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When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality.

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WHEN SECOND-PARENT ADOPTION IS THE SECOND-BEST OPTION: THE CASE FOR LEGISLATIVE REFORM AS THE NEXT BEST OPTION FOR SAME-SEX COUPLES IN THE FACE OF CONTINUED MARRIAGE INEQUALITY

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ABSTRACT

The occurrence of gay and lesbian parenting is far from unique. The availability of second-parent adoptions for same-sex couples, however, is far from common. Indeed, most states remain unclear as to the status of such adoptions. Until marriage equality is secured for same-sex couples, the struggle for second-parent adoptions will remain a critical consideration for gays and lesbians attempting to conform to the family law structure currently in place.

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This Note begins from the premise that same-sex parenting is a viable and acceptable parentage arrangement. It provides an overview of state laws concerning same-sex second-parent adoptions, including past legislative and judicial action on the issue. An argument is then made for the best course of action for securing greater protections for such familial situations. Based on a number of considerations, this Note advocates legislative action as the preferred route for reform. Such legislation ultimately results in a predictable, more enduring framework–allowing same-sex couples to secure their legal parentage, and more importantly, providing children the legal protection of both parents.

The arguments presented in this Note are particularly important in light of the recent wave of state bans on gay marriage. As gay and lesbian advocacy groups work to secure other legal protections in the face of what appears to be growing opposition, this piece suggests a move away from the more facially-successful judicial challenges to the less-utilized statutory route.

I. INTRODUCTION

Two mothers have raised Hannah Brink since she left a Vietnamese orphanage–Nancy Brink and Dana Bainbridge, a lesbian couple living in Omaha.[1] Hannah shares the last name of one of her mothers, but the state only legally recognizes her other mother.[2] Now in fifth grade, Hannah explains: "I have two moms who love me and care for me. But when I look at my birth certificate I see only one name. My birth certificate doesn't tell the truth about my life."[3] Because of this discrepancy, a variety of Nebraska laws leave Hannah's future unsettled. For instance, in relation to her unrecognized mother, Hannah may be ineligible for health insurance, life insurance, and disability benefits.[4] Without a will,

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1. Martha Stoddard, *Adoption Law Appeal Made; Girl Speaks for Bill Opening Door to Unmarried Adults*, OMAHA WORLD-HERALD, Mar. 21, 2007, at 1A.

2. *Id.* ("She shares the last name of one mother, the Rev. Nancy Brink, pastor of North Side Christian Church of Omaha. But the State of Nebraska recognizes the other, Dana Bainbridge, as her legal parent. Only Bainbridge's name appears on Hannah's adoption certificate.").

3. *Id.* (internal quotation marks omitted) (quoting Hannah Brink's testimony before the Nebraska Legislature Judiciary Committee in its consideration of Legislative Bill 571, a proposal to expand adoption to both joint unmarried adoptions as well as second-parent adoptions by unmarried partners).

4. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 936 (2000) (explaining that the unrecognized co-parent may even be prevented from giving consent to needed procedures in a medical emergency involving the child).

Hannah could not inherit from her unrecognized mother.[5] Finally, if her recognized mother dies, her unrecognized mother would have no automatic right to custody or visitation.[6] As another lesbian mother similarly situated to the unrecognized mother in Hannah's situation accurately explains, "[U]nder the law, I am a stranger to my child."[7]

The occurrence of gay and lesbian parenting is far from unique. Indeed, the 2000 Census reported 34.3% of lesbian couples raising children, with 22.3% of gay male couples doing the same.[8] An additional two million gay, lesbian, and bisexual Americans have an interest in pursing adoption.[9] Hannah's situation demonstrates how the need for a second-parent adoption can typically arise in the context of gay and lesbian parenting.[10] A second-parent adoption allows a non-legal parent to become a legal parent of a child.[11] Similar to a step-parent adoption, second-parent adoptions do not require the current legal parent to relinquish parental rights to the child.[12] The legal climate surrounding

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5. *Id.* (showing the dilemma faced by a potential parent who may die intestate). For a detailed discussion of the issue of inheritance in second-parent adoptions, see Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005).

6. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 936 (2000) ("Apart from these tangible legal risks, there is the disturbing asymmetry between the profound emotional bonds that may link a child to a non-biological parent and the law, which, in the absence of second-parent adoption, is likely to treat that parent as a 'legal stranger' to the child.").

7. Joan Biskupic, *Same-Sex Couples Redefining Family Law in USA*, USA TODAY, Feb. 18, 2003, at 1A, *available at* http://www.usatoday.com/news/nation/2003-02-17-cover-samesex_x.htm (quoting Donna Colley, the unrecognized parent of a different lesbian couple raising a child in Nebraska).

8. LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS 3 (2004), *available at* http://www.hrc.org/documents/costkids.pdf (illustrating the prevalence of gay and lesbian couples raising children in the United States). These statistics compare to 45.6% of married, heterosexual couples raising children and 43.1% of unmarried, heterosexual couples doing the same. *Id.*

9. GARY J. GATES ET, AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 6 (2007), *available at* http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf ("[O]ur estimate of two million gay, lesbian, or bisexual people who have ever considered adopting a child is likely to be a conservative one.").

10. John Ireland, *50 Ways to Adopt a Baby*, ADVOCATE, Aug. 28, 2007, at 39, 39 (stating that second-parent adoption can arise in a variety of parentage situations, and may include artificial insemination, in vitro fertilization, or surrogacy, in addition to children existing prior to the current same-sex relationship).

11. *E.g.*, Diana Lauretta, Comment, *Protecting the Child's Best Interest: Defending Second-Parent Adoptions Granted Prior to the 2002 Enactment of California Assembly Bill 25*, 33 GOLDEN GATE U. L. REV. 173, 174 (2003) ("Second-parent adoptions have allowed many children the benefit of having two, legally recognizable parents.").

12. *Id.*

gay and lesbian parenting, however, remains unclear, being described as "fractured,"[13] "lagging behind,"[14] and requiring gay couples to "delicately navigate and manipulate the system."[15] And in the words of one commentator, "The status of same-sex second-parent adoption is haziest."[16]

This Note has a modest goal. It begins by providing an overview of the current state of the law with respect to second-parent adoptions by same-sex couples, presenting both statutory reforms and judicial developments, and assesses the outcome of the law on current second-parent rights (Part II). In Part III, the Note considers the interrelationship of legislative and judicial reforms and discusses the various advantages and disadvantages of these two routes. Finally, Part IV concludes that legislative reform offers the optimal route for same-sex couples to secure legal recognition of parentage through second-parent adoption. While this piece is primarily targeted at advocacy groups working to secure greater legal protections for same-sex parents, it may also be used by state legislatures considering expanded coverage for second-parent adoptions.

This Note's scope includes only same-sex couples seeking to secure second-parent adoptions.[17] This Note also proceeds under the assumption that same-sex parenting presents a viable and acceptable option as "there has been a tremendous shift in the nation's attitude toward gay parenting."[18] Moreover, the analysis and argument presented applies only in

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One method in which courts have recognized the relationship between children and their nonbiological parent is through second-parent adoptions. Much like stepparent adoptions, second-parent adoptions allow the child's nonbiological parent to become the child's legal parent. Courts grant the adoption without severing the parental rights of the biological parent. *Id.*

13. Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142 (describing the legal landscape of gay adoption).

14. Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 683 (describing the legal parentage of children born into same-sex families).

15. John Ireland, *50 Ways to Adopt a Baby*, ADVOCATE, Aug. 28, 2007, at 39, 39 (describing the states whose adoption laws are unclear with respect to gay and lesbian couples).

16. Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142 (describing how roughly three dozen states have unclear laws regarding same-sex second parent adoption).

17. The analysis of same-sex couples will apply to children both biologically and non-biologically related to the parent. That is, the first parent could be either biologically related to the child, or could have initially adopted the child as a single person before, in the present, seeking to add a same-sex partner as a legal parent through second-parent adoption. *See supra* note 10.

18. Nate Blakeslee, *Family Values*, TEX. MONTHLY, March 2007, at 142, 284 (describing progressively changing attitudes on the subject). Indeed, all major child welfare organizations now accept that children of same-sex parents are no less healthy or well-adjusted than those reared by their heterosexual counterparts. *Id.* The percentage of Americans

the absence of a same-sex couple's right to marry.[19] If a same-sex couple could legally marry, the issue of second-parent adoption essentially becomes moot as all states provide for so-called "step-parent adoption."[20] Finally, it is assumed that the key issue in a second-parent adoption by a same-sex partner is the initial procurement of an adoption decree. This works forward from the premise that another state would later give full faith and credit to the initial state's adoption decree, thereby eliminating the threat of later legal challenge to the adoption's validity.[21] Full faith

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opposed to gay adoption has decreased from fifty-seven percent in 1999 to forty-eight percent in 2006. *Id.* Efforts to ban gay parenting have been far less successful than efforts to ban gay marriage. *Id.* at 286. For a sampling of differing viewpoints regarding the advantages and disadvantages of same-sex parenting, see Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 NEW ENG. L REV. 643 (2004); Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23 (2006).

