49 (D. Md. 1973) (court found sexual orientation is largely settled by age five or six), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); J. MONEY & A. EHRHARDT, MAN & WOMAN, BOY & GIRL 235 (1972) (factors of sexual orientation probably determined before birth and established in late infancy

bian parents and heterosexual parents and their parenting capabilities, some courts have been slow to acknowledge the research.[128] If they are to overcome their heterosexist attitude, these courts must recognize what social scientists have come to understand. Once they accept the research findings, the only factor for them to consider in any adoption, by any adult, is the same for all persons seeking to adopt: the child's best interests.

## II. CONCLUSION

Lesbians as well as heterosexuals can provide the environment and elements necessary for a child's best interests, and for a child's healthy psychosocial/psychosexual development.[129] Heterosexuals do not have a monopoly on good parenting skills. In fact, the Washington definition of basic parenting functions does not identify sexual orientation as a factor in determining whether an individual can perform parenting duties.[130] Children who have lesbian parents, however, are sometimes denied the rights given to children of heterosexual marital families.

For example, a recent tragic situation occurred because a lesbian couple did not petition a Florida court to allow the nonbirth parent to adopt her child before the natural parent died.[131] In this case the two women lived together in a monogamous relationship for thirteen years. The child was eight years old when her natural mother died. This child's maternal grandparents were awarded custody and the nonbirth parent was given "reasonable visitation" privileges of one day per month. Later, the grandparents were permitted to adopt the child. The grandparents then sent the child to live with her aunt because they were 70 years old and had health problems. Court battles ensued, and five and one half years later an appellate court set aside the adoption by the grandparents. The court determined that the nonbirth parent's sexual orientation did not have any detrimental effect on the child and that the child's best interests would be served by reuniting her with

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and early childhood); M. SAGHIR & E. ROBINS, MALE & FEMALE HOMOSEXUALITY 319 (1973) (homosexuality determined early in childhood).

128. *See* Opinion of the Justices, 129 N.H. 290, 525 A.2d 1095 (1987).

129. *See generally* sources cited *supra* note 110.

130. *See* WASH. REV. CODE § 26.09.004(3) (1989).

131. *In re* Pearlman, No. 87-24926 DA (Fla. Cir. Ct. Broward County Mar. 31, 1989) (as cited in 15 F.L.R. 1355 (5-30-89)).

the nonbirth mother.[132]

In Washington, an unnecessary separation of a family could be prevented through a second parent adoption and, all other "best interests" factors being equal, such an adoption would not contravene the adoption statute or the legislative intent of providing for the best interests of the child. A child with two parents, one natural and the other nonbirth, can have her best interests served by allowing the nonbirth parent to adopt the child she has coparented since birth, and the Washington courts have the authority to grant these types of adoptions.

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132. The court in *In re* Pearlman, No. 87-24926 DA, indicated that there are few cases nationwide that involve custody disputes between lesbian or homosexual partners; however, there is precedent for making an award of custody to the nonbirth parent. *Id.* (citing *In re* Hatzopoulos, 4 Fam. L. Rep. (BNA) 2075 (Denver County Juv. Ct. Nov. 15, 1977) (after the biolological mother's death and an interim custody award to a relative of the biological mother, her lesbian partner was awarded custody of the seven-year-old daughter born during their thirteen-year relationship); *In re* Matter of B.T.B., No. 13475 (San Diego Super. Ct.) (a deceased father's homosexual partner was awarded guardianship and custody of a 16 year old boy as against the child's biological mother); No. CF-027204 (Los Angeles Super. Ct.) (a nonbirth mother has standing to seek joint custody of a child when the two womens' relationship breaks up); *In re* L.O. and E.W. (Lane County, Oregon 1988); *In re* S.S.H. and G.L.M., No. 15-86-05039 & 56-86-05040 (Lane County, Oregon July 15, 1986) (cases in which lesbian couples have obtained orders awarding joint custody to the biological and nonbiological mothers).