19. *E.g.*, Susan E. Dalton, *Protecting Our Parent-Child Relationships: Understanding the Strengths and Weaknesses of Second-Parent Adoption*, *in* QUEER FAMILIES, QUEER POLITICS 215 (Mary Bernstein & Renate Reimann eds., 2001) (showing how second-parent adoption is far from ideal in that, despite creating parental rights for both adults, the two adults remain legal strangers to one another); Louise McGuire, *Parental Rights of Gay and Lesbian Couples: Will Legalizing Same-Sex Marriage Make a Difference?*, 43 DUQ. L. REV. 273, 283–84 (2005) (noting the increased legal friction surrounding gay parenting given that it appears unlikely that same-sex marriage will be legalized on a wide-spread basis for the immediate time being).

20. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 4–5 (1999).

> If a same-sex marriage were available, a married lesbian couple engaging in reproduction through artificial insemination would not need to take any steps at all to protect the rights of the partner who did not carry the child, as the latter would be considered to be in the same position as the husband of a heterosexual woman who is inseminated with the semen of another man. In such a situation the law deems the husband the legal parent of a child born as a result of the insemination, despite the absence of genetic connection.
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> Also, if same-sex couples could marry, a single parent could consent to a step-parent adoption by his or her partner, and the adoption could be completed within a few months, at a minimal cost, in contrast to the lengthier independent adoption process.
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> *Id.* (footnote omitted).

See also Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142, 285 ("[I]t is impossible to talk about gay parenting without talking about gay marriage, because the inability to marry is a big part of what makes child rearing so fraught with legal difficulties for gay parents."). For a discussion of inconsistencies in the judiciary's treatment of same-sex marriage and adoption cases, see Vanessa A. Lavely, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 267–83 (2007). For further discussion of the role of same-sex adoption in the same-sex marriage debate, see generally June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341 (2006).

21. *See* Finstuen v. Crutcher, 496 F.3d 1139, 1156 (10th Cir. 2007) ("[F]inal adoption orders and decrees are judgments that are entitled to recognition by all other states under

and credit treatment, however, then creates a question as to the jurisdictional requirements necessary for adoption.[22]

Statutes in only seventeen states require state residency as an eligibility requirement for adoption, two of which are states expressly allowing same-sex second-parent adoptions.[23] Nine jurisdictions permitting same-sex second-parent adoption, however, require no form of residency.[24] An otherwise prohibited same-sex second-parent adoption may be avoided, therefore, by securing the adoption decree in a state that has no prohibition on the adoption as well as no residency requirement.[25] This path of adoption, however, is less than ideal as a long-term solution for many reasons, the primary one being the many logistical complications necessarily entailed. Moreover, widespread use of this option may lead to the enactment of residency restrictions by additional states.

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the Full Faith and Credit Clause. Therefore, Oklahoma's adoption amendment is unconstitutional in its refusal to recognize final adoption orders of other states that permit adoption by same-sex couples.").

22. *See* Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 809 (2003).

> [T]o require that adoption jurisdiction be limited to states in which all interested parties are domiciled would be undesirable, because it would unduly restrict adoptions that are in the best interests of the child in question. Therefore, adoption jurisdiction also exists when the child and the adoptive parents are domiciled in different states, as long as personal jurisdiction exists over both parties or, if this is lacking in the case of the child, the state has personal jurisdiction over the person having legal custody of the child so that it may protect all the necessary interests. *Id.*

23. CHILD WELFARE INFO. GATEWAY, WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 (2006), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.pdf (showing Arizona, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Minnesota, Mississippi, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming to have residency requirements ranging from sixty days to one year). Some states create exceptions to residency requirements including, for example, agency adoptions or special needs adoption. *Id.*

24. *Compare id.* (listing states with residency requirements), *with* FAMILY EQUAL. COUNCIL, STATE-BY-STATE: SECOND PARENT ADOPTION LAWS 1–2 (2008), *available at* http://www.familyequality.org/resources/publications/secondparent_withcitations.pdf (listing jurisdictions allowing same-sex second-parent adoption, which include California, Colorado, Connecticut, the District of Columbia, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont).

25. *See, e.g.*, Davenport v. Little-Bowser, 611 S.E.2d 366, 372 (Va. 2005) (requiring issuance of new birth certificates with both adoptive parents for children born in Virginia who were later adopted in other states by same-sex parents). *Davenport* involved children who were no longer living in Virginia, but the decision did not appear to hinge on the current residency of the children or parents, but rather the existence of an out-of-state adoption. *See id.* "The sole issue in this case is the enforcement of the directive of the General Assembly concerning the issuance of new certificates of birth upon receipt of notice of an out-of-state adoption." *Id.*

II. CURRENT STATE OF THE LAW

The majority of same-sex second-parent adoptions must confront the dilemma of whether the adoption necessarily terminates the legal status of the current legal parent.[26] Adoption is a creature of state statutes, the "cut-off" provisions of which often require parents to terminate all legal rights to the child in order for the adoption to subsequently proceed.[27] These same statutes, however, generally exempt step-parent adoptions, in which a birth parent's new spouse adopts the child, while the first parent retains full legal rights.[28] One issue for same-sex couples, therefore, emerges from the fact that the same-sex couple cannot marry (with the exception of Massachusetts), and therefore cannot use the step-parent adoption scheme.[29] An equally significant problem arises from the traditional belief that a child can have only one mother and one father, a notion that is automatically rattled by same-sex parents.[30] State responses to the same-sex second-parent adoption dilemma have come in the form

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26. *E.g.,* Heather Buethe, Note, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283, 294 (2006) ("The toughest barrier that courts have had to overcome in recognizing second-parent adoptions via existing adoption statutes is the cut-off provision, which requires termination of birth parents' rights prior to adoption proceedings.").

27. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 937 (2000) ("[T]ermination of the birth parents' legal rights is consistent with the basic principle that the adoption extinguishes an existing set of family relationships and creates a new set in its place. The adoptive parents, that is, acquire all the rights and responsibilities that are relinquished by the birth parents.").

28. *Id.* (discussing Wisconsin's cut-off provision, with the exception for step-parents). An example of the typical statutory language reads as follows:

> After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents and the relationship between the adopted person and all persons whose relationship to the adopted person is derived through those birth parents shall be completely altered and all the rights, duties, and other legal consequences of those relationships shall cease to exist, unless the birth parent is the spouse of the adoptive parent, in which case those relationships shall be completely altered and those rights, duties, and other legal consequences shall cease to exist only with respect to the birth parent who is not the spouse of the adoptive parent and all persons whose relationship to the adopted person is derived through that birth parent. *Id.* (citing WIS. STAT. ANN. § 48.92(2) (West 2006)).

29. *Id.* at 938 (assuming that states providing for civil unions, such as Vermont, Connecticut, and New Jersey, in which rights comparable to marriage are provided for, also likely prevent the need for a provision or interpretation in addition to the step-parent exception).

30. *But cf.* Elisa B. v. Super. Ct., 117 P.3d 660, 666 (Cal. 2005) ("We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes, which took effect this year.").

of both statutes and judicial decisions, and have both permitted and prohibited the second-parent adoption by a same-sex partner.[31]

A. *Statutes Permitting Second-Parent Adoptions*

Currently, only four states[32] provide statutory protection for same-sex parents to complete second-parent adoptions: California,[33] Colorado,[34] Connecticut,[35] and Vermont.[36] These statutes specifically allow for second-parent adoptions by persons other than step-parents. The Vermont statute provides perhaps the most explicit authorization, stating: "If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[37]

Interestingly, judicial decisions precede many of these statutes. The Vermont statute, for instance, codified the Vermont Supreme Court's decision from *In re Adoption of B.L.V.B.*,[38] holding that the rights of a biological parent need not be terminated when children are adopted by a person to whom the biological person is not married, and the adoption is

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31. NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2007), *available at*, http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf (showing a graphical representation of the current state of the law regarding second-parent adoption).

32. Pennsylvania could be seen as a fifth state permitting same-sex second-parent adoptions in that its statute allows the court to permit adoptions in the best interest of a child, despite all statutory conditions not being fulfilled. *See In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002) ("The exercise of such discretion does not open the door to unlimited adoptions by legally unrelated adults. Such decisions will always be confined by a finding of cause and a determination of the best interests of the child in each individual case.").

33. CAL. FAM. CODE § 9000 (West 2007) ("A domestic partner . . . desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides."). Same-sex couples that have registered in California's domestic partner registry "may adopt each other's children using the simpler process available to stepparents." STATE BAR OF CAL. COMM. ON SEXUAL ORIENTATION, REGISTERED DOMESTIC PARTNERS IN CALIFORNIA 5 (2006), *available at* http://www.calbar.ca.gov/calbar/pdfs/comcom/C50GID_Domestic-Partners.pdf.

34. COLO. REV. STAT. ANN. § 19-5-203 (West 2007) (allowing a second-parent adoption after written and verified consent by sole legal parent).

35. CONN. GEN. STAT. ANN. § 45a-724 (West 2008) (requiring parental responsibility to be shared).

36. VT. STAT. ANN. tit. 15A, § 1-102 (2008) (giving specific allowance for a "parent's partner" to adopt).

37. *Id.*

38. 628 A.2d 1271 (Vt. 1993).

in the best interests of the children.[39] The court explained that "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment."[40] The Vermont statute, therefore, confirmed the court's reasoning and formally clarified that same-sex couples were indeed eligible for second-parent adoption procedures.

While the Vermont statute codified a previous decision, Connecticut's statute superseded and reversed the Connecticut Supreme Court's decision from *In re Adoption of Baby Z.*,[41] which had held that a same-sex couple was not within the parties capable of executing a second-parent adoption.[42] Similarly, Colorado's 2007 statute[43] not only superseded a 1996 appellate decision prohibiting a second-parent adoption,[44] but also followed on the heels of a 2006 constitutional amendment banning same-sex marriage.[45] Despite sponsorship by the only openly gay lawmaker in the state, the Colorado legislation was marketed as protection for children being raised in nontraditional families, including not only same-sex couples, but also grandparents, aunts and uncles, and other relatives providing care for a child.[46] Not surprisingly, the opposition was led primarily by Republicans arguing the bill sought to advance the homosexual

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39. *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993) ("We hold 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, terminating the natural mother's rights is unreasonable and unnecessary.").

40. *Id.* at 1275 (fulfilling the intent of the statute by allowing adoptions when in the best interest of the child).

41. 724 A.2d 1035 (Conn. 1999), *superseded by statute*, CONN. GEN. STA. ANN. § 45a-724 (West 2008).

42. *In re* Adoption of Baby Z., 724 A.2d 1035, 1050 (Conn. 1999), *superseded by statute,* CONN. GEN. STA. ANN. § 45a-724 (West 2008).

43. COLO. REV. STAT. ANN. § 19-5-203 (West 2007).

44. *In re* Adoption of T.K.J., 931 P.2d 488, 496 (Colo. Ct. App. 1996), *superseded by statute*, COLO. REV. STAT. ANN. § 19-5-203 (West 2007).

45. Tim Padgett, *Gay Family Values*, TIME, July 16, 2007, at 51, *available at* http://www.time.com/time/magazine/article/0,9171,1640411,00.html.

> So they were disappointed last fall when Colorado voters joined the bandwagon of states that ban same-sex marriage and civil unions. But the couple won a measure of vindication this spring when Governor Bill Ritter signed a bill making Colorado the 10th state to allow gay and lesbian partners to adopt children as couples instead of restricting parental rights to one partner. *Id.*

46. April M. Washington, *Senate OKs Adoption by Same-Sex Couples*, ROCKY MOUNTAIN NEWS, Apr. 12, 2007, *available at* http://www.rockymountainnews.com/drmn/government/article/0,2777,DRMN_23906_5479666,00.html ("Sen. Jennifer Veiga, D-Denver, contends that same-sex couples, grandparents, aunts and uncles, and other relatives have a hard time getting government benefits and providing health care coverage to children they're raising because Colorado's adoption law allows only married couples or singles—gay or straight—to adopt.").

agenda.[47] Ultimately, a primarily partisan vote approved the Colorado statute as a free-standing piece of legislation.[48]

California provides an interesting variation in that its appellate decision of significance arose after the state's adoption statute provided the right to second-parent adoptions to registered partners. *Sharon S. v. Superior Court of San Diego County*[49] confirmed the validity of those same-sex second-parent adoptions secured prior to the enactment of the state's domestic partner registry. The decision explained that the legislature's conferring of second-parent adoptions by registered couples was not an assertion that the act was previously unavailable, but rather streamlined a previously existing process.[50] The impact of this decision, therefore, was significant for its validation of a multitude of previous adoptions, but has little lasting impact, as California's statutory provisions now expressly provide for the adoption procedure.[51]

B. *Statutes Prohibiting Second-Parent Adoptions*

On the other side of the statutory spectrum, a few states categorically prohibit adoptions by gays and lesbians: Florida,[52] Mississippi,[53] and Utah.[54] Perhaps the most explicit of these prohibitions, the Florida statute provides that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[55] Functionally equivalent, Mississippi's statute prohibits "[a]doption by couples of the same gender"[56] and

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47. *Id.* ("Sen. Scott Renfroe, R-Greeley [said] 'It's not about protecting children. It is an attack on the traditional family. It undermines the traditional marriage structure that we need to keep strong and sacred.'").

48. H.B. 1330, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (passing 39–25 in the Colorado House of Representatives and 20–15 in the Colorado Senate).

49. 73 P.3d 554 (Cal. 2003).

50. Sharon S. v. Super. Ct., 73 P.3d 554, 572 (Cal. 2003) ("[It] simply streamlines the adoption process for a subset of those who already were accessing second parent procedures, much as occurred in 1931 when the Legislature streamlined stepparent adoption itself.").

51. CAL. FAM. CODE § 9000 (West 2007) (removing the need for judicial interpretation).

52. FLA. STAT. ANN. § 63.042 (West 2007) (specifically banning homosexual adoption).

53. MISS. CODE ANN. § 93-17-3 (West 2004) (banning homosexual adoption by prohibiting same gender couples from adopting).

54. UTAH CODE ANN. § 78B-6-117 (West 2008) (disqualifying individuals in unmarried sexual relationships from adopting, thus banning homosexuals who are unable to legally marry).

55. FLA. STAT. ANN. § 63.042 (West 2007); *see* Lofton v. Sec'y of the Dep't. of Children and Family Servs., 358 F.3d 804, 806 (11th Cir. 2004) (affirming a district court's holding which essentially upheld the Florida statute against a constitutional challenge).

56. MISS. CODE. ANN. § 93-17-3 (West 2004).

Utah's statute provides that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage."[57] There is a continual effort in many states to either pass similar legislation or advance ballot initiatives,[58] although a number of attempts to do so have proven unsuccessful.[59]

Given the statute's language, a same-sex second-parent adoption is necessarily prohibited in Florida as the second-parent would be a homosexual. The same result likely applies in Utah. The outcome in Mississippi is unclear as the statute's prohibition applies to a couple and a second-parent adoption would not technically involve a couple, but rather the single adoption by the second parent. It should be noted, however, that at least one survey identifies the status of same-sex second-parent adoption in all three states as "unclear."[60]

C. *Judicial Decisions Permitting Second-Parent Adoptions*

Appellate court opinions of seven jurisdictions currently permit same-sex second-parent adoptions: the District of Columbia,[61] Illinois,[62] Indi-

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57. UTAH CODE ANN. § 78B-6-117 (West 2008); *see also id.* § 78B-6-103 (West 2008) ("'[C]ohabiting' means residing with another person and being involved in a sexual relationship with that person.").

58. *See* Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, USA TODAY, Feb. 21, 2006, at 1A, *available at* http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm (explaining that sixteen states are the focus of such efforts); Amanda Paulson, *Several States Weigh Ban on Gay Adoption*, CHRISTIAN SCI. MONITOR, Mar. 15, 2006, at 2, *available at* http://www.csmonitor.com/2006/0315/p02s02-ussc.html ("Seven states introduced bills last year that would prevent gays or lesbians from adopting, and a few states—Georgia, Kentucky, Missouri, and Tennessee, among others—have indicated a willingness to introduce constitutional amendments in future years."); *see also, e.g.*, *Arkansas: Vote on Gay Adoptions*, N.Y. TIMES, Aug. 26, 2008, at A13, *available at* http://www.nytimes.com/2008/08/26/us/26brfs-voteongayado_brf.html (detailing the certification of signatures necessary for a November 2008 ballot initiative in Arkansas to ban unmarried couples, thus including gay men and lesbians, from becoming foster or adoptive parents).

59. *See* Jeff LeBlanc, *My Two Moms: An Analysis of the Status of Homosexual Adoption and the Challenges to Its Acceptance*, 27 J. JUV. L. 95, 99–100 (2006) (outlining a number of failed attempts to add discriminatory restrictions into state adoption statutes). Also shown is the history of New Hampshire's addition of, and later removal of, restrictions on gay adoption. *Id.*

60. *See* NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf (showing a graphical representation of states treatment of second-parent adoption in the United States).

61. *In re* M.M.D., 662 A.2d 837, 859 (D.C. 1995) ("Accordingly, adoption petitions by unmarried couples shall be granted or rejected on a case-by-case basis in the best interests of the prospective adoptee.").

ana,[63] Massachusetts,[64] New York,[65] New Jersey,[66] and Pennsylvania.[67] Throughout these cases, courts employed a variety of canons of statutory interpretation to ultimately authorize the second-parent adoption.[68] For instance, many courts referenced the need for liberal construction of the statute, concluding that exemption from the cut-off provision was in the best interest of the child.[69] Similarly, many courts concluded that the plain meaning of the statute would produce "absurd results" by requiring termination of the parental rights of a parent seeking to maintain their current parentage status.[70] An Indiana opinion provides an accurate summary of this position, concluding:

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62. *In re* K.M., 653 N.E.2d 888, 895 (Ill. App. Ct. 1995) ("A construction that excludes all unmarried persons, regardless of sex, from petitioning to adopt jointly, does not give paramount consideration to the best interests and welfare of the persons to be adopted.").

63. *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1255 (Ind. Ct. App. 2004) ("While Indiana statutory law does not expressly divest the rights of an adoptive parent in the event of a second-parent adoption, neither does it expressly permit two unmarried adults to simultaneously exercise these rights with respect to an adopted child." (quoting *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003))).

64. Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993) ("There is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants such as the petitioners.").

65. *In re* Jacob, 660 N.E.2d 397, 403 (N.Y. 1995) ("[C]omplete severance of the natural relationship [is] not necessary when the adopted person remain[s] within the natural family unit as a result of an intrafamily adoption." (quoting *In re* Estate of Seaman, 583 N.E.2d 294, 300 (N.Y. 1991))).

66. *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 538 (N.J. Super. App. Div. 1995) ("[T]he stepparent provision of N.J. Stat. Ann. § 9:3-50 should not be narrowly interpreted so as to defeat an adoption that is clearly in the child's best interests.").

67. *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002) ("When the requisite cause is demonstrated, Section 2901 affords the trial court discretion to decree the adoption without termination of the legal parent's rights pursuant to Section 2711(d)."). For a detailed examination of second-parent adoption in Pennsylvania, see generally Martha Elizabeth Lieberman, Note, *The Status of Same Sex Adoption in the Keystone State Subsequent to the State Supreme Court's Decision in* Adoption of R.B.F. and R.C.G., 12 J.L. & POL'Y 287 (2003).

68. *See* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 938–39 (2000); Heather Buethe, Note, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283, 294–95 (2006) (identifying various statutory tools used by courts to approve second-parent adoptions). For a comprehensive overview of statutory interpretation, see generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION (2d ed. 2006).

69. *See In re M.M.D.*, 662 A.2d at 844–45; *In re K.M.*, 653 N.E.2d at 892–96; *In re Adoption of Two Children by H.N.R.*, 666 A.2d at 537–39.

70. *See In re M.M.D.*, 662 A.2d at 859–62; *In re Adoption of K.S.P.*, 804 N.E.2d at 1256–57; *In re Adoption of Two Children by H.N.R.*, 666 A.2d at 539–41; *In re Jacob*, 660 N.E.2d at 402–06; *In re* Adoption of R.B.F., 803 A.2d at 1202–03 (Pa. 2002) (relying on the

> [W]here, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result.[71]

Legislative intent is another justification provided for exemption from the biological parent's cut-off provision. Some courts concluded that the provision was not intended to apply to any situation in which a current parent was, in fact, a party to the adoption.[72] Such an analysis closely parallels the "absurd results" argument in that the legislative intent is derived by concluding that the legislature could not have meant the result produced by the statute.[73] In perhaps a further-reaching analysis, some courts analogized the same-sex couple's adoption to a step-parent adoption, bringing the same-sex couple within the exemption from the requirement of termination of parental rights.[74] Finally, courts pointed to the lack of any express prohibition of allowing the adoption to proceed.[75]

Each of the opinions grappled with issues of statutory construction, thus side-stepping any potential constitutional arguments. In doing so, however, no single canon of statutory interpretation decisively resolved the issue. Rather, a combination of various interpretative tools, applied

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plain language of the statute, but concluding that the statute in fact conferred discretion to the trial judge to waive the statutory requirements in the best interest of the child). *But see In re* Adoption of Luke, 640 N.W.2d 374, 382 (Neb. 2002) (reading the statute to not allow co-adoptions except in specifically allowed step-parent adoptions).

71. *In re Adoption of K.S.P.*, 804 N.E.2d at 1260 (citation omitted).

72. *See In re M.M.D.*, 662 A.2d at 860–62; *Adoption of Tammy*, 619 N.E.2d at 321 ("The Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition.").

73. *See, e.g., In re M.M.D.*, 662 A.2d at 859–62; *In re Adoption of K.S.P.*, 804 N.E.2d at 1256–57; *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 at 539–41; *In re Jacob*, 660 N.E.2d at 402–06; *In re Adoption of R.B.F.*, 803 A.2d at 1202–03.

74. *See In re M.M.D.*, 662 A.2d at 860 ("[T]he stepparent exception easily applies here by analogy; Bruce and Mark are living together in a committed personal relationship, as though married, and are jointly caring for Hillary as their child."); *In re Adoption of K.S.P.*, 804 N.E.2d at 1260 (citing *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995)); *In re Jacob*, 660 N.E.2d at 405 ("[The cut-off provision,] designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial interfamily adoptions by second parents.").

75. *See Adoption of Tammy*, 619 N.E.2d at 318–19 (noting the lack of any language prohibiting two unmarried cohabitating persons from jointly adopting or any language prohibiting a person from adopting their own child); *In re Adoption of R.B.F.*, 803 A.2d at 1201 ("*Unless the court for cause shown determines otherwise*, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated . . . . " (emphasis added) (quoting 23 PA. CONS. STAT. § 2901 (2001))).

in a seemingly patchwork fashion, ultimately developed the opinions. Perhaps arriving at the desired result required such a combination of tools. At least one commentator has suggested the process calls on "judges to massage the language of outdated statutes to obtain the desired result."[76]

D. *Judicial Decisions Prohibiting Second-Parent Adoptions*

Appellate decisions in three states currently prevent second-parent adoptions by same-sex couples: Nebraska,[77] Ohio,[78] and Wisconsin.[79] Each of the decisions found no constitutional claims at issue, instead focusing exclusively on statutory interpretation.[80] All three courts employed the so-called cut-off provision and concluded that the statutory scheme of each state required relinquishment of the existing parent's rights prior to an adoption.[81]

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76. Heather Buethe, Note, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283, 294 (2006). For a discussion regarding the validity of judicial determinations in second-parent adoptions, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 939–50 (2000).

77. *In re* Adoption of Luke, 640 N.W.2d 374, 379 (Neb. 2002) ("[A]s to the biological parent, 'termination of his or her parental rights is the foundation of our adoption statutes.' This pronouncement is reflected in the adoption statutes that require relinquishment or termination prior to adoption, except when a stepparent adopts, and is further reflected in case law . . . ." (quoting *In re* Adoption of Kassandra B., 540 N.W. 2d 554, 558 (Neb. 1995))).

78. *In re* Adoption of Jane Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) ("R.C. 3107.15(A) provides that a final decree of adoption issued by an Ohio court has the effect of terminating all parental rights of biological parents and creating parental rights in adoptive parents."). For a detailed examination of the status of second-parent adoptions in Ohio, see generally Susan J. Becker, *Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 CLEV. ST. L. REV. 101 (2000).

79. *In re* Angel Lace M., 516 N.W.2d 678, 684 (Wis. 1994) ("To avoid this absurd result and to harmonize the rules of statutory construction discussed above, we hold that the 'cut-off' provision of [WIS. STAT. § 48.92(2) (2008)] is mandatory.").

80. *See In re Adoption of Luke*, 640 N.W.2d at 377; *In re Angel Lace M.*, 516 N.W.2d at 678. For an analysis of the constitutional implications in second-parent adoptions, see generally Christopher Colorado, Note, *Tying the Braid of Second-Parent Adoptions – Where Due Process Meets Equal Protection*, 74 FORDHAM L. REV. 1425 (2005).

81. *See In re Adoption of Luke*, 640 N.W.2d at 379.

> [W]ith the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child "before any minor child may be adopted by any adult person or persons." Under Nebraska's statutory adoption scheme, the minor child, Luke, was not eligible for adoption by A.E. because B.P. had not relinquished him and the county court's reading of the statute was correct. *Id.*

In re Adoption of Jane Doe, 719 N.E.2d at 1073 ("[T]he trial court did not err in finding the biological mother's parental rights would terminate upon adoption of the child by appel-

In interpreting the statutes, two courts acknowledged the "best interest of the child" standard,[82] but both courts failed to follow the standard's lead, and instead the arguments subsequently fell prey to a strict interpretation analysis. Both courts concluded that the plain language of each state's step-parent adoption procedures was used to exclude the same-sex couples.[83] Moreover, two courts referenced the "absurd results" that would result if the second-parent adoptions were permitted.[84]

Despite some similar concerns, each state's opinion focused on distinct issues in its analysis, a difference likely attributable to the particular arguments raised on appeal. The attention of the courts' reasoning focused on a variety of issues, such as: refuting consent to an adoption as functionally equivalent to relinquishment for purposes of the cut-off provision;[85] applying the "best interest of the child" standard's application to the adoption process, but not the effects of the adoption;[86] and clarifying the mandatory, as opposed to permissive, nature of the cut-off provision.[87] Despite these variations, a strict interpretation ultimately guided each court's decision in each case.

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lant, a non-stepparent."); *In re Angel Lace M.*, 516 N.W.2d at 683 ("Because Georgina's parental rights remain intact, Angel is not eligible to be adopted by Annette.").

82. *See In re Adoption of Jane Doe*, 719 N.E.2d at 1073 ("Best interest pertains to the adoption process, not to the legal effects of the adoption."); *In re Angel Lace M.*, 516 N.W.2d at 681 ("[T]he fact that an adoption – or any other action affecting a child – is in the child's best interest, by itself, does not authorize a court to grant the adoption.").

83. *See In re Adoption of Jane Doe*, 719 N.E.2d at 1073; *In re Angel Lace M.*, 516 N.W.2d at 682 ("Our purpose in interpreting a statute is to give effect to the intent of the legislature, with the plain language of the statute acting as our primary guide." (citing Tahtinen v. MSI Ins. Co., 361 N.W. 2d 673, 677 (Wis. 1985))); *see also In re Adoption of R.B.F.*, 803 A.2d at 1202 ("We note that our decision is not creating a judicial exception to the requirements of the Adoption Act, but rather is applying the plain meaning of the terms employed by the Legislature."). The Pennsylvania court also employed a strict interpretation of the statute acting, on its face, granted the trial court discretion to waive statutory requirements. *See id.*

84. *See In re Adoption of Luke*, 640 N.W.2d at 382 (concluding that the application of the cut-off provision to step-parent adoption, which is explicitly provided for, would produce an absurd result); *In re Angel Lace M.*, 516 N.W.2d at 682–83 (refusing to construe a statute so as to provide absurd results, as in, allowing a stranger to adopt a child while one parent still retained legal rights to the child).

85. *In re Adoption of Luke*, 640 N.W.2d at 379–83 ("This section establishes a distinction between a consent and a relinquishment. Moreover, the statute clearly contemplates that there will be circumstances under which there is a consent to an adoption, but not a relinquishment.").

86. *In re Adoption of Jane Doe*, 719 N.E.2d at 1072–73 ("Best interest pertains to the adoption process, not to the legal effects of the adoption.").

87. *In re Angel Lace M.*, 516 N.W.2d at 683–85 ("To avoid this absurd result and harmonize the rules of statutory construction . . . we hold that the 'cut-off' provision . . . is mandatory.").

E. *Where the Issue Remains Unresolved*

Given the limited number of states mentioned in the preceding sections, it is clear that the vast majority of states, in fact, remain unclear as to the status of same-sex second-parent adoption. Within the realm of those states with unresolved positions, two categories are generally identified. One category involves states in which trial courts have issued second-parent adoption decrees, but no appellate court has ruled on the issue; the other category is those states where it remains unclear whether second-parent adoption is permitted under the state adoption statutes.[88] The former category includes fifteen states, while the latter accounts for another twenty-two states.[89] The generally unpublished status of trial court opinions makes it difficult to determine how wide-spread the practice might be, while also preventing their use in subsequent citation.[90]

For example, in *Schott v. Schott*,[91] the Iowa Supreme Court considered a district court's ruling that same-sex second-parent adoptions were impermissible under the state's adoption statute.[92] The case arose when a lesbian couple's relationship ended, resulting in a petition for determination of custody and support.[93] Although an Iowa trial court had previously issued two second-parent adoption decrees to the couple, the trial court in the current case concluded that it lacked subject matter jurisdiction over the petition because the adoptions were at odds with the state's statute and therefore invalid.[94] The Iowa Supreme Court disagreed and

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88. NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf (distinguishing graphically between all the states' position on second-parent adoptions).

89. *Id.* (showing that trial courts have permitted second-parent adoptions in the following states: Alabama; Alaska; Delaware; Hawaii; Iowa; Louisiana; Maryland; Michigan; Minnesota; Nevada; New Mexico; Oregon; Rhode Island; Texas; and Washington). The states categorized as "unclear" include Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Id.*

90. Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93, 96 (2000).

91. 744 N.W.2d 85 (Iowa 2008).

92. Schott v. Schott, 744 N.W.2d 85, 88 (Iowa 2008) ("The district court held chapter 600, which governs adoptions, does not allow an unmarried adult to adopt a child without terminating the parental rights of both natural parents.").

93. *Id.* at 86 ("Jamie and Heather were in a committed relationship, which lasted several years. They have two children. Jamie is the children's natural parent and Heather is the children's adoptive parent. After the parties ended their relationship, Heather filed a petition requesting a determination on child custody, physical care, and support.").

94. *Id.* ("The [district] court reasoned that because Heather was a legal stranger to the children, the court did not have subject matter jurisdiction to rule on her petition."). The couple (Heather and Jamie) began a relationship in 2000. *Id.* Heather adopted Jamie's son

held that the trial court did, in fact, have subject matter jurisdiction over the petition as neither adoption was appealed, making the final judgments conclusive on collateral attack.[95] Framing the issue as a jurisdictional question, the decision specifically avoided the underlying question of whether same-sex second-parent adoptions were permissible in the state.[96] Thus, in doing so, the uncertainty of second-parent adoptions will continue in Iowa. Iowa trial courts will continue to take differing positions while the issue will remain unresolved on both judicial and legislative fronts.

A recent article documenting a cross-country trip meeting with same-sex adoptive couples noted a general hesitancy in the "ambiguous" states to openly discuss the adoption process, including one state leader's admission that if it became known that gays were adopting, legislation prohibiting the practice would necessarily result.[97] Moreover, the judicial ambiguities have led to the development of make-shift systems of advocates and attorneys designed to steer potential parents to judges known to grant same-sex parents second-parent adoptions.[98]

These unresolved states form the focus of this Note. While states with clear policies regarding same-sex second-parent adoptions form the foundation of the analysis, such analysis aims to develop the best alternative for same-sex parents in the face of the continued inability to legally marry. In other words, the goal is to identify the best process by which same-sex parents may gain the protections afforded to heterosexual couples and therefore, the most legally sound parentage arrangement.

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in 2001 through a second-parent adoption after the natural father's parental rights were terminated. *Id.* Following artificial insemination by an anonymous donor, Jamie gave birth to a daughter in 2004. *Id.* A second-parent adoption was also secured by the couple the same year to add Heather as a parent. *Id.*

95. *Id.* at 88 ("[A] final judgment is conclusive on collateral attack, even if the judgment was erroneous, unless the court that entered the judgment lacked jurisdiction over the person or the subject matter.").

96. *Id.* at 89 ("We need not decide whether second parent adoptions are permissible in Iowa for purposes of this appeal. Even if the district court who issued the adoption decrees misinterpreted Iowa's adoption statute, the adoptions are not void.").

97. John Ireland, *50 Ways to Adopt a Baby*, ADVOCATE, Aug. 28, 2007, at 39, 39 ("Lesson learned: In rural and conservative areas, the adoption closet can be a beneficial, though unfortunate, tool.").

98. *See* Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142, 145 (describing private agencies known for assisting same-sex couples with adoption that have also emerged); *see also* Susan E. Dalton, *Protecting Our Parent-Child Relationships: Understanding the Strengths and Weaknesses of Second-Parent Adoption*, *in* QUEER FAMILIES, QUEER POLITICS 215 (Mary Bernstein & Renate Reimann eds., 2001) (describing the word-of-mouth system used to distribute information regarding same-sex adoption).

F. *Outcomes Assessment*

This section seeks to provide the reader with a set of basic observations that may be valuable in attempting to evaluate the future of second-parent adoptions for same-sex couples, and is not intended to provide an in-depth analysis of empirical data of an otherwise intricate nature. Table 1, below, summarizes the current state of the law as to second-parent adoptions by same-sex couples, while Table 2 tracks each state's legal position with respect to same-sex marriage.[99]

TABLE 1

Same-Sex Second-Parent Adoption Position	**Number of States**	**Years of Decision/ Enactment**
Statutorily Permitted	4 [CA; CO; CT; VT]	1995 2000 2004 2007
Judicially Permitted	7 [DC; IL; IN; MA; NJ; NY; PA]	1993 1995 1995 1995 1995 2002 2003 2004
Statutorily Prohibited	3 [FL; MS; UT]	1977 2000 2000
Judicially Prohibited	3 [NE; OH; WI]	1994 1998 2002
Granted by Trial Courts	15	–
Unclear	22	–

99. *See supra* Parts II.A–E. For the purposes of Table 1 located in the text, fifty-four jurisdictions are listed in Table 1, accounting for all states, the District of Columbia, and double entries for Florida, Mississippi, and Utah, which are included under both "Statutorily Prohibited" and "Unclear." In the "Judicially Permitted" row of Table 1, a total of eight entries are listed for "Years of Decision/Enactment" to account for two Indiana cases. *See In re* Adoption of K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 271 (Ind. Ct. App. 2003). For a summary of state positions on same-sex marriage, see NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf; NAT'L GAY & LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (2008), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_1_08_color.pdf.

TABLE 2

Same-Sex Second-Parent Adoption Position	State Recognition of Same-Sex Relationship (Marriage, Civil Union, etc.)	
	Provided	Banned
Statutorily Permitted	3	1
Judicially Permitted	3	3
Statutorily Prohibited	0	3
Judicially Prohibited	0	3
Granted by Trial Courts	1	12
Unclear	0	21

A quick look at these figures reveals that eleven jurisdictions currently permit second-parent adoptions, while a total of six prohibit it. Legislation superseding negative judicial decisions in both Connecticut and Colorado, however, is the key to this difference. Prior to legislation superseding previous judicial decisions,[100] a total of eight states prohibited the practice, making for a much closer differential.

Not surprisingly, the jurisdictions permitting second-parent adoptions tend to occur in more liberal areas, while those prohibiting the practice tend to be more conservative areas.[101] Of the eleven jurisdictions currently allowing second-parent adoptions, more than half also provide some form of recognition to same-sex couples.[102] Three of the eleven states have statutes banning same-sex marriage and one has a constitutional amendment banning the same.[103] Of the six prohibiting states, all

100. *See* CONN. GEN. STAT. ANN. § 45-a724 (West 2008) (superseding *In re* Adoption of Baby Z., 724 1035, 1055 (Conn.1999)); COLO. REV. STAT. ANN. § 19-5-203 (West 2007) (superseding *In re* Adoption of T.K.J., 931 P.2d 488, 496 (Colo. Ct. App. 1996)).

101. Florida may very well be debatable as to its label as "conservative," particularly compared to Utah and Mississippi; however, Florida's statute was enacted over thirty years ago in 1977. All three judicial decisions prohibiting the practice are centered in the Midwest.

102. NAT'L GAY & LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (2008), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_2_08.pdf (showing how Massachusetts permits same-sex marriage; Connecticut, Vermont, and New Jersey permit civil unions; and the District of Columbia has a limited domestic partner registry program); *see also In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (striking down California's same-sex marriage ban).

103. NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf (noting that Illinois, Indiana, and Pennsylvania statutorily ban same-sex marriage, while Colorado passed a constitutional amendment banning gay marriage in 2007).

six have a constitutional amendment or statute banning gay marriage.[104] While direct causation between banning gay marriage and prohibiting second-parent adoptions may not necessarily exist, a correlation exists between any prohibiting decision or legislation and a state's prohibition of gay marriage.[105] With nearly thirty states banning gay marriage since 2000,[106] protecting the legal status of same-sex couples functioning as, or intending to be, parents requires pro-active action. An argument as to the correct path of such action, thus, forms the focus of this Note.

Interestingly, judicial decisions (of either outcome) were concentrated during the time period ranging from the mid-1990s through the early 2000s, while statutory provisions permitting second-parent adoptions appear to be the most evenly distributed in terms of occurrence. Also of note, the most recent activity on either side of the fence was Colorado's 2007 legislation permitting the practice,[107] while the last prohibition came in 2002.[108]

Each of the different state statutes permitting the practice expressly provide, in varying forms, for the ability of same-sex couples to adopt.[109] On the other hand, the statutes that prohibit a second-parent adoption do not fall under the second-parent or step-parent adoption sections, but

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104. *Id.* (showing the correlation by which states banning same-sex adoption also ban gay marriage).

105. *See* Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142, 284 (noting the same concern). "They [same-sex couples] have reason to worry. In the fall of 2005, Texans approved by a landslide a state constitutional amendment . . . to ban gay marriage. At its core, the debate over gay parenting turns on the same fundamental question that the gay marriage referendum posed: What makes a family?" *Id.* With the exception of Nebraska, each state prohibiting second-parent adoption took its prohibiting action prior to its later ban on gay marriage. *Compare* NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf (showing states that have banned same-sex marriage either by statute or constitutional amendment), *with* NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf (showing states that have allowed or prohibited second-parent adoption).

106. NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf.

107. COLO. REV. STAT. ANN. § 19-5-203 (West 2007) (granting the right of second-parent adoption). In this context, the 2008 Iowa case should not be considered as the most recent activity because it failed to resolve whether the state's statute allowed for same-sex second-parent adoption, but instead solidified the ambiguity by deciding the case on jurisdictional grounds. *See* Schott v. Schott, 744 N.W.2d 85, 89 (Iowa 2008) (refusing to address the permissibility of second-parent adoptions).

108. *In re Adoption of Luke*, 640 N.W. 2d at 376.

109. *See, e.g.*, CAL. FAM. CODE § 9000 (West 2007); VT. STAT. ANN. tit. 15A, § 1-102 (2002).

rather provide categorical prohibitions.[110] And as noted previously, the focus of prior decisions has centered on the application of the biological parent cut-off provision and whether a same-sex couple could be exempt from the requirement of relinquishing the first parent's parental rights, similar to a step-parent adoption.[111]

When considering this summary in light of its attempt to provide a snapshot of state positions, the overwhelmingly unclear status of the situation becomes apparent, with some thirty-plus states notably absent from the summary. Moreover, and perhaps most useful, this information demonstrates the truly difficult nature of making any generalizations regarding the history of second-parent adoptions in the context of same-sex couples. Accordingly, Part III highlights the various advantages and disadvantages of each course of action.

III. ANALYSIS

Admittedly, the number of conceivable arguments for or against legislative reform and judicial challenges is limitless. This section simply highlights the most relevant of such arguments, with an eye toward both past outcomes and future results. In doing so, the emphasis is on those considerations which may help facilitate a decision as to the best possible route for same-sex couples to pursue in securing parental rights. Moreover, the significant interplay between these two institutional routes of reform must be acknowledged.[112] As such, the analysis identifies the ways in which the two, at times, appear to be co-dependent on one another.

A. *Advantages of Legislative Reform*

Adoption is a creature of statute, making the legislature a natural setting for adoption reform.[113] Indeed, a number of judges, in prohibiting a second-parent adoption based on statutory language, have noted that the ability of same-sex couples to execute second-parent adoptions remains a legislative issue.[114] In perhaps the most well-articulated example of this

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110. *See, e.g.*, FLA. STAT. ANN. § 63.042 (West 2007); MISS. CODE ANN. § 93-17-3 (2004); UTAH CODE ANN. § 78B-6-117 (West 2008).

111. *See supra* Part II.C–D.

112. *See* Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 879 (2006) (discussing the advances and backlashes associated with the judicial and legislative pursuit of gay rights issues).

113. *See, e.g., In re* Angel Lace M., 516 N.W.2d 678, 681 ("Adoption proceedings, unknown at common law, are of statutory origin and the essential statutory requirements must be substantially met to validate the proceedings.").

114. *See, e.g., In re* Adoption of Baby Z., 724 A.2d 1035, 1060 (Conn. 1999), *superseded by statute*, CONN. GEN. STAT. ANN. § 45a-724 (West 2008) ("The members of our legislature, as elected representatives of the people, have the power and responsibility to

position, Judge Geske's concurring opinion in *In re Angel Lace M.* explains:

> Hopefully our legislators will continue to work to advance the interests and protection of our children by listening to their constituents, reviewing our current laws, and debating the wisdom of statutory changes. Children cannot protect their own interests. The legislature can protect those interests by vigilantly overseeing the children's code and ensuring a statutory scheme that indeed provides for the best interests of our kids.[115]

Such language demonstrates the ability of a court to side-step the issue by simply referring it to the legislature for resolution. The Connecticut legislature heeded such advice[116] by subsequently amending its statute to provide for expanded coverage of second-parent adoptions.[117] Determining law in the legislature as opposed to the judiciary indicates a state's firm public policy against liberal interpretation of statute, essentially leaving legislative reform as the only mechanism by which to facilitate change. This seems rational given that the traditional adoption structure providing for married and single, unmarried persons resulted from the legislative's inability to foresee gay couples (two unmarried adults) needing access to adoption, in the absence of the ability to marry.[118] Given the less controversial nature of same-sex adoption when compared to the marriage issue, the viability of amending the statutes to explicitly provide for second-parent adoption seems like a viable option.[119]

Legislation also provides a much more permanent protection to gay and lesbian parents, as they become subject to statutory coverage and thus removed from the possible fluctuations that a judicial ruling pro-

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establish the requirements for adoption in this state."); *In re* Adoption of Jane Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (Wise, J., concurring) ("[T]his is a legislative issue for the General Assembly."); *In re Angel Lace M.*, 516 N.W.2d at 687 (Geske, J., concurring) ("The legislators, as representatives for the people of this state, have both the right and the responsibility to establish the requirements for legal adoption, for custody, and for visitation. This court cannot play that role.").

115. *In re Angel Lace M.*, 516 N.W.2d at 678 (Geske, J., concurring).

116. *In re Adoption of Baby Z.*, 724 A.2d at 1060 (stating that the legislature has the responsibility rather than the court to allow second-parent adoption).

117. CONN. GEN. STAT. ANN. § 45a-724 (West 2008) (allowing a second person to share parental responsibilities upon consent of a parent, as long as the other biological parent's rights have been terminated).

118. *See* Susan E. Dalton, *Protecting Our Parent-Child Relationships: Understanding the Strengths and Weaknesses of Second-Parent Adoption*, *in* QUEER FAMILIES, QUEER POLITICS 205 (Mary Bernstein & Renate Reimann eds., 2001).

119. *See* Nate Blakeslee, *Family Values*, TEX. MONTHLY, Mar. 2007, at 142, 145 ("In the past ten years, 26 states have amended their constitutions to outlaw gay marriage. Parallel efforts to ban gay parenting have been less successful—thus far.").

vides. As a result, many pro-active voter initiatives to ban gay parenting may also subside.[120] In essence, the legislation would settle the question of a second adoption's validity and eliminate any such question from lying within the purview of a single judge or set of judges. The legislative path also prevents the public perception of judicial activism. This also inherently eliminates much of the statutory interpretation currently necessary to bring otherwise ambiguous family law statutes into the more modern conception of parenting.

In terms of a state's public policy concerns, statutory reform provides the opportunity for legislatures to dictate the exact scope of second-parent adoptions.[121] Such a scope could very well, and likely would, include more than same-sex couples in its coverage.[122] This possibility offers perhaps the most substantial advantage of same-sex couples pursuing the legislative route. That is, the pursuit of legislative reform provides the gay and lesbian community the unique opportunity to form coalitions with other groups, beyond the Lesbian, Gay, Bisexual and Transgender (LGBT) community.[123] In other areas in which the LGBT community seeks reform, such as employment discrimination or marriage rights, no other class of people is subject to the same treatment, leaving gays and lesbians to pursue their rights alone. The regulation of second-parent adoption, however, affects not only same-sex couples, but any unmarried person seeking legal parentage through second-parent adoption.[124]

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120. *See* Amanda Paulson, *Several States Weigh Ban on Gay Adoption*, CHRISTIAN SCI. MONITOR, Mar. 15, 2006, at 2, *available at* http://www.csmonitor.com/2006/0315/p02s02-ussc.html (explaining that while gay adoption is still a divisive issue, it is not as contentious as gay marriage, which explains why efforts to ban gay adoption have not been as successful as attempts to ban gay marriage, at least, according to conservatives).

121. *Compare* VT. STAT. ANN. tit. 15A, § 1-102 (West 2008) (allowing the partner of a parent to adopt a child of the parent if in the best interest of the child), *with* CONN. GEN. STAT. ANN. § 45a-724 (West 2008) (authorizing the parent of a minor child to agree in writing with another person who shares parental responsibility for the child that such person shall adopt or join in the adoption of the minor child).

122. *See* COALITION FOR ADOPTION RIGHTS EQUALITY, SECOND PARENT ADOPTION: A MEASURE TO PROTECT MICHIGAN'S CHILDREN 4 (2007), *available at* http://www.michcitizenaction.org/assets/pdf/SPA.pdf ("Second parent adoption will benefit any child in which there are two unmarried adults working together to raise children, or, any family in which there is a single guardian who wishes to have help from another trusted adult."). For a thorough consideration of the scope of family law's coverage, see generally Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007).

123. *See* Tim Padgett, *Gay Family Values*, TIME, July 16, 2007, at 51, *available at* http://www.time.com/time/magazine/article/0,9171,1640411,00.html (showing how more than just a minority, such as homosexuals, are interested in getting second-parent adoptions).

124. *Id.* (including an unmarried person, such as an aunt, uncle, or grandparent, in addition to non-relatives).

Colorado demonstrates not only the possibility of a legislative coalition, but also the necessity of such support. As one commentator noted regarding the recent passage of the Colorado legislation permitting second-parent adoption, "[I]t wasn't [designed as] a gay-adoption bill. It was a second-parent adoption bill that allows unmarried heterosexuals to adopt jointly. It was presented predominantly as child-friendly, not gay-friendly, and therefore ran less risk of alienating potential supporters than gay marriage does."[125] In doing so, Colorado also demonstrates the ability to secure same-sex second-parent legislation despite significant obstacles including both an adverse appellate decision and a same-sex marriage ban.

B. *Disadvantages of Legislative Reform*

Legislative reform of adoption statutes faces many of the same challenges that generally impede legislation—time, speed, and the parties involved. Legislation often takes a significant time commitment in order to gather the support necessary to pass legislation. It also appears that action on the part of the legislature, at least in the context of permitting same-sex second-parent adoptions, may be partly prompted by a previous judicial decision on the issue.[126] This trend, however, is not seen when legislation seeks to prohibit the practice.[127]

Obtaining both the necessary support and action-provoking appellate decision requires a lengthy process. States in which legislatures may meet as rarely as once every two years further compound the time consideration.[128] When compared to the judicial route, the legislative route requires the involvement of many more parties, both in terms of actual legislators, as well as supporters of the legislation. Of course, such a process also necessarily entails the involvement of the general population who may voice varying opinions to their representatives. At least one commentator has cautioned against the often overstated idea of "robust

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125. *Id.* (internal quotation marks omitted) (quoting, in part, Seth Grob, a family law attorney practicing in Colorado); *see also* April M. Washington, *Senate OKs Adoption by Same-Sex Couples*, ROCKY MOUNTAIN NEWS, Apr. 12, 2007, *available at* http://www.rockymountainnews.com/drmn/government/article/0,2777,DRMN_23906_5479666,00.html; Jeff LeBlanc, *My Two Moms: An Analysis of the Status of Homosexual Adoption and the Challenges to Its Acceptance*, 27 J. JUV. L. 95, 96 (2006) (arguing that allowing same-sex couples to adopt is not an issue of gay rights, but is an issue of the best interest of the child).

126. *See supra* Part II.A.

127. *See supra* Part II.B.

128. *See* Paul Jenks, *CongressLine by GalleryWatch.com: The State Legislatures*, June 18, 2006, http://www.llrx.com/congress/statelegislatures.htm ("[M]ost states meet only for a short time, usually for a couple of months a year, sometimes every two years. If you follow the state legislatures, your busy time is January-June with the busiest months being February through April. Most states do not have full time legislators.").

legislative accountability and responsiveness"[129] by suggesting that legislatures "cannot always be counted on to reflect, or to act consistently, with public opinion."[130]

C. *Advantages of Judicial Challenges*

Many of the advantages of judicial challenges to second-parent adoption statutes directly counter the disadvantages of statutory reform offered in the previous section. That is, judicial challenges generally provide a quicker result than legislation, while involving a smaller number of people.[131] While the litigation may involve other interest groups, the core of the decision lies with the panel of judges, eliminating much of the need for consensus on a broader scale.[132] Moreover, rather than requiring consensus building and a principled agreement as to the statutory coverage, a judicial challenge rests solely on arguing the ambiguity of the statute and the appropriate interpretation, as compared to a directed effort to resolve the ambiguity statutorily.[133]

The apparent success rate perhaps offers the most significant advantage of judicial reform. Of the ten appellate opinions currently regulating second-parent adoptions,[134] seven have approved the inclusion of same-sex couples, while only three have prohibited it. Furthermore, no decision permitting the practice has been subsequently reversed by legislation.[135] Any excitement regarding this success rate, however, should be tempered by the overwhelming number of states that have passed gay marriage prohibitions in recent years, which may impact future outcomes.[136] Moreover, this success rate is derived solely from appellate decisions. In

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129. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 879 (2006) (citing Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 575–60 (2004)).

130. *Id.* at 880 (showing a disconnect between public opinion and actions by state legislatures).

131. *See supra* Part III.B.

132. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 882 (2006) ("It is unconvincing to lay it all at the door of public opinion. There is little reason . . . to suspect that there was significant public support for protecting gay governmental employees in 1969 . . . or for recognizing gay campus groups . . . or for second parent adoption beginning in the mid-1980s.").

133. *See* Adoption of Tammy, 619 N.E.2d 315, 318 (Mass 1993) ("To the extent that any ambiguity or vagueness exists in the statute, judicial construction should enhance, rather than defeat, its purpose.").

134. *See supra* Part II.C–D.

135. *See* Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 877 (2006) ("Indeed, not a single state court decision granting a second-parent adoption has been overturned by legislation.").

136. *See* NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMar-

the absence of an adverse ruling, no appeal of an adoption petition would exist, thus eliminating the possibility of an appellate opinion on the matter. The ability of same-sex couples to forum shop to secure an adoption decree may also artificially deflate the number of appellate opinions.[137]

D. *Disadvantages of Judicial Challenges*

The most significant disadvantage of a judicial challenge to a state's second-parent adoption statute is the risk entailed with statutory interpretation. Such interpretation remains unpredictable and ultimately leaves same-sex couples rolling the dice as to their future parental status. As one court has noted, "The trial judge reached her result by making a decision to employ 'strict construction' . . . . The judge, however, just as easily could have opted for a 'liberal interpretation.'"[138] Moreover, the evolving nature of statutory interpretation allows it to change not only over time, but also as multiple judges evaluate a case, each of whom has various approaches to statutory interpretation. From the public perspective, the idea of judicial activism also surfaces in this context.[139] And of course, judges "can harbor irrational fears or adhere to unfair myths" when exercising broad discretionary power relative to same-sex adoptions.[140] Indeed, at least one study has concluded that judges often rely on traditional conceptions of family when evaluating same-sex second-parent adoptions.[141]

In spite of this uncertainty, the judicial process can produce a positive result, but the long-term viability of such a decision remains debatable. First, the decision could be reversed in much quicker fashion than that of

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riage_09_25_07.pdf (showing an uneasy tension between stances on gay marriage versus stances on same-sex adoptions).

137. *See supra* notes 21–23 and accompanying text (explaining how prospective parents can seek adoptions in states that allow it).

138. *In re* M.M.D., 662 A.2d 837, 839, (D.C. 1995).

139. For an argument regarding the propriety of judicial resolution of second-parent adoptions, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 939–50 (2000).

140. Amy D. Ronner, *Gay and Lesbian Adoption: Banishing the Pied Piper*, 18 ST. THOMAS L. REV. 207, 207–08 (2005) (describing how some courts, in considering gay adoption issues, labor under the unfounded notion that gays and lesbians are "dangerous suspects" unfit for contact with children); *see* STEPHEN HICKS & JANET MCDERMOTT, LESBIAN AND GAY FOSTERING AND ADOPTION 11–14 (Stephen Hicks & Janet McDermott eds., 1999) (dispelling misconceptions often associated with same-sex couples).

141. Catherine Connolly, *The Description of Gay and Lesbian Families in Second-Parent Adoption Cases*, *in* THE GAY & LESBIAN MARRIAGE & FAMILY READER 109–25 (Jennifer M. Lehmann ed., 2001) ("[G]ay and lesbian petitioners encounter numerous problems in child custody cases. Judges have often ignored all other considerations commonly associated with a determination of the child's best interests when the mother is a lesbian.").

legislation being repealed. Second, courts may narrowly tailor the issue to prevent a holding that would broadly alter the state's adoption regime. In Iowa, for example, the state supreme court resolved its case on the grounds of subject matter jurisdiction and specifically declined to decide whether a same-sex second-parent adoption was valid in the state.[142] Finally, the future success rate of judicial challenges remains very unclear. With the new wave of same-sex marriage bans since 2000, it is questionable how courts will resolve the second-parent adoption statute's ambiguity in the future.[143] Courts may very well align their future decisions with the state's ban on gay marriage by also prohibiting second-parent adoptions by same-sex couples.[144] The new wave of bans may also lead to bans in additional states as current voter initiatives would seek to implement.[145] Indeed, a one line addition to the adoption code (explicitly prohibiting homosexuals or same-sex couples from adopting) can eliminate any possibility of a second-parent adoption by a same-sex couple.[146]

The parties involved in a case suggest another inherent risk of litigating the issue of second-parent adoptions. Litigation requires a couple to petition the court for a second-parent adoption in the face of an ambiguous or prohibiting statute. The couple, therefore, must necessarily place their parentage status at risk by seeking the decree (instead of relying on a state that explicitly allows the adoption). If the couple successfully secures the decree, their personal interests are indeed satisfied, but the ability to appeal is then eliminated. Fifteen states currently present this

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142. *See* Schott v. Schott, 744 N.W.2d 85, 88 (Iowa 2008) (refusing to address the validity of a second-parent adoption, instead giving preclusive effect to the lower court's initial adoption decree as it was issued with proper jurisdiction).

143. *See* NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MEASURES IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf. *But see* Tim Padgett, *Gay Family Values*, TIME, July 16, 2007, at 51, *available at* http://www.time.com/time/magazine/article/0,9171,1640411,00.html (illustrating how Colorado, despite state law prohibiting same-sex marriage, has recently passed legislation permitting second-parent adoption).

144. *See* Vanessa A. Lavely, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 286 (2007) (arguing that courts should incorporate updated conceptions of family law into same-sex marriages). The argument, however, would only apply to states in which same-sex adoption is, in fact, allowed. *See id.* In the remaining states, it is just as feasible that the conceptions could be parallel to the state's ban on gay marriage, thereby also prohibiting adoption. *See id.*

145. *See* Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 20, 2006, at 1A, *available at* http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm ("Steps to pass laws or secure November ballot initiatives are underway in at least 16 states, adoption, gay rights and conservative groups say.").

146. *See* FLA. STAT. ANN. § 63.042 (West 2007) (stating, by statute, that homosexuals are ineligible to adopt); *see also* MISS. CODE ANN. § 93-17-3 (West 2004); UTAH CODE ANN. § 78B-6-117 (West 2008).

dilemma with evidence of trial court decrees, but no appellate decisions.[147]

Similarly, the judicial route does not necessarily ensure advancement of the ideal case. That is, any couple may appeal a denied adoption, possibly leading to an appellate decision that may not accurately reflect the best case for second-parent adoption. In Texas, for example, a lesbian is currently fighting for sole custody of her biological daughter and claims that the second-parent adoption by her former partner is void.[148] The adoption has been upheld by three judges, but further appeals continue to be pursued.[149] A same-sex couple successfully raising a child, seeking the legal protection of two parents, likely offers the ideal party to an appeal. This contrasts significantly with a custody dispute claiming a void adoption decree from six years previous, as is the situation in Texas.[150] Nevertheless, the story highlights the potential problem of the inability to plan and execute a successful appeal if the case arises earlier in a different context, involving less-than-ideal parties.

IV. CONCLUSION

"[T]he task at hand is gaining legal recognition for the multiple variations of modern family life as they already exist."[151] Within those multiple variations, second-parent adoptions are merely one avenue for same-sex couples seeking the same legal protections afforded to their heterosexual counterparts. Until marriage equality is secured for same-sex couples, the struggle for second-parent adoptions will remain a critical

147. NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf (showing trial decisions in Alabama; Alaska; Delaware; Hawaii; Iowa; Louisiana; Maryland; Michigan; Minnesota; Nevada; New Mexico; Oregon; Rhode Island; Texas; and Washington).

148. *Fighting for Custody. Second Parent Adoption Jeopardized in Texas*, PROUDPARENTING.COM, July 21, 2007, http://www.proudparenting.com/node/493 ("The daughter's biological mother, Julie Anne Hobbs, claims the 2001 adoption by her former partner, Janet Kathleen Van Stavern, is void.").

149. *Id.* While this situation may lead to a definitive answer regarding the status of second-parent adoptions in Texas, the court could also choose, like Iowa, to resolve the case on jurisdictional grounds. *See* Schott v. Schott, 744 N.W.2d 85, 88 (Iowa 2008).

150. *See Fighting for Custody. Second Parent Adoption Jeopardized in Texas*, PROUDPARENTING.COM, July 21, 2007, http://www.proudparenting.com/node/493 (showing the biological parent to be disputing the legal rights of her previous partner).

151. Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93, 99 (2000) (showing how the attitudes of society may have changed over the years, but now the laws must catch up).

consideration as gays and lesbians "struggle to fit into a family law framework that does not acknowledge their existence as families."[152]

Unfortunately, the majority of states remain unclear with respect to second-parent adoptions. Synthesizing the various considerations outlined in the previous section, the argument exists that legislative reform offers the more advantageous route for same-sex couples pursuing legal recognition of their parental rights. The unpredictable nature of statutory construction, particularly in the face of sweeping bans on same-sex marriage and mounting momentum to add restrictions on adoption, make statutory reform the preferred route for same-sex couples.[153] This proactive solution allows same-sex couples to couch the legislation as pro-child, thereby garnering support extending past the gay and lesbian community, while also eliminating the ambiguity previously functioning as a stumbling block.[154]

The statutory language necessary to implement the change proposed in this Note will vary according to a state's position with respect to recognition of a same-sex relationship. States providing for some form of relationship recognition (marriage, civil unions, domestic partner registry, etc.) presumably provide same-sex couples the same benefits of marriage.[155] As such, same-sex couples would likely fall within the scope of step-parent adoptions and would not encounter the cut-off provision required for other types of adoptions.[156] Legislation, however, could still specifically amend the adoption code's references to step-parent adoption to include, alongside "spouse," the applicable term such as "partner."

In states banning gay marriage, the legislation would remain gender neutral and focus on amending the cut-off provision which requires a parent to terminate parental rights prior to an adoption proceeding.[157] By focusing on the cut-off provision, as opposed to amending the second-parent adoption provision, the legislation avoids the issue of any relationship recognition. In doing so, the legislation remains pro-child, and less centered on gay rights, thus allowing an anticipated increase in support. The provision would be amended to exempt a parent from the termina-

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152. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. Juv. L. 1, 21 (1999) (noting the emotional trauma that can result from not being afforded the same parental rights).

153. *See supra* Part III.

154. *See supra* Part III.A–D.

155. *See* Nate Blakeslee, *Family Values*, Tex. Monthly, Mar. 2007, at 142, 284 (showing benefits of marriage as it pertains to what to expect in certain situations when a child is co-adopted). The benefits afforded to same-sex couples in these states are exclusively state-level benefits, and do not involve any benefits on the federal level. *See id.*

156. *See supra* note 20 and accompanying text.

157. *See supra* notes 27–28 and accompanying text.

tion requirement when said parent is a party to the adoption. That is, when the legal parent of a child consents to the adoption by a second parent, the termination of previous parental rights would not be required in order for an adoption to proceed. The same approach should be followed in states without gay marriage bans so as to ensure the continued viability of the statute in the face of a later marriage ban.

Such legislation ultimately results in a predictable, more enduring framework–allowing same-sex couples to secure their legal parentage, and more importantly, providing children the legal protection of both parents